

IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 11748/2007

DATE: 3/11/2009

IN THE MATTER BETWEEN:

TROYE VILLA (EDMS) BPK	1 ST PLAINTIFF
LEKKERRUS WARMWATER BRON (EDMS) BPK	2 ND PLAINTIFF
LIBERTAS MINERALE BRON (EDMS) BPK	3 RD PLAINTIFF
WERNICO (EDMS) BPK	4 TH PLAINTIFF
LEKKERRUS BESTUURSONDERNEMING BK	5 TH PLAINTIFF
JOHANNA JACOBA VAN TONDER	6 TH PLAINTIFF
HERMAN DANIEL WOITE	7 TH PLAINTIFF
AND	
KLUB LEKKERRUS/LIBERTAS	1 ST DEFENDANT
DIE STAATSPRESIDENT VAN DIE REPUBLIEK VAN SUID-AFRIKA	2 ND DEFENDANT
DIE SUID-AFRIKAANSE MENSEREGTE KOMMISSIE	3 RD DEFENDANT
MEESTER VAN DIE HOOGEREGSHOF	4 TH DEFENDANT

JUDGMENT

MAKGOBA, JINTRODUCTION

- [1] This matter essentially pertains to the right of ownership of shares in Second and Third Plaintiffs, which entities are the registered owners of the properties known as Portion 7 and Portion 11 respectively of the farm Welgevonden 343 district Potgietersrus on which Club Lekkerrus/Libertas, a mineral water resort in the Limpopo Province is situated. The main role players herein are the Sixth Plaintiff, Ms Johanna Jacoba van Tonder (hereinafter referred to as "Ms Van Tonder"), the widow of the Late P J H van Tonder, the founder of the Club, and the First Defendant (Club Lekkerrus/Libertas) now governed by a new Board of Trustees of which Ms Van Tonder was previously the Chairperson.
- [2] The origin of the dispute lies in two contracts of Sale of Shares entered into between the Late P J H van Tonder (hereinafter referred to as "Mr Van Tonder") and Club Lekkerrus and between Mr Van Tonder and Club Libertas (both on 10 August 1990), in terms of which the shares and members' interests in the Second and Third Plaintiffs were sold for minimum purchase considerations of R4,5 million and R2,5 million respectively. The Plaintiffs aver that the purchase price was never fully paid whilst the First Defendant contends that same was fully paid.
- [3] Ms Van Tonder, together with the other Plaintiffs instituted various claims against the First Defendant:

- 3.1 A claim for the rectification of the share registers of the Second and Third Plaintiffs [Lekkerrus Warm Water Bron (Pty) Ltd and Libertas Minerale Bron (Pty) Ltd respectively] to reflect the deceased estate of P J H van Tonder as the sole shareholder;
- 3.2 Payment of R15 699 576,00 to the estate of Van Tonder;
- 3.3 A declarator declaring the two lease agreements in terms of which the Third Defendant occupies Portions 7 and 11 of the Farm Welgevonden 343 district Potgietersrus, duly cancelled and an eviction order;
- 3.4 A declarator that the First Defendant is not entitled to access to the First and Fourth Plaintiffs' property.

Claim 5 was postponed *sine die* in terms of Rule 33(4) by agreement between the parties and Claim 6 was abandoned at the commencement of the trial.

4 The First Defendant instituted various counter-claims:

- 4.1 Claim for the rectification of the share registers of the Second and Third Plaintiffs to reflect the First Defendant as the sole shareholder therein;
- 4.2 Repayment of R5 512 812,00 from the estate of the late P J H van Tonder;

- 4.3 A declarator that the First Defendant had become the owner of certain properties by acquisitive prescription.

FACTUAL BACKGROUND

- [5] It is common cause that the properties on which the holiday resorts called Lekkerrus and Libertas were being conducted by Mr Van Tonder (Portion 7 and 11 of the Farm Welgevonden 343) belonged to the Second and Third Plaintiffs and were being let to the clubs. The clubs were managed by two close corporations of which the Fifth Plaintiff was one.
- [6] Prior to 10 August 1990 the late Mr Van Tonder was the owner of all the shares and loan accounts in the two companies (Second and Third Plaintiffs) as he conducted the two resorts thereon through a firm named Van Tonder Vakansie Beleggings.
- [7] Further relevant to the properties in contention, Mr Van Tonder purchased the totality of shares of Wernico (Edms) Bpk ("the Fourth Plaintiff") which is the registered owner of Portion 32 (a portion of Portion 12) of the Farm Welgevonden 343. The hiking trail of the resort, the waste dump as well as the sewerage of the resort and personnel houses are situated on this property. The aforementioned aspects pertaining to the hiking trail, waste dump, sewerage and personnel houses are only relevant to the First Defendant's claim in regard to acquisitive prescription.

