IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MAKHANDA)

[Not Reportable]

Case No.: 2521/2022

In the matter between:

CHARALAMBOS COMMERCIAL PROPERTIES CC (Registration Number: 2005/117681/23)	**Applicant**
and	
TRANSKEI FURNISHERS (PTY) LTD (Registration Number: 1970/008903/07)	**First Respondent**
FIRSTRAND BANK LIMITED	**Second Respondent**
REGISTRAR OF DEEDS, MTHATHA	**Third Respondent**

JUDGMENT

ROBERSON J:

Introduction

[1] On 21 August 2015, the applicant, as lessee, entered into a notarial agreement of lease (the lease) with the first respondent, as lessor. The property leased was Erf 4[...] (Portion of Erf 2[...]) Mount Frere, Umzimvubu Municipality, district of Kwa Baca, Province of the Eastern Cape (the property). The lease was for a duration of thirty years, commencing 1 November 2014, with an option to renew for a further thirty years. The rent payable was R14 520.56 per month, escalating annually by 8%. The lease contained an option for the applicant to purchase the property, which option the applicant exercised. In this application the applicant seeks an order declaring that it validly exercised its option The applicant further seeks an order directing the first respondent to sign, within ten days of service of the order, the agreement of sale of the property. Should the first respondent not sign the agreement of sale, an order is sought authorising the Sheriff of this Court to sign the agreement of sale and all other documents necessary in order to effect transfer of the property.

[2] In the conclusion of the lease, the applicant was represented by Mr Charalambos Christodoulou, and the first respondent was represented by Mrs Nozibele Vakalisa. It is common cause that at the time of the conclusion of the lease, Mrs Vakalisa was the only director of the first respondent, whereas the articles of association provide for not less than two directors.

[3] Clause 19 of the lease contained the option to purchase and provided as follows:

The Landlord hereby grants the Tenant an irrevocable option to purchase the Property ("the Option") subject to the following terms and conditions:

9.1 The Option shall be capable of being exercised by the tenant upon the death of NOZIBELE DORIS VAKALISA (Identity Number: 3[...]) and the Tenant shall have a period of 30 (THIRTY) days, calculated from the date of her death, to exercise the Option, by delivering a written notice to NOZIBELE DORIS VAKALISA'S Executor.

9.2 The price to be paid by the Tenant for the Property shall be the sum of R1 400 000.00 [ONE MILLION FOUR HUNDRED THOUSAND RAND] plus escalation equal to the average rate of the Consumer Price Index (as published by the Department of Statistics South Africa) per year, calculated from the year of signature hereof to the year of exercise of the said option.

9.3 The Parties undertake to do all things necessary to formalize this option agreement in writing, which agreement will contain the usual terms and conditions associated with an agreement of sale in respect of immovable property.

[4] The opposition to the application is essentially based on a challenge to Mrs Vakalisa's authority to enter into the lease on behalf of the first respondent.

Evidence

[5] Mr Christodoulou deposed to the founding affidavit. It appears from the authority to institute the application that he is a trustee of the Twin Angels Trust, which is the sole member of the applicant.

[6] Although contained in the replying affidavit, it is useful to include at this point, for chronological purposes, Mr Christodoulou's account of events leading to the conclusion of the lease. During September 2014 the first respondent had two directors, Mrs Vakalisa and Mr Tobile Melani. On 16 September 2014 the first respondent passed a resolution in terms of which Mrs Vakalisa was authorised to conclude a notarial lease subject to the reregistration of the first respondent. A copy of this resolution was annexed to the replying affidavit. It bore the name of the first respondent, was signed by both directors and recorded as follows:

> "Resolved that Nozibele Doris Vakalisa, a director of the Company is hereby authorised to enter into a Notarial Head Lease on behalf of the Company, subject to the Company being reinstated with the Companies and Intellectual Property Commission."

[7] On 14 August 2015, after the first respondent's reinstatement, Mrs Vakalisa signed a power of attorney in favour of specified persons to appear before a notary public for the purpose of executing the lease, a draft of which was attached to the power of attorney. These documents were also annexed to the replying affidavit. The notary public, Mr Marc Sharratt, explained to Mrs Vakalisa the consequences of the lease. Mr Anthony Lawrence was also present. Mr Sharratt and Mr Lawrence deposed to confirmatory affidavits.

