Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 68918/2012

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

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In the matter between:

HIGHLANDER RESORT (PTY)LTD	First Plaintiff
HIGHLANDER RESORT HOLDINGS (PTY) LTD	Second Plaintiff

and

MARTHA WILHELMINA HOOD	First Defendant
HENNING PETRUS NICOLAAS PRETORIUS	Second Defendant
REGISTRAR OF DEEDS	Third Defendant
BENRU DEVELOPMENTS (PPTY) LTD	Fourth Defendant
INVESTEC BANK LIMITED	Fifth Defendant

JUDGMENT

van der Westhuizen, J

[1] In this action the plaintiffs seek declaratory orders in respect of the transfer of immovable property, described as Portion 82 of the Farm Hartbeesthoek 498, Registration Division JQ ("the consolidated immovable property"), initially registered in the name of the first plaintiff. The second plaintiff was the registered shareholder of the only share issued in respect of the first plaintiff. The immovable property was the only asset of the first plaintiff. The declaratory orders are sought in terms of the provisions of section 228(1)(b) of the previous Companies Act, 61 of 1973.

[2] The plaintiffs averred that the second plaintiff was incorporated, during 1995, for the sole purpose of acquiring the first plaintiff as a subsidiary and which was achieved by the issuing of the only share in the first plaintiff to the second plaintiff. The second plaintiff was deregistered on 1 March 2005. Consequently, the only share certificate became *bona vacantia* as a result of the said deregistration. It consequently affected any disposition of assets of the first plaintiff, in particular where it was the only asset in the first plaintiff. The second plaintiff was re-registered in the Companies Office on 21 June 2010.

[3] It was common cause between the parties that on 27 February 2008, a purported transfer of the said immovable property, the only asset of the first plaintiff, was transferred from the name of the first plaintiff into the name of the first defendant. This occurred in the Office of the Registrar of Deeds. Two years later, on 18 June 2010, the said property was purportedly sold by way of a sale in execution to the second defendant.

[4] The purported registration of the said property in the name of the second defendant occurred on 17 January 2012, two years after the

purported sale in execution and the purported sale thereof by the Sheriff to the second defendant.

[5] On 15 November 2012, the plaintiffs instituted this action against the first and second defendants. On or about 4 July 2016, after the institution of this action, the said property was purportedly transferred from the second defendant to the fourth defendant. Six months later, the latter registered a mortgage bond in favour of the fifth respondent. It was submitted on behalf of the fourth defendant that the mortgage bond was not in respect of the purchase price. On 19 July 2019, both the fourth and fifth defendants were joined as parties to this action.

[6] The first defendant (initially), the second defendant and the fourth defendant defended the action. The fifth defendant filed a notice to abide the court's decision. The first respondent did not participate further in the proceedings.

[7] The first defendant, in response to Rule 37(4) interrogatories on behalf of the plaintiffs, made certain admissions of fact. Those admissions admitted *inter alia* the compliance with the requirements prescribed in terms of the provisions of section 228 of the previous Companies Act. It is trite law that an admission in respect of an issue pled in the pleadings, eliminated that issue form the issues to be tried.[1] It was submitted on behalf of the plaintiffs that those admissions definitively proved the plaintiffs' case against the first defendant.[2] The admissions included: that the first and second plaintiffs were correctly identified in the summons; that first defendant was correctly cited and that she was never a shareholder of either of the plaintiffs; that the said property was the only asset of the first plaintiff; that the first plaintiff purportedly sold the said property to her and that it was registered in her name in the offices of the third defendant; that at all material times the second plaintiff was the holder of the only share issued in the first plaintiff and

[1] *Filta-Matix (Pty) Ltd v Freudenberg* 1998(1) SA 606 (SCA) at 614A-D
[2] *Filta-Matix, supra*

that the second plaintiff was the holding company of the first plaintiff; that the second plaintiff was deregistered on 1 March 2005 and remained so until it was reregistered on 21 June 2010; that during the period of deregistration of the second plaintiff, its assets, the shareholding in the first plaintiff, was *bona vacantia* in favour of the State; that no shareholder signed the transfer document, or that a special meeting of shareholders was held; that the disposition of the said property represented a disposition of the whole or greater part of the asset of the first plaintiff as contemplated in section 228(1)(b) of the previous Companies act; that the disposition of the whole or greater part of the assets of the first plaintiff required a general meeting of the shareholders of the first plaintiff; and that the precondition in section 228 of the previous Companies Act was not met. In consequence of the aforementioned admissions, the first defendant further admitted that she was unable to pass title in the said property and that it was null and void and of no legal consequence. She admitted that the property remained the first plaintiff's property since 3 October 1993.