[8] The Plaintiffs adduced evidence of Ms Van Tonder (the Sixth Plaintiff) and Mr Johan van Zyl, an auditor. The First Defendant concedes that their evidence, at least for the period up to 2005, is credible and should be accepted. The First Defendant adduced the evidence of Mr Justus van Wyk, a forensic auditor, and Mr Lemmer, the present vice-chairman of the board of trustees of the First Defendant.

[9] On 10 August 1990 Club Lekkerrus and Club Libertas were officially founded. The founding members were Mr and Ms Van Tonder, Henry Woite (Mr Van Tonder's auditor), Mr J van Wyk (their attorney) and a personnel member of each of the clubs. The aforementioned also formed the initial Board of Trustees of each of the clubs and the following agreements were entered into on the said date:

- 9.1 The constitution of each club;
- 9.2 Management agreements of each club;
- 9.3 Lease agreements in regard to the properties owned by the two companies (Second and Third Plaintiff);
- 9.4 Purchase agreements in regard to the shares of the Second and Third Plaintiffs (Annexures "E" and "F" to Particulars of Claim) between Mr Van Tonder and the respective clubs.

[10] The last-mentioned agreements between Mr Van Tonder and the clubs in regard to the shares are the core of the disputes in this matter. In terms of the agreements, which are basically identical apart from the minimum purchase price, Mr Van Tonder sold the totality of the issued share capital as well as the totality of his loan accounts in the respective companies to Club Lekkerrus and Club Libertas.

[11] The purchase consideration as formulated in clause 2 of the agreements reads as follows:

"2.1 Die totale koopprys vir die aandele sowel as die leningsrekenings beloop die gesamentlike bedrag van 'n som gelykstaande aan 60% van die lidmaatskapintreegelde (waarby ingesluit tydsdelingbelange wat die KOPER van sy lede invorder oor 'n tydperk van sestig maande vanaf datum van die ondertekening hiervan, met dien verstande dat die koopprys minstens die som van R4 500 000,00 (vier-en-'n-half miljoen rand) sal beloop.

[Note: In regard to Libertas this amount was R2 500 000,00.]

2.2 Betaling van voormelde koopsom geskied in kontant aan die VERKOPER aan die einde van elke maand ooreenkomstig die formule hierbo vermeld (waarop die koopprys bereken word) ten

opsigte van alle voormelde gelde wat die KOPER werklik van tyd tot tyd in ontvangs neem.

- 2.3 Die eerste betaling ooreenkomstig voormelde formule sal plaasvind voor of op 30 September 1990 en daarna op die laaste dag van elke daaropvolgende maand vir 'n totale tydperk van 60 maande vanaf datum van sluiting van hierdie ooreenkoms, met dien verstande dat die voormelde minimum koopprys voor die afloop van die gemelde tydperk van 60 maande betaal moet wees."

[12] A further relevant and important provision contained in the agreements is the non-variation clause to the effect that no variations or amendments of the agreements will be of any force or effect unless same are reduced to writing and signed by the parties to the agreements.

[13] In her evidence Ms Van Tonder gave a definition of "Lidmaatskapintreegelde" as reflected in the constitutions of the clubs. The constitution differentiates between "intreegelde" and "ledegelde" under the heading "Lidmaatskapgelde". It is only the "intreegelde" which are, in terms of the above referred agreements to be applied in satisfying the purchase price. "Lidmaatskapintreegelde" entailed the once off payment someone makes for acquiring a timeshare module for a week, once a year. The "ledegelde" on the other hand entailed the membership fee that someone who acquired timeshare would have to pay every year. The "ledegelde"

or membership fee was payable in terms of the contracts and not to be taken into account as part of the payment of the purchase price.