[8] Mr Christodoulou stated that Mrs Vakalisa resigned as a director of the first respondent on 1 June 2020 and on that day Mr Chuma Unathi Vakalisa and Mr Pierre Mandisile Vakalisa were appointed as directors. To avoid confusion because of the same surname, and with no disrespect, I shall refer to them as Chuma and Mandisile respectively. Chuma is the son of Mrs Vakalisa and Mandisile is the grandson of Mrs Vakalisa's late husband, Mr Sandile Acton Vakalisa. Again, with no disrespect, I shall refer to him as Sandile. Sandile died intestate on 27 April 1988 and Mrs Vakalisa was appointed as estate representative. I mention here that at the time of his death Sandile was the sole shareholder in the first respondent.

[9] Mrs Vakalisa died on 23 January 2022 and Chuma was appointed by the Master of the High Court as the representative of her estate. The applicant gave notice of its election to exercise the option to the first respondent, to Chuma and to Mandisile. Thereafter the applicant's attorneys presented the agreement of sale to the first respondent for signature. The purchase price of R1 872 897.00 was calculated by Mr Johan Riekert, a chartered accountant. This sum has been deposited into the trust account of the applicant's attorneys, and the applicant tendered payment to the first respondent as due consideration for the property.

[10] According to Mr Christodoulou, correspondence from Mandisile indicated that he did not recognise the lease and consequently disputed the option to purchase. Correspondence from Mandisile was annexed to the founding affidavit. In a letter dated 28 January 2022 Mandisile said that the directors of the first respondent and the heirs in Sandile's estate, of which Mrs Vakalisa

was the executor, had instructed the first respondent's attorneys to contest the validity of the lease and in particular the option to purchase clause. On 17 February 2022, in response to the notice of intention to exercise the option, Mandisile maintained the challenge to the lease. In an email sent on 24 May 2022 to the conveyancer appointed to attend to the transfer of the property, Mandisile stated that the first respondent was not selling the property and was not bound by the lease. In a letter addressed to the attorney who prepared the agreement of sale, Mandisile repeated the first respondent's stance. Accusations were made of unscrupulous conduct, thievery, thuggery and greedy ambitions. The purchase price was also challenged, Mandisile stating that the municipal valuation of the property was R5.4 million.

[11] Mr Christodoulou referred to a tripartite agreement between the applicant, the first respondent and the second respondent (First Rand) in terms of which, *inter alia*, First Rand agreed to advance a loan to the applicant, and the first respondent bound itself together with the applicant as surety and co-principal debtor in favour of First Rand. The loan was to be released to the applicant on registration of a mortgage bond. The lease bears an endorsement to the effect that it is mortgaged for R10 million. Clause 5 of the lease provides that if the applicant wished to mortgage the lease in favour of a bank in order to raise the capital required to finance any development and refurbishment of the buildings, the first respondent consented to such mortgage.

[12] Mr Christodoulou said that the applicant had complied with its obligations in terms of the lease.

[13] The chartered accountant Mr Riekert deposed to a confirmatory affidavit.

[14] Mandisile deposed to the first respondent's answering affidavit. As foreshadowed in his correspondence, he denied that the option was validly granted. He said that when he heard of the potential sale of the property in 2014, he confronted Mr Christodoulou and told him that any sale would be resisted. Clause 19, so he stated, was the result of the earlier sale negotiations. He was excluded when the lease was concluded.

[15] Mandisile recounted some history of the first respondent. In 1980 the property described as the Remainder of Erf 2[...] Mount Frere (Erf 2[...]) was granted to the first respondent. Sandile was the shareholder and director of the first respondent and ran a business on this property. When he ceased trading, the other buildings on this property were leased to other concerns and one individual. Sandile sold various portions of Erf 2[...] until eventually only Erf 4[...] remained and it is the first respondent's only asset.