[8] It is to be recorded that the plaintiffs, relying on the aforesaid admissions, only led the evidence of an expert in handwriting. That evidence was to prove that the signature on a transfer of the shareholding in the first plaintiff to the first defendant was not in conformity with the signature that appeared on the initial shareholding certificate in the first plaintiff to the second plaintiff. The second defendant did not effectively disprove the expert evidence, despite posing some questions to the expert. The fourth defendant did not address any cross-examination to the expert. The evidence of the expert was: a signature of a person in wet-ink will not be replicated exactly as on another occasion; there is a natural deviation in signatures; the exact replication of a signature will not occur after a particular long period in between the two signatures; an exact replication of a signature is only possible when there is a superimposing of the one signature. The expert concluded that the signature appearing on the share certificate of documenting a transfer

of shares from the first plaintiff to the first defendant was an exact replica of the signature appearing on the share certificate documenting the transfer of the share in the first plaintiff to the second plaintiff. He opined that the signature on the purported transfer of shareholding to the first defendant was superimposed on the vexed share certificate. No natural deviation presented. Consequently, it was not an original wet-ink signature.

[9] Furthermore, it was submitted that the said admissions together with the un-contradicted evidence of the expert, resulted in a *prima facie* case of the plaintiffs requiring an answer by the defendants.[3]

[10] The second defendant addressed to the plaintiffs interrogatories in terms of Rule 37(4). The plaintiffs were requested to make certain admissions. Should the plaintiffs not make the requested admissions, they were requested to indicate why that admission was not made. In their response to those interrogatories, the plaintiffs referred to certain documents that were attached to their response. The reference in the plaintiffs' response to the second defendant's interrogatories in terms of Rule 37(4) relating to the said documents attached thereto, were incorporated therein in terms of the principle of inclusion by reference.

[11] It is to be recorded that the second defendant, as well as the fourth defendant closed their respective cases on the plaintiffs closing their case. No evidence was led by the second defendant and neither by the fourth defendant. Counsel for the second defendant placed on record that the second defendant would not lead any evidence, and would argue on the pleadings. There was no application for absolution of the instance after the closing of the plaintiff's case. Neither was there any application for absolution of the instance after the defendants had closed their respective cases.

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[3] *Ex parte the Minister of Justice: In Re Rex v Jacobson & Levy* 1931 AD 466 at 478 *in fin* to 479

[12] As recorded, no further evidence was led in the trial. Consequently, it was submitted on behalf of the plaintiffs that the *prima facie* evidence of the plaintiffs became conclusive evidence.

[13] The second and fourth defendants, failing to lead any evidence, were constrained to argue on their respective pleadings. At the outset, it is trite law that pleadings do not constitute evidence. The purpose of pleadings are merely to set the battle field. The purpose is clearly to record those issues that require adjudication.[4]

[14] Both the second and fourth defendants pled the sale in execution of the said property to the second defendant. Their respective pleas mirror each other. Both submitted that, as the said property was allegedly sold to the second defendant *sub hasta*, the sale was impeachable. Thus the second defendant was free to on-sell the said property to the fourth defendant.

[15] The second defendant further averred in his plea that the said property would not have been transferred into the name of the first defendant without compliance with the requirements of section 228 of the previous Companies Act. That averment was gainsaid by the first defendant when she admitted that there had been no compliance with the requirements of section 228 of the previous Companies Act. There is further no merit in the plea that the "conduct of the plaintiffs after the transfer of the said property into the name of first defendant" amounted to a unanimous approval by the second plaintiff of the sale and transfer of the said property into the name of the first plaintiff. There is no merit in that submission for: the second plaintiff was at that stage deregistered and could not in any way conduct itself to have acquiesced therein; and the first defendant admitted that the requirements of section 228 of the previous Companies Act were not complied with. Likewise, there is no merit in the submission that the first plaintiff *ex post facto* ratified the sale of the property by

[4] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198

"unanimously" granted consent. It was admitted by the first defendant that there was no compliance of the requirements of section 228. There could consequently be no "unanimous" consent. In any event, no evidence was led on behalf of the second defendant to substantiate the averments contained in his plea. Furthermore, the second defendant, on his own plea, entered the arena two years later, and consequently he could not have any knowledge in relation to the purported transfer of the said property to the first defendant. The second defendant consequently did not prove that there was compliance with the requirements of section 228 of the previous Companies Act. Similarly, the fourth respondent failed to prove compliance with the requirements of section 228 of the previous Companies Act. No evidence was led on behalf of the fourth defendant to substantiate the averments contained in its plea.

[16] A further defence that the second and fourth defendants attempted to rely on related to the averment that the property was sold to the second defendant *sub hasta***,** and consequently it constituted a complete defence. It is trite law, that a sale in execution would be unassailable only if the purchaser was a *bona fide* purchaser.[5] This was the main defence of the second defendant and to an extent of the fourth defendant.