- [14] Ms Van Tonder dealt further in her evidence with the term "accommodation fees". This entailed the money paid by an outsider or non-member who visited the resorts. Such person then paid accommodation fees per night stay. The accommodation fees clearly do not constitute "lidmaatskapintreegelde" and therefore can in no form be considered as part payment of the purchase price.

- [15] Ms Van Tonder testified that the 60% as referred to in clause 2.1 of each of the purchase agreements annexures "E" and "F" was decided upon so that the remainder would be utilised and be enough to run and operate the resorts/clubs. This did not turn out to be possible as it happened later on that what was supposed to have been utilised as payment of the purchase price was actually utilised as operating costs of the resorts/clubs.

According to Ms Van Tonder, Mr Van Tonder could not and did not really make a profit in the circumstances.

- [16] The properties on which the resorts/clubs operated were bonded to Absa and the latter was only finally paid after the death of Mr Van Tonder, when Ms Van Tonder also paid in an amount to settle the liabilities of the deceased estate towards Absa.

[17] Subsequent to the establishment of the clubs, the resorts' management was handled by Lekkerrus Bestuursonderneming Bk and Libertas Bestuursonderneming Bk in terms of management agreements with the respective clubs. At a general meeting of Club Lekkerrus on 17 August 1991 a decision was unanimously taken that the two clubs should amalgamate.

[18] It appeared from the evidence of Ms Van Tonder that a new constitution was drafted for the new club, but it was never signed. Nobody, however, disputed that a new club by the name of "Klub Lekkerrus/Libertas" was formed. Since 1991 the resorts were therefore consolidated and controlled by a single club. Hereafter, no mention was ever made of the two previous clubs. In no form or fashion did the initial clubs therefore continue to operate or exist. There was no further separate meetings of trustees of the respective clubs after amalgamation, nor were there separate sets of employees. They did not retain any members, assets or liabilities. Even the management agent remained one, namely Lekkerrus Bestuursonderneming Bk (the Fifth Plaintiff).

Hereafter, all meetings and minutes of meetings were of the consolidated Club Lekkerrus/Libertas.

[19] From the financial statements made available as evidence during the trial it was already apparent in 1994 that the timeshare units sold to members, and income

through members, was insufficient to cover the costs of running the resorts. For this purpose, a certain portion of accommodation fees of "tydelike lede" were used to operate the resorts.

[20] The situation of being cash stricken persisted throughout the existence of the club. Ms Van Tonder testified that there was pressure from Absa in regard to Mr Van Tonder's indebtedness towards them.

From the minutes of the board of trustees meeting dated 30 May 1996 it appears that a new category of members was introduced, namely "Jaarlede". These members enjoyed no benefits than merely a right to make a reservation for accommodation for which they pay per night. At the subsequent annual general meeting of 16 November 1996, it was also resolved that such "Jaarlede" should be admitted as members. Furthermore it was decided that 60% of the income (being accommodation fees) in this respect would go to Mr Van Tonder.

The Plaintiffs contend that this constituted a binding agreement, hence the claim for R15 699 576.00 as per claim 2 in the combined summons.

[21] During or about February 1997 Absa initiated sequestration proceedings against Mr Van Tonder in regard to the referred indebtedness. Mr Van Tonder passed away on 23 July 1997 while still being indebted to Absa. A settlement agreement was eventually reached with Absa on 2 March 1998 in regard to Mr Van Tonder's

estate. As mentioned above, it was Ms Van Tonder who committed herself in this regard. It is clear that neither at this stage, nor at any stage, did the club fully satisfy the purchase price as provided for in the 1990 sale of shares agreements.

[22] On 2 February 2007 the club, which is run by a new Board of Trustees to the exclusion of Ms Van Tonder and Mr Woite, cancelled the management agreement with the Fifth Plaintiff. Subsequently the Second and Third Plaintiffs cancelled the rental agreements with the club on 7 February 2007. The club was requested in writing to vacate the properties by 10 August 2007. Notwithstanding cancellation of the rental agreements, the club refused to vacate the properties.

[23] Regarding the expert evidence pertaining to the issue of what was paid in regard to the purchase prices stipulated in "E" and "F" as well as the accommodation fees, the expert reports in terms of Rule 36(9)(b) were filed. The pertinent conclusions can be summed up as follows:

23.1 Mr Johan van Zyl, an auditor, testified that the minimum price of R7 million (R4.5 million plus R2.5 million in terms of "E" and "F" respectively) had to be paid from 60% "Lidmaatskapintreegelde" but it was never realised. According to the 2006 members lists R5 331 148,00 may have been received and 60% thereof amounts to R3 198 688,00.