[16] Mandisile referred to periods of deregistration of the first respondent, namely August 1985 to July 2008, and 13 July 2009 to 21 October 2014. He also related various allegedly unauthorised acts performed by Mrs Vakalisa on behalf of the first respondent when she was not a director, or was purporting to act as sole director, when the articles of association of the first respondent provide that there be not less than two directors. In 1993 she sold a portion of Erf 2[...] when her only authority was her appointment as the representative of Sandile's estate. In 1995 she concluded a notarial deed of lease of the Remainder of Erf 2[...], Mount Frere, with one of Mr Christodoulou's associated close corporations, C & Y Comdev CC, when the first respondent was deregistered and she had not been appointed as a director. In 2006 she cancelled this notarial lease and entered into a second notarial lease of the Remainder of Erf 2[...], Mount Frere with another of Mr Christodoulou's associated close corporations, Mount Frere Commercial Properties CC. Neither of these notarial leases contained an option to purchase clause.

[17] According to Mandisile, in 2008 the first respondent was reregistered to facilitate the sale of a portion of Erf 2[...] to the Sparg Group and in terms of a court order Mrs Vakalisa was appointed as a director. The court order, in the form of a rule *nisi*, was published in a Government Gazette and annexed to the answering affidavit. It reflected that the Registrar of Companies was ordered to reregister the first respondent, that Sandile was the sole shareholder of the first respondent at the time of his death, that Mrs Vakalisa was recorded as the sole shareholder in her capacity as administrator of Sandile's estate and that she be appointed as a director of the reregistered first respondent. Mandisile

maintained that this appointment as director was merely to facilitate the sale to the Sparg Group.

[18] Mandisile said that his investigations revealed that income earned by the first respondent was deposited into Mrs Vakalisa's personal bank account. He alleged that the first respondent was simply a shell for use by Sandile, and then Mrs Vakalisa, for their convenience and with no regard for its distinct legal persona.

[19] Mandisile said that the notarial lease concluded in 1995 provided for the lessee at its own cost to develop the premises for the purpose of establishing a shopping centre. A stamp on the lease indicated that it had been mortgaged for R1 million and an additional R300 000.00. The notarial lease concluded in 2006, so Mandisile stated, provided that the lessee could mortgage the lease to obtain finance for the development and refurbishment of the building. This lease bore the endorsement that it had been mortgaged for R2 million. Mandisile alleged that this amount was not used for the development and refurbishment of the buildings and instead it was used to provide finance to other entities associated with Mr Christodoulou.

[20] The current lease has been mortgaged for the sum of R10 million. According to Mandisile there has been no development of the property, and he maintained that the property has been used as a vehicle for raising finance most probably for the benefit of the applicant and associated entities. Consequently, so Mandisile alleged, the applicant was in breach of the current lease and had commercially exploited the first respondent. The first respondent earns R306 000.00 annually from the lease whereas the applicant earns in excess of R2.1 million from sub-letting the property.

[21] Mandisile also said that he had learned that a further mortgage bond had been executed for R9 500 000.00 to cover the applicant's indebtedness to First Rand, thereby hypothecating all right, title and interest in the leasehold rights of the property.

[22] In elaborating on the alleged lack of authority on the part of Mrs Vakalisa, Mandisile stated that during her lifetime she was a housewife, a teacher and a nurse. She had no business experience and no knowledge of corporate governance and the responsibilities of a director. She was not capable of fulfilling her duties as estate representative or her fiduciary duties as a director of the first respondent.

[23] In relation to the required number of directors of the first respondent Mandisile said that Mr Melani had been appointed as a director in order to facilitate the sale to the Sparg Group, and that he was removed as a director on 25 March 2015.

[24] Mandisile raised s 112 of the Companies Act 71 of 2008, ss (2) (a) of which provides that a company may not dispose of all or a greater part of its assets unless the disposal is approved by a special resolution of shareholders. He said that the intestate heirs in Sandile's estate who are entitled to a child's share wish that the shareholding in the first respondent should be taken up by a trust of which they would be the beneficiaries. He stated that while the heirs' interest in the shareholding of the first respondent remains undetermined s 112 cannot be complied with.

[25] Mandisile further stated that if the first respondent had been a natural person the option to purchase would have amounted to an impermissible *pactum successorium*, being an irrevocable post-mortem disposition of property. The linking of the option to purchase to the death of Mrs Vakalisa, so the view was expressed, also undermined the essence of perpetual succession.