[17] Further in this regard, the second defendant submitted that the plaintiffs had likewise made admissions in response to the second plaintiff's interrogatories in terms of Rule 37(4). The pertinent "admission" was that the said property was sold in execution to the second defendant. When that admission is considered, it is clear that the plaintiffs had merely conceded: a purported sale in execution of the said property; that it was purportedly sold to the second defendant at that purported sale in execution; that a purported transfer had taken place. In my view, the aforesaid response is not an "admission" as submitted by counsel for the second respondent. Furthermore it does

[5] *Sookdeyi et al v Sahadeo et* al 1952(4) SA 569 (AD) at 571A to 572G

not constitute an admission in the true sense. It was qualified. As recorded earlier, the plaintiffs, were requested in the interrogatories of the second defendant, required to indicate why the required admission was not made. In response to that request, the plaintiffs indicated their reasons. Apart from reiterating their averments in their particulars of claim, the plaintiffs attached documents in which they clearly indicated that the purported sale to the second defendant was a contrived sale. The second defendant was to purchase the said property on behalf of the first defendant, as nominee, and was subsequently to retransfer the said property into the name of the first defendant. The second defendant was acutely aware that no title could pass into his name as true owner of the said property following on the purported purchaser as nominee of the first defendant. He would and could not be a *bona fide* purchaser. Furthermore, the second defendant addressed a letter to the Sheriff, who conducted the sale in execution. In that letter he advised the Sheriff that he withdrew from the purchase of the property sold in execution. That letter was attached to the plaintiffs' said Rule 37(4) response. That withdrawal resulted in no sale of the property *sub hasta*. The withdrawal from the purchase of the property rendered the second defendant without the pled defence. The second defendant was obliged to lead evidence in rebuttal of the plaintiffs' assertions in that regard. He led no evidence. Consequently, that evidence stands uncontested.

[18] Despite that fact, the second defendant was acutely aware of the contested title when he purportedly sold it years later to the fourth defendant and after the commencement of this action. The second defendant could consequently not transfer full title to the fourth defendant.

[19] In my view, the plaintiffs have proven that the second defendant was not a *bona fide* purchaser of the property *sub hasta*. The second defendant's defence in respect of the sale *sub hasta* cannot succeed.

[20] In view of the fact that the second defendant did not have a clear title in the property, he could not transfer ownership to the fourth respondent in terms of the *nemo plus iuris*-principle.

[21] The fourth defendant failed to prove a valid defence to the plaintiffs' claims.

[22] It follows that the plaintiffs are entitled to the relief sought.

[23] The issue remaining is that of costs. The plaintiffs sought a punitive costs order against the second and fourth defendants. I am not persuaded that the second and fourth defendants' conduct warrant a punitive costs order.

I grant the following order:

1. It is declared that:
    1.1 The purported registrations of transfer of ownership of the immovable property described as Portion 82 of the Farm Hartbeesthoek 498, Registration Division JQ ("the consolidated immovable property") effected in the Deeds Office on:
        (a) 27 February 2008 ostensibly registering the transfer of the ownership of the said property from Highlander Resort (Pty) Ltd to Martha Wilhelmina Zacharia Hood (Identity no. […]);
        (b) 17 January 2012 seemingly registering the transfer of ownership of the said property from Martha Wilhelmina Zacharia Hood (Identity no. […]) to Henning Petrus Nicolaas Pretorius (Identity no. […]);
        (c) 4 July 2016 seemingly registering the transfer of ownership of the property from Henning Petrus Nicolaas Pretorius (Identity no. […]) to BENRU

DEVELOPMENS (PTY) LTD (Registration no. 2014/136115/07)

are null and void and of no legal effect *ab initio*;

1.2 Highlander Resort (Pty) (Registration no. M1988/000957/07) has been the duly registered owner of the said property since 2 October 2003;

2. The mortgage bond in favour of Investec Bank over the said property is to be cancelled and BENRU DEVELOPMENS (PTY) LTD (Registration no. 2014/136115/07) is liable for payment thereof to Investec Bank;

3. The Registrar of Deeds is directed to correct the records of the said property in the Deeds Office in accordance of the declaratory orders of prayer 1 above and to give effect thereto;

4. The second and fourth defendants are ordered to pay the costs of this action jointly and severally, the one paying the other to be absolved.

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C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of the Plaintiffs:	Ms L Metzer
Instructed by:	De Jager Du-Plessis Attorneys
On behalf of the Second Defendant:	D Prinsloo
Instructed by:	Lagenhoven Pistorius Modihapula
On behalf of the Fourth Defendant:	J A van Aswegen

Instructed by:	Theron Jordaan & Smit Inc.
Date of Hearing:	8 June 2023
Judgment Handed down:	21 June 2023