23.2 The Defendant's expert, Mr Justus van Wyk, also testified. The relevant and rather decisive aspect of his evidence was the fact that he agreed with

Mr Van Zyl that a maximum amount of R6 075 190,00 may have been paid towards "lidmaatskapintreegelde" according to the financial statement. He could not comment on Mr Van Zyl's calculation of the accommodation fees and he therefore did not dispute it.

AMENDMENT OF PLEADINGS

[24] Paragraph 21 of the Plaintiffs' Particulars of Claim in its original form stated the following:

"21. Op 10 Augustus 1990 is al die uitgereikte aandeel en leningsrekenings van mnr P H J van Tonder in elkeen van die tweede en derde eisers aangekoop deur onderskeidelik Klub Lekkerus van tweede eiser, en Klub Libertas van derde eiser. Afskrifte van die afsonderlike ooreenkomste word hierby aangeheg as aanhangsels 'E' en 'F' onderskeidelik."

The First Defendant in its plea pleaded as follows:

"Ad paragrawe 18, 19, 20 en 21 daarvan

Die bewerings vervat in hierdie paragrawe word erken."

[25] On 18 June 2009 the Plaintiff brought an amendment to paragraph 21 of its Particulars of Claim. The application for amendment was not opposed by the First Defendant. The amended paragraph 21 introduced sub-paragraphs 1 to 9 and reads as follows:

- "21.1 Op 10 Augustus 1990 is al die uitgereikte aandele en leningsrekenings van mnr P H J van Tonder in elkeen van die tweede en derde eisers aangekoop deur, onderskeidelik Klub Lekkerrus van tweede eiser, en Klub Libertas van derde eiser. Afskrifte van die afsonderlike ooreenkomste word hierby aangeheg as aanhangsels 'E' en 'F' onderskeidelik.
- 21.2 Klub Lekkerrus en Klub Libertas het tot 'n einde gekom gedurende 1991, en 'n nuwe klub is gestig, naamlik Klub Lekkerrus/Libertas, die Eerste Verweerder in hierdie aksie, wat 'n nuwe entiteit was.
- 21.3 Beide aanhangsels 'E' en 'F' het uitdruklike bepalings bevat dat die ooreenkomste die gehele ooreenkomste tussen die partye is en dat enige wysiging of toevoeging daarvan van geen waarde of regskrag sou wees nie tensy dit op skrif gestel is en deur beide partye onderteken is.
- 21.4 Eerste Verweerder is nooit vervang as 'n party tot aanhangsels 'E' of 'F' in skrif, onderteken deur al die relevante partye nie, en geen regsgeldige delegasie van regte en verpligtinge vanaf Klub Lekkerrus en Klub Libertas na Eerste Verweerder het ooit plaasgevind nie.

- 21.5 In die vooropstelling het die twee kontrakte, aanhangsels 'E' en 'F', tot 'n einde gekom toe die twee afsonderlike klubs, naamlik Klub Lekkerus, en Klub Libertas, ontbind is in 1991.
- 21.6 Klousule 2.3 van beide aanhangsels 'E' en 'F' het bepaal dat betaling van die koopsom ingevolge beide ooreenkomste moes plaasvind voor of op 30 September 1990, en daarna op die laaste dag van elke daaropvolgende maand vir 'n totale tydperk van 60 maande vanaf datum van sluiting van die ooreenkoms, met dien verstande dat die voormelde minimum koopprys voor die afloop van die gemelde tyd van 60 maande betaal moes wees.
- 21.7 'n Periode van 60 maande het verstryk op 30 September 1995 op die laaste, nie een van die 60 maande tydperke in aanhangsels 'E' tot 'F' is skriftelik verleng nie, en paragraaf 2.3 van elkeen van die ooreenkomste is nie skriftelik gewysig en onderteken deur alle relevante partye nie.
- 21.8 In die vooropstelling het aanhangsel 'E' en 'F' derhalwe tot 'n einde gekom in 1991, *alternatiewelik* op die laaste op 30 September 1995, na afloop van die 60 maande periodes. Alternatiewelik, as gevolg van die aangaan van aanhangsel 'G', wat 'n novasie van aanhangsels 'E' en 'F' daargestel het, *alternatiewelik* is aanhangsels

'E' en 'F' by ooreenkoms tussen die partye daartoe, en eerste verweerder, beëindig na die dood van mnr P H J van Tonder en voor die aangaan van aanhangsel 'G'.