[26] Mandisile also raised s 42 (2) of the Administration of Estates Act 66 of 1965 which provides that an executor who wishes to effect transfer of immovable property in terms of a sale shall lodge a certificate from the Master to the effect that there is no objection to the transfer.

[27] Mandisile anticipated that the applicant would rely on s 20 of the Companies Act (I assumed s 20 (7)), which in the present instance would prevent the first

respondent from asserting that the lease was void because Mrs Vakalisa was the only director at the time of its conclusion. He countered such a position by narrating the history of the relationship between Mrs Vakalisa and Mr Christodoulou. He said that he believed that they were introduced to one another in the early 1990's by a close friend and business associate of Sandile. Mr Christodoulou thus became aware of Mrs Vakalisa's personal circumstances. Mandisile said he understood that it was as a result of meetings between Mrs Vakalisa and Mr Christodoulou that the 1995 notarial lease was concluded. It would have been clear to Mr Christodoulou, so it was alleged, that the first respondent was a shell and the *alter ego* of Mrs Vakalisa, particularly because the rent was paid into her personal bank account. Mandisile said he understood that Mr Christodoulou was unhappy about the sale to the Sparg Group, and on seeing Mrs Vakalisa's ability to deal with the assets of the first respondent as though they were her own, Mr Christodoulou was able to negotiate the purchase of the property for around R1,4 million.

[28] Mandisile described the relationship between Mrs Vakalisa and Mr Christodoulou as one of benevolence on the part of Mr Christodoulou, in that he paid R100 000.00 as a contribution to her 75th birthday celebrations and that she had been his dinner guest. He expressed the view that their dealings were not at arm's length and that the benevolence of Mr Christodoulou was aimed at "sweetening" the potential purchase of the property.

[29] Mandisile said he could say without fear of contradiction that all contracts and documents (presumably involving Mrs Vakalisa) were drawn up by the applicant or its corporate associates which were parties to the 1995 and 2006 leases and presented to Mrs Vakalisa for signature. She was never professionally represented, and with no knowledge of her obligations as an executrix or a director, had liquidated the majority of Sandile's estate for her personal benefit and that of her immediate family. He further alleged that Mrs Vakalisa's lack of authority, lack of understanding of her role, and lack of professional advice applied equally to the tripartite agreement.

[30] In his replying affidavit Mr Christodoulou said that at the time of the conclusion of the 1995 and 2006 notarial leases, he was the sole member of the two lessees. He was unaware that the first respondent was deregistered at the time and had no knowledge of the first respondent's internal affairs relevant to the conclusion of transactions. He relied on Mrs Vakalisa's representation that she was authorised to act on behalf of the first respondent. He denied that her appointment as a director in 2008 was limited as alleged.

[31] In response to the allegation that the rent was paid into Mrs Vakalisa's personal account and that the first respondent was her *alter ego*, Mr Christodoulou said he had no knowledge of the first respondent's internal financial arrangements, or that the first respondent did not function as a separate legal persona.

[32] Mr Christodoulou confirmed that the applicant's rights under the lease serve as collateral security as required by its bankers. He said the applicant had complied with its obligations and had never been served with a notice of breach. He denied the allegation of commercial exploitation. With regard to the rental income earned by the applicant from the property, he said that the applicant was entitled to this because of the capital it had invested in the property.

[33] With regard to the criticism of Mrs Vakalisa's competence, he said she was educated and competent to discharge her functions as a director of the first respondent. She had also received legal advice prior to the conclusion of the lease.

[34] Mr Christodoulou agreed that he had had a longstanding business and personal relationship with the Vakalisa family, and has on many occasions financially assisted members of the family. The payment of R100 000.00 was for financial assistance to Mrs Vakalisa at her request. Mr Christodoulou denied having dinner with Mrs Vakalisa.

Discussion

[35] The points concerning a *pactum successorium* and non-compliance with s 42 (2) of the Administration of Estates Act were not pursued

[36] The validity of the lease and Mrs Vakalisa's authority were challenged on a number of grounds.