21.9 As gevolg van bogenoemde is alle uitgereikte aandele wat oorgedra moes gewees het ingevolge aanhangsels 'E' en 'F' terugoorhandig aan die verkoper ingevolge aanhangsels 'E' en 'F', mnr P H J van Tonder, *alternatiewelik* moes alle uitgereikte aandele wat oorgedra was of moes gewees het ingevolge aanhangsel 'E' en 'F' terugoorhandig gewees het aan die verkoper, mnr P H J van Tonder en in sy naam geregistreer gewees het, en derhalwe in sy bestorwe boedel geval het."

[26] On 29 July 2009 the Third Defendant pleaded to the above paragraphs 21.1 to 21.9 as follows:

" 11.

AD PARAGRAAF 21 DAARVAN

11.1 Die Eerste Verweerder erken dat die ooreenkomste, aanhangsels 'E' en 'F' tot die Eisers se Besonderhede van Vordering, gesluit is.

11.2 Die Eerste Verweerder pleit dat die Eerste Verweerder sy verpligtinge ingevolge die ooreenkomste nagekom het."

It should be noted that in its plea the First Defendant does not specifically deal with each of the allegations contained in sub-paragraphs 21.1 to 21.9 of the Plaintiff's particulars of claim. The plea as it stands purports to admit all the allegations set out by the plaintiffs.

[27] During the course of the trial the First Defendant brought an application for amendment of its plea, the effect thereof would be that the First Defendant now pleads to each and every specific allegation in paragraph 21 of the particulars of claim. To this the Plaintiffs objected and on the ground that such an amendment amounts to a withdrawal of admissions already made.

[28] After hearing argument from all parties I refused the application for amendment and gave my reasons as summarised hereunder.

[29] Rule 22(3) states as follows:

"Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea."

In my view the First Defendant's plea does not comply with this rule. In fact it purports to admit all the allegations. The proposed amendment will obviously amount to a withdrawal of the admissions already made.

[30] For purposes of withdrawing an admission, the Applicant has to show more than an applicant in respect of a normal amendment. An applicant must show and give a full explanation to convince the court of the *bona fides* thereof, and that the other party is not prejudiced thereby. See *J R Janisch (Pty) Ltd v J M Spilhaus & Co (WP) (Pty) Ltd* 1992 1 SA 167 (CPD) at 170C-F; *President Versekeringsmaatskappy Bpk v Moodley* 1964 4 SA 109 (T); *Amod v South African Mutual Fire & General Insurance Co Ltd* 1971 2 SA 611 (N).

In the founding affidavit the First Defendant took a standpoint that the proposed amendment does not amount to a withdrawal of the admissions. It did not give a reasonable explanation for the withdrawal of the admissions, how it came about, if the First Defendant was *bona fide* and if there was no prejudice to Plaintiffs. Hence the application for amendment of plea was refused.

[31] The refusal of First Defendant's application for amendment of its plea, is in my view, a technical knock-out against the First Defendant. It put the First Defendant's case in jeopardy. Certain crucial allegations of fact relied upon by the Plaintiffs in their case have now been admitted and have become common cause.

[22] The following facts are therefore common cause, and not in contention any more that:

- 32.1 a new club, namely Klub Lekkerrus/Libertas was created, which was a new entity, the First Defendant in the action, and the two previous separate clubs were dissolved in 1991;
- 32.2 First Defendant was never substituted as a party to the two original agreements, annexures "E" and "F" in writing, signed by all the relevant parties;
- 32.3 no lawful delegation of rights and obligations from the two clubs to the First Defendant had ever occurred;
- 32.4 the periods of sixty months referred to in annexures "E" and "F" were not extended in writing and signed by the parties with effect from 30 September 1995;
- 32.5 annexures "E" and "F" had terminated therefore in 1991 when no proper delegation took place in accordance with the provisions of annexures "E" and "F", and in particular in accordance with the non-variation clause in those two agreements.

[53] The non-variation clause in the agreements "E" and "F" reads as follows:

"Hierdie ooreenkoms is die gehele ooreenkoms tussen die partye hiertoe en is enige wysiging of toevoeging daarvan van geen waarde of regsrag nie tensy dit op skrif gestel is en deur beide partye onderteken is."

PLAINTIFFS' CLAIMS AND SUBMISSIONS

[34] The Plaintiffs' case in respect of claim 1 is that upon termination of the agreements the First Defendant had not complied with the said agreements and as such it is not entitled to the shares in the Second and Third Plaintiffs.

[35] The submission of the Plaintiffs is that any substitution of the two original clubs with the new club that was created in 1991 had to comply with the non-variation clause in each of the two agreements. Therefore the delegation of rights and obligations by the two separate clubs had to be done in writing and had to be signed by all three parties. See *Van Achterberg v Walters* 1950 3 SA 734 (T) at 745C-F; Christie *The Law of Contract in South Africa* 5th edition page 462.

[36] It follows from the foregoing that the only possible conclusion that can be reached is that the purchase agreements terminated in 1991 when the substitution was not done lawfully and when the two original clubs ceased to exist.

The admission therefore, by the First Defendant in its plea, that the two original clubs had dissolved, is also in accordance with the law applicable.

- [37] I accordingly come to a finding that the two original purchase agreements terminated in 1991. In any event, the sixty months time periods stipulated in the agreements within which the whole purchase price for the shares should have been paid, was never extended in writing in terms of the agreements and therefore the agreements would still have terminated on 30 September 1995.

In the circumstances the shares of the two companies of Second and Third Plaintiffs must accrue to the estate of the late Mr Van Tonder and be registered as such in the share register.

The relief sought in this regard should therefore succeed.

- [38] The Plaintiffs also simultaneously therewith seek an order, on the basis of restitution and the principles of restitution, that membership introduction fees ("lidmaatskapintreegelde") of those members who are still members of the First Defendant, should be repaid to those members. In accordance with the calculation made by the auditor, Mr Van Zyl, such amount is the sum of R3 198 688.80. A declaratory order will accordingly be made in this regard.

- [39] It needs to be mentioned at this juncture that after the death of Mr Van Tonder, more specifically on 12 November 1997 an agreement was entered into by and between Mr Woite (in his capacity as executor of the deceased estate of Mr Van Tonder) and Ms Van Tonder (in her capacity as a representative of Club

Lekkerrus/Libertas) in terms whereby the shares and interests of the late Mr Van Tonder were purportedly sold to the Club (First Defendant). This agreement turned out to be null and void on the ground that the purchase price was not determined. This agreement is referred to as annexure "G" to the Plaintiffs' Particulars of Claim.

[40] A subsequent agreement which is annexure "H" to the Particulars of Claim, also turned out to be null and void in as much as it was based on the void agreement, annexure "G". It is common cause between the parties in this case that the two agreements "G" and "H" are null and void.

[41] It is worthwhile to state paragraph 2.5 of annexure "G" which reads as follows:

"Die partye kom verder ooreen dat 60% van die akkommodasiegeelde van die jaarlede aan die verkoper betaal word in kontant vir die onbepaalde tydperk van 16 November 1996 op 'n maandelikse basis."

The Plaintiffs' contention is that clause 2.5 can be regarded as severable from the rest of the illegal and void agreement. Counsel for the Plaintiffs submits that clause 2.5 has no bearing upon the purchase price, it constitutes a separate agreement pertaining to payment of accommodation fees, which had nothing to do with the purchase and sale part of the agreement, annexure "G". Therefore, it is submitted further by counsel, that clause 2.5 should be regarded as severable and

standing on its own. The First Defendant contends that the clause is void together with the rest of the agreement.

[42] Referring to some authorities, counsel for Plaintiffs finally submitted that the general rule is that where the illegal from the legal part of a contract cannot be separated, the whole contract is void. Where they can be separated, the bad may be rejected and the good may be retained. See Christie *The Law of Contract in South Africa* 5th edition pages 388 to 391; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 1 SA 438 (A).

I am persuaded by counsel's argument in this regard and I therefore make a finding that clause 2.5 of annexure "G" is severable from the rest of the void agreement.