[37] I deal firstly with the resolution of September 2014. On this date the first respondent had not been re-registered. It was reregistered on 21 October 2014. Section 82 (4) of the Companies Act provides:

> "If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company."

[38] In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) at paragraph [29] Brand JA stated:

> "As I see it, the wording of the section leaves no room for the pragmatic approach adopted by the court a quo. The only meaning available on that wording, as I see it, is that s 82(4) has automatic retrospective effect, not only in revesting the company with its property but also in validating its corporate activities during the period of its deregistration."

[39] Mr Kincaid, who appeared for the first respondent, referred to paragraph [26] of *Newlands Surgical Clinic*, where it was said that the retrospective validation of corporate activities during the period of deregistration holds as a matter of course the inherent risk of prejudice to third parties. Mr Kincaid submitted that in the present matter the applicant was aware that the first respondent was deregistered at the time of the resolution and most probably aware of the breaches of fiduciary duties and corporate mismanagement on the part of Mrs Vakalisa. Automatic retrospective reinstatement should not, so it was submitted, be used to sanitise the series of invalid acts underpinning the applicant's contractual claim.

[40] There was no evidence that the applicant, through Mr Christodoulou, was aware of the deregistration of the first respondent at the time of the resolution, or aware of the alleged breaches of fiduciary duties or corporate mismanagement on the part of Mrs Vakalisa. In my view this submission does not support a finding that the resolution was not validated by reregistration.

[41] Mr Kincaid submitted that the judgment in *Newlands Surgical Clinic* may not be settled law. He referred to the judgment in *Aquila Steel v Minister of Mineral Resources* 2019 (3) SA 621 (CC) where, at paragraph [119], it was stated that it was not necessary to consider the effect of the deregistration of one of the respondent companies and whether the approach of the Supreme Court of Appeal was correct. In the footnote to this paragraph, it was recorded that prior to the hearing the parties had been advised that they would be invited to make submissions on whether the judgments in *Newlands Surgical Clinic* and another matter, were compatible with certain judgments of the Constitutional Court. In the footnote Cameron J stated:

> "It is unnecessary, for now, to determine whether *Newlands and Palala* sufficiently recognise the distinction between retrospectivity and retroactivity and whether they can stand in the light of *Du Toit* and *McBride*."

[42] Mr Kincaid submitted that there was an insinuation in the footnote which supported the submission that *Newlands Surgical Clinic* was not settled law. I do not agree. It is clear that no decision was made on the status of the judgment in *Newlands Surgical Clinic* and in my view there was not even an insinuation.

[43] Mr Kincaid submitted further that Mr Melani would not have anticipated a situation where the lease was concluded when there was only one director of the first respondent. He would have anticipated permissible conduct. In other words, as I understand the submission, the resolution must be interpreted as only authorising the conclusion of the lease if there were two directors at the time of its conclusion. In my view such an interpretation is somewhat remote.

The resolution and the conclusion of the lease were two separate instances, with their own legal requirements.

[44] It was also submitted that if Mr Melani had been aware that the two previous notarial leases did not contain an option to purchase clause, it could not be inferred from the resolution that clause 19 would have been included in the lease. The inclusion of an option to purchase clause in the lease, if envisaged, should therefore have been expressed in the resolution. Mr Melani did not depose to an affidavit in this application. One cannot speculate on what he knew and what his thought processes would have been. As the resolution stands, it does not prohibit the inclusion of an option to purchase clause.

[45] It was also submitted that Mr Melani had signed a blank cheque, in that the resolution did not name the other party to the lease or contain the terms of the lease. In my view the resolution is sufficient to support the ultimate conclusion of the lease. The property was the only asset in the first respondent and the property to be leased was therefore identifiable. The fact that the terms of the lease or the name of the lessee were not included in the resolution does not in my view undermine the authority given to Mrs Vakalisa in the resolution. Further in this regard it was submitted that no director acting responsibly and in accordance with his fiduciary obligations could have resolved that the first respondent would be bound to a contract in terms of which the option could be exercised on the happening of an arbitrary condition, namely the death of Mrs Vakalisa. I do not find anything objectionable in the condition, and why it should be considered differently from providing, for example, for a specific calendar date for the exercise of the option. Mrs Vakalisa was involved with the first respondent as a director and as the representative in Sandile's estate, which was the sole shareholder in the first respondent. The date of her death would therefore not be an arbitrary condition, unlike the example given by Mr Kincaid of the death of an employee of the first respondent such as the messenger.