[43] In accordance with claim 2, the Plaintiffs claim payment to the estate of Van Tonder, of all outstanding accommodation fees of the year members in terms of clause 2.5 of annexure "G". The amount claimed as per particulars of claim is R15 699 576,00. The uncontroverted evidence by the expert of the Plaintiff, Mr Van Zyl puts the amount at R18 751 137,40. However the Plaintiffs are settled with the conservative sum of R15 699 576,00 as supported by minutes of the meeting of members during the year 2006 as opposed to the higher calculated amount.

[44] Because of the fact that annexure "G" is void, payment of the accommodation fees of the year members as per clause 2.5, can never be and should not be regarded as payment of the purchase price. Therefore the amount in respect of accommodation fees should accrue to the deceased estate of the late Mr Van Tonder.

[45] The uncontroverted evidence of Ms Van Tonder was that on 16 November 1996 a decision was taken at the general meeting of members of the First Defendant that 60% of such accommodation fees will be paid to her late husband, Mr Van Tonder. She testified that the intention was never that these funds would be regarded in substitution of the purchase price for any shares.

[46] The evidence pertaining to these claim was strengthened by the evidence of Mr Lemmer who did not dispute that the trustees at three different meetings confirmed the amounts reflected in those minutes as being correct and that they accepted that the amounts were outstanding. Therefore, the evidence of Ms Van Tonder in conjunction with the evidence of Mr Lemmer, indicates on a balance of probabilities that the accommodation fees (60% thereof) were never paid since 1996, and therefore the claim of the Plaintiff in this regard must succeed.

[47] The Plaintiffs' claim 3 relates to the two lease agreements which were entered into simultaneously with annexures "E" and "F". In terms of the lease agreements the then two clubs occupied the properties, Portions 7 and 11, of the farm

Welgevonden owned by the Second and Third Plaintiffs respectively. The lease agreements are annexures "C" and "D" to Plaintiffs' Particulars of Claim. The evidence was that these two lease agreements were terminated by Ms Van Tonder as the only director of the Second and Third Plaintiffs with effect from 10 August 2007.

[48] Because of the fact that the Second and Third Plaintiffs are the owners of Portions 7 and 11 respectively of the farm Welgevonden 343, district Potgietersrus, the Second and Third Plaintiffs became entitled to access and occupation of these properties owned by them with effect from 10 August 2007. It is common cause between the parties that Second and Third Plaintiffs were not granted access to the properties and therefore it follows that the declaratory order sought by the Second and Third Plaintiffs should be granted.

[19] In terms of claim 4 the First and Fourth Plaintiffs allege that the First Defendant and its members exercised control over the properties belonging to First and Fourth Plaintiffs and that no agreements exist in respect thereof.

The First Defendant and its members have access of the properties by use of a hiking road, sewerage plant, waste dump and lapa.

[30] The First Defendant pleads that the First Defendant and its predecessors in title utilised these properties for an uninterrupted period of thirty years as if they were

owners of the properties. The First Defendant therefore alleges that the First Defendant became owner of the properties through acquisitive prescription.

The First Defendant's counter-claim pertaining to acquisitive prescription will be considered hereunder. Should the defence of acquisitive prescription not succeed, it is clear that the First and Fourth Plaintiffs are entitled to access and use of the properties and thus should succeed in their claim.

FIRST DEFENDANT'S COUNTER-CLAIMS

[51] The First Defendant instituted three counter-claims, namely-

51.1 claims for the rectification of the share registers of the Second and Third Plaintiffs to reflect the First Defendant as the sole shareholder therein;

51.2 repayment of R5 512 812,00 from the estate of the late P H J van Tonder;

51.3 a declarator that the First Defendant had become the owner of certain properties by acquisitive prescription.

[52] Since I have already made a finding that the estate of the late P H J van Tonder is entitled to all the issued shares in the Second and Third Plaintiffs, it goes without saying that the First Defendant's claim for the rectification of the share registers of the Second and Third Plaintiffs to reflect the First Defendant as the sole shareholder therein cannot succeed.

Regarding the claim for repayment of R5 512 812.00, the First Defendant failed to present any evidence from Mr Lemmer or from any other source to support this claim. There is no basis laid for this claim whatsoever.