[46] I deal next with the submission on behalf of the respondent that s 112 and s 115 of the Companies Act had not been complied with, in circumstances where

the sole asset of the first respondent was to be disposed of. Section 112 (2) of the Companies Act provides:

> "A company may not dispose of all or the greater part of its assets or undertaking unless-
>
> (a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and
>
> (b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company."

It was submitted on behalf of the applicant that the principle of unanimous consent was of application.

[47] In *Gohlke and Schneider and Another v Westies MInerale (Edms) Bpk and Another* 1970 (2) SA 685 (AD) the following was stated at 693E-H:

> "The articles, therefore, only empower a general meeting to appoint directors to fill vacancies caused by retirement or removal of directors, a situation which did not arise in the present case. I agree however with Mr. *Coetzee* that the members must have inherent or implied general power to appoint directors to fill other vacancies caused, for example, by resignation, death, incapacity, or disqualification. Usually, as a matter of practice, they would exercise that power by ordinary resolution at a general meeting. But the articles neither require that nor prohibit the power from being exercised by their unanimous assent achieved otherwise than at such a meeting. After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that not be just as effective? Thus in the case of *Salomon v Salomon and Co. Ltd*., 1897 A.C. 22, one of the questions that arose was whether the agreement

whereby the company purchased the vendor's business was valid, since there had been no independent board of directors to render the company bound. No general meeting of members of the company had been held to approve the agreement, but according to the evidence they all knew of its terms and accepted them. At p. 57 Lord DAVEY said:

'I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members.'"

[48] In *Levy and Others v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 485F the following was stated:

> "I am hence of the opinion that the unanimous consent of the shareholders of a company to a specific transaction has the same effect and validity as the approval of such transaction by a general meeting of the company."

[49] And in *Moraitis Investments v Montic Dairy* 2017 (5) SA 508 (SCA) at paragraph [37] Wallis JA stated (footnote omitted):

> "The purpose underpinning the requirements of ss 112 and 115 is to ensure that the interests and views of all shareholders are taken into account before the company disposes of the whole or the greater part of its assets or the undertaking itself. In the case of a special resolution ss 65(9) and (10) stipulate the majority that must be achieved for such a resolution to be passed. Where the company only has a single shareholder these requirements become a mere formality. In those circumstances it seems to me that the principle of unanimous consent can be invoked in answer to the appellants' contention. That principle, long recognised in English company law, from which our courts have received much guidance, was accepted as part of our law relating to companies, under both the 1926 and the 1973 Companies Acts. I can

see nothing in the current Act to suggest that the principle no longer finds application. The problems that this court identified in *Quadrangle Investments* and those identified by Professor Beuthin in his article on the topic do not arise here to preclude the invocation of the principle."

[50] On behalf of the applicant, several factors were relied upon to support the application of the principle of unanimous consent. At the time of the conclusion of the lease, Mrs Vakalisa was the representative of Sandile's estate, which was the sole shareholder of the first respondent. The control over the shareholding vested in Mrs Vakalisa in her capacity as representative of the estate. In terms of the 2008 court order (see paragraph [17] above, Mrs Vakalisa was recorded as the sole shareholder of the first respondent in her capacity as representative of the estate. When the resolution of 2014 was taken, Mrs Vakalisa was at the time the sole shareholder of the first respondent in her representative capacity. Mrs Vakalisa signed the power of attorney for the execution of the lease. It was submitted that these factors left no doubt that Mrs Vakalisa, the sole shareholder in her representative capacity, approved of the sale of the property. In view of the authorities referred to and the facts, I am of the view that the principle of unanimous consent finds application and that the disposal of the sole asset of the first respondent was properly approved.

[51] The respondent's difficulty with unanimous consent appears to be the interests of future shareholders. Reference was made to an article in the 1974 South African Law Journal Volume 1 at page 2 by Professor Beuthin, in which he distinguished between those juristic acts unanimously assented to which had run their full course and those where the real effects continued to live on, operating in the future to the possible prejudice of others, including new members. In my view the juristic act in the present matter has run its full course. The lease has been concluded and the option has been exercised.

[52] It was submitted that when Mrs Vakalisa died her nominal shareholding would have been transmitted to the executor in her estate, namely Chuma, who is not in favour of the sale. The disposal of the property, so it was submitted, is to be

determined at the present time in terms of the sale agreement, and not at the time of the execution of the lease. I do not agree with this submission. I have already dealt with the resolution and its validity. The time of the disposal of the property in my view was the conclusion of the lease. The sale agreement is a consequence of the exercise of the option contained in the lease. The fact that a current director is opposed to the sale of the property does not change the position.

[53] With regard to the interests of the heirs in Sandile's estate, it was submitted on behalf of the applicant that they had no interest in the shareholding of the first respondent, nor did they have a right as shareholders to participate in a shareholders' meeting. I agree with this submission. An heir may only enforce a claim for his or her inheritance when the liquidation and distribution account in an estate has been approved in terms of s 35 of the Administration of Estates Act. See *Estate Smith v Estate Follett* 1942 AD 364 at 383, and *Clarkson N.O. v Gelb and Others* 1981 (1) SA 288 (WLD) at 297D-E.

[54] Mrs Vakalisa's authority was also questioned on the basis of her alleged lack of competence to carry out her functions as a director. No statutory grounds for her ineligibility were alleged. No specific qualifications were required in the articles of association of the first respondent for a person to be appointed as a director. She qualified as a nurse and a teacher and was clearly educated, but in any event her past occupations were irrelevant. Related to this aspect is the allegation that she did not receive legal advice when entering into the lease. However, when the lease was notarised the legal effects were explained to her by the notary, Mr Sharatt.

[55] Next I deal with the Turquand rule and s 20 (7) of the Companies Act. In *Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk.* [2004] 1 All SA 396 (SCA) at paragraph [8] Farlam JA stated:

> "A modern formulation of the rule, which was approved by Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 474, is taken from

Halsbury's Laws of England, 2 ed, vol 5, paragraph 698 (see now 4 ed, reissue vol 7(1), paragraph 980) and is in the following terms:

"Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.""

[56] ……………"the third party is not *bona fide* if he in fact knows that the requirement has not been observed …………………. or if he knows facts which as a reasonable man should put him on enquiry with regard to whether or not it has been." (*Henochsberg on the Companies Act* Volume 1 106.)

[57] Section 20 (7) of the Companies Act provides:

"A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement."

[58] It was submitted on behalf of the first respondent that it was probable that Mr Christodoulou knew that the first respondent was a company in name only and that its business was conducted for the personal benefit of Mrs Vakalisa. The following factors were highlighted in support of this submission: the relationship between Mr Christodoulou and the Vakalisa family, especially Mrs Vakalisa, was one of benevolence and intimacy; Mr Christodoulou had questioned the sale to the Sparg Group and had made known his wish to purchase the property; Mrs Vakalisa was pliable in Mr Christodoulou's hands given his charity towards her; Mr Christodoulou was confronted by Mandisile concerning the proposed sale of the property and clause 19 of the lease was therefore a deliberate strategy in the face of this opposition to the sale; and

clause 19 was made possible by Mr Christodoulou's manipulation of Mrs Vakalisa.

[59] In my view to infer knowledge on the part of Mr Christodoulou of the first respondent's internal requirements based on these factors, amounts to conjecture and speculation. Much of Mandisile's evidence on this aspect was hearsay or speculation. Mr Christodoulou admitted that he had had a longstanding business and personal relationship with the Vakalisa family, and had assisted them financially. He denied however having knowledge of the first respondent's internal affairs and said that he relied on Mrs Vakalisa's representation that she was authorised to act on behalf of the first respondent. I can find no grounds for concluding that Mr Christodoulou knew or ought reasonably to have known that the internal requirements of the first respondent had not been met.