[53] It is necessary to consider and determine the claim of First Defendant of acquisitive prescription. The first requirement to prove is possession. Such possession must be full juristic possession. There must be possession and the mental reservation and intention to possess as owner. See *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 2 SA 264 (W) at 467G; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C) at 281D-E.

[54] In *Malan v Nabygelegen Estates* 1946 AD 562 at 574 the court said the following:

""In order to avoid misunderstanding it should be pointed out here that mere occupation of property '*nec vi nec clam nec precario*' for a period of 30 years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract of legal relationship such as lease or usufruct which recognises the ownership of another."

See also *Bishop v Stafford* 1974 3 SA 1 at 8A-B where it was held that the *nec precario* requirement is that the possession must not be by virtue of a revocable permission.

[55] According to the evidence of Ms Van Tonder, which is not contested, the permission to use the hiking roads, the sewerage facility, the waste dump and the lapa, was given on the basis of a clear understanding between the First Defendant and its representatives on the one hand, and her husband, herself and the Second, Third and Fourth Plaintiffs on the other hand, that the permission can at all relevant times be withdrawn.

There was therefore an agreement on the basis that there would be use, but with consent. Such consent was withdrawn in August 2007.

[56] It is therefore clear that the First Defendant can never be found as having used the property as if it was the owner thereof or as if it wanted to become the owner thereof. In the circumstances the claim for acquisitive prescription cannot succeed.

CONCLUSION

[57] The ultimate result in this matter is that the Plaintiffs have proved their claims and the First Defendant failed to prove any of its counter-claims.

ORDERS

[58] I accordingly grant the following orders:

1. A declaratory order that-
 - 1.1 the deceased estate of the late P H J van Tonder is entitled to possession and registration of all issued shares in Second and Third Plaintiffs in its name as well as cession of all loan accounts of First Defendant in Second and Third Plaintiffs and that the share registers of Second and Third Plaintiffs be rectified accordingly;
 - 1.2 any transfer of all issued shares in Second and Third Plaintiffs to the deceased estate of the late P H J van Tonder and any rectification of the share registers of the Second and Third Plaintiffs should not be effected before the deceased estate of the late P H J van Tonder pays the sum of R3 198 688,80 to the First Defendant.
2. That the deceased estate of the late P H J van Tonder is entitled to payment by the First Defendant of the sum of R15 699 576,00 together with interest thereon at the rate of 15,5% per annum from 1 January 2007 to date of payment.
3. A declaratory order that-

- 3.1 the two lease agreements, annexures "C" and "D" were lawfully terminated with effect from 10 August 2007;
- 3.2 the Second and Third Plaintiffs are, with effect from 10 August 2007, entitled to full possession, control and occupation of the properties, namely Portion 7 of the farm Welgevonden 343, district Potgietersrus held under Title Deed T210008/60 and Portion 11 of the farm Welgevonden 343, district Potgietersrus held under Title Deed T15902/62;
- 3.3 that the First Defendant had no right of access, possession, control or occupation of the properties referred to in 3.2 above, with effect from 10 August 2007.

4. A declaratory order that the First Defendant and its members are, with effect from 10 August 2007, not entitled to any right of access, possession, control and occupation of any of the properties belonging to First and Fourth Plaintiffs, namely Portions 21, 22, 23, 24 and 25 of the farm Welgevonden 343 district Potgietersrus, Registration Division KR, Limpopo Province and Portion 32 (a portion of Portion 12) of the farm Welgevonden 343, district Potgietersrus, Registration Division KR, Limpopo Province.

5. That the First Defendant and its members be and are hereby ordered to vacate the properties referred to in 3.2, 3.3 and 4 above within 30 (thirty) days of this order.
6. That the First Defendant's counter-claims are dismissed with costs.
7. That the First Defendant pays the costs of this action, such costs to include the costs of two counsel of which one is a Senior Counsel.

E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

11748-2007

HEARD ON: 7, 8, 9, 12, 13, 14 & 16 OCTOBER 2009
FOR THE PLAINTIFFS: R DU PLESSIS SC & W ROOS
INSTRUCTED BY: MARIUS COERTZE ATTORNEYS
FOR FIRST DEFENDANT: P ELLIS SC & A A BOTHA
INSTRUCTED BY: FRANS RABIE ATTORNEYS c/o VAN DER MERWE
ATTORNEYS