[60] It bears mentioning at this point that Mr Kincaid submitted that there is a subtext in this matter, which colours the application. The sub-text alleged, as I understand it, is that something untoward occurred on the part of Mr Christodoulou and Mrs Vakalisa resulting in an intrusion on the separate legal persona of the first respondent. Thus allegations were made of manipulation and pliability, a strategy to achieve the sale of the property in order to bypass opposition to the sale, Mrs Vakalisa using the first respondent as her alter ego, and commercial exploitation of the first respondent. Such a sub-text is in my view a matter of suspicion and speculation and is simply not supported by evidence. Mandasile's evidence that the first respondent's income was paid into Mrs Vakalisa's bank account was hearsay. He did not identify the source of his information. The mortgaging of the lease in favour of First Rand was not a mortgage of the property. Mandisile did not substantiate his allegation that finance raised by the applicant was not used for the development of the property.

[61] The final point relied upon by the first respondent is that clause 19 offends public policy, in that, so it was submitted, in the factual context of the matter, clause 19 offends the fundamental principle of separate legal personality and

threatens the continued existence of the first respondent. In my view, as indicated above, the factual context relied upon has not been established.

[62] The determination of whether or not a contract or a contractual term offends public policy is determined in the context of constitutional values. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at paragraph [83] the following was stated (footnotes omitted):

> "The first is the principle that "[p]ublic policy demands that contracts freely and consciously entered into must be honoured". This Court has emphasised that the principle of *pacta sunt servanda* gives effect to the "central constitutional values of freedom and dignity". It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values."

[63] At paragraph [87] it was further stated (footnote omitted):

> "In our new constitutional era, *pacta sunt servanda* is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging *pacta sunt servanda* over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances."

[64] *Pacta sunt servanda* clearly applies in the present case. With regard to other constitutional rights and values, I do not think that clause 19 offends the

separate legal personality of the first respondent, or threatens its existence. At the risk of repetition, the resistance to the sale of the property, and the alleged abuse of its corporate personality are founded on suspicion and speculation. If the sale of the property is completed, the first respondent will be paid the purchase price and will still be in existence. Option to purchase clauses and the disposal of company assets are not unusual occurrences. If the underlying procedures are legally executed, I can see no undermining of the first respondent's corporate existence.

[65] Insofar as the purchase price was linked to the aspect of public policy, it was agreed at the time the lease was concluded and the updated calculation was done by a chartered accountant. Other than a reference to the municipal valuation, documentary proof of which was not annexed to the answering affidavit, there was no evidence supporting a challenge to the original price and the chartered accountant's updated calculation.

[66] It follows that I can find no legal impediment to the enforcement of clause 19 of the lease.

Costs

[67] The matter was complex and involved a number of issues for decision. I am of the view that the costs of two counsel on scale C are warranted.

[68] The following order will issue:

[68.1] It is declared that the applicant has validly exercised its option granted to it in terms of a notarial deed of lease concluded between the applicant and the first respondent on 21 August 2015, to purchase the immovable property described as Erf 4[...] (Portion of Erf 2[...]), Mount Frere, Umzimvubu Municipality, district of Kwa-Baca, Province of the Eastern Cape, in extent 945 (nine hundred and forty-five) square metres held under certificate of registered title number T1338/2009.

[68.2] The first respondent is directed to sign, within ten (10) days of service of this order on the first respondent, the agreement of sale annexed to the notice of motion.

[68.3] The applicant is directed to comply with its obligations in terms of the agreement of sale referred to in paragraph [68.2] of this order.

[68.4] In the event of the first respondent refusing and/or failing to comply with paragraph [68.2] of this order, the sheriff of this Court is authorised and directed to sign the agreement of sale and all documents necessary in order to effect transfer of the property referred to in paragraph [68.1] of this order.

[68.5] The first respondent is to pay the costs of the application, including the costs of two counsel where so employed, on scale C.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Adv D H de la Harpe SC
Instructed by : Mason Incorporated,
c/o De Jager & Lordan Incorporated
Makhanda

Counsel for the First Respondent : Adv J C Kincaid
Instructed by : Chris Bodlani Attorneys
c/o Whitesides Makhanda.

Date heard	:	20 February 2025
Date delivered	:	29 April 2025