THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 260/10

In the matter between

KLUB LEKKERRUS/LIBERTAS **APPELLANT**

and

TROYE VILLA (PTY) LTD **FIRST RESPONDENT**
LEKKERRUS WARMWATERBRON (PTY) LTD **SECOND RESPONDENT**
LIBERTAS MINERALE BRON (PTY) LTD **THIRD RESPONDENT**
WERNICO (PTY) LTD **FOURTH RESPONDENT**
LEKKERRUS BESTUURSONDERNEMING CC **FIFTH RESPONDENT**
JOHANNA JACOBA VAN TONDER **SIXTH RESPONDENT**
HERMAN DANIEL WOITE **SEVENTH RESPONDENT**

Neutral citation: *Klub Lekkerrus/Libertas v Troye Villa (Pty) Ltd* (260/10) [2011] ZASCA 101 (1 June 2011)

Coram: **HARMS DP, MALAN, SHONGWE, MAJIEDT JJA and MEER AJA**

Heard: **13 May 2011**

Delivered: **1 June 2011**

Summary: Contract ─ sale of shares ─ new tacit agreement ─ not affected by non-variation clause ─ voluntary associations ─ dissolution of ─ legal effect of amalgamation.

ORDER

On appeal from: North Gauteng High Court (Pretoria), (Makgoba J sitting as court of first instance):

(1) The appeal is upheld with costs against the first, sixth and seventh respondents jointly and severally, including the costs of two counsel.

(2) The order of the court below is substituted with the following order:

‘(a) Mr H D Woite is joined as the eighth plaintiff in his capacity as executor in the estate of the late P J H van Tonder, estate no 14453/97.

(b) It is declared 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.

(c) The balance of the plaintiffs' claims is dismissed.

(d) It is declared that the first defendant is the sole shareholder of all the issued shares in the second and third plaintiffs and that the share registers should reflect that fact.

(e) The balance of the first defendant’s counterclaims is dismissed.

(f) The first, sixth, seventh and eighth plaintiffs are ordered jointly and severally to pay the first defendant's costs, including the costs of two counsel.’

JUDGMENT

MAJIEDT JA (HARMS DP, MALAN, SHONGWE JJA and MEER AJA concurring):

[1] The appellant, Klub Lekkerrus/Libertas (the Club) came about through the amalgamation of two voluntary associations, Klub Lekkerrus and Klub Libertas. Like its forebears, the Club (which was the main defendant below), operates as a holiday club under a written constitution.

[2] This appeal concerns in the main a dispute about the ownership of shares in the second and third plaintiffs (the plaintiffs are the respondents in the appeal) arising from two written agreements in terms of which Klub Lekkerrus and Klub Libertas had purchased all the issued shares and loan accounts in the second plaintiff and the third plaintiff respectively. At issue further is the effect of the amalgamation on these agreements of sale which the Club had continued with and whether a non-variation clause in the agreements precluded such continuation. For the reasons that follow we find that the Club is the owner of the shares in the second and third plaintiffs, since new agreements on the same terms were tacitly concluded between the parties in place of the two agreements mentioned and that the non-variation clause was no bar to the tacit new agreements.

[3] Sitting in the North Gauteng High Court (Pretoria), Makgoba J held otherwise by upholding the plaintiffs' claims with costs and dismissed with costs the Club's counterclaims. This appeal is with the leave of the court below.

[4] Klub Lekkerrus and Klub Libertas previously operated as separate voluntary associations with separate constitutions, members' meetings and financial statements. The Club was formed after the two clubs' members unanimously resolved during 1991 to amalgamate. A single board of trustees

was constituted to give effect to the amalgamation. A constitution for the new Club was drawn and there is no dispute about its validity.

[5] The first plaintiff, Troye Villa (Pty) Ltd (Troye Villa), is registered as the sole shareholder of the second and third plaintiffs each of which owns a portion of the farm Welgevonden 343, district Mokopane (previously Potgietersrus). Troye Villa is also the registered owner of Portions 21, 22, 23, 24 and 25 of Welgevonden. The fourth plaintiff (Wernico) is the registered owner of a remaining part of another portion of that farm. The fifth plaintiff, Lekkerrus Bestuursonderneming CC, is a close corporation which conducts business as a management corporation. It was established with the aim of managing a holiday resort on behalf of Klub Lekkerrus.

[6] The sixth plaintiff, Mrs Johanna Jacoba van Tonder, is the widow of the late Mr P J H van Tonder who owned all the issued shares in the second and third plaintiffs and who was the president of the clubs and a member of a managing corporation. The seventh plaintiff, Mr H D Woite, is an auditor by profession and at all material times he acted as such for the second, third and fourth plaintiffs and for the appellant. He was also the executor in the deceased estate of Mr van Tonder. Although Mr Woite joined as plaintiff in his personal capacity only, there is an application before this court that he be joined also in his capacity as executor. In the light of the special circumstances of this case, that application is granted.

[7] Welgevonden, which consists of a number of portions, has several hot water springs. Holiday resorts, Lekkerrus and Libertas, have since the late 1950s and early 1960s been established on two of them. During the early 1980s, Mr van Tonder operated the holiday resorts through his companies, the second and third plaintiffs – each being the owner of a portion of the farm. A comprehensive strategic reorganisation of the businesses of the resorts occurred in 1990. First, on legal advice, they were converted into holiday clubs, apparently in order to preserve their racial exclusivity in the face of impending legislation outlawing racially segregated residential areas, facilities

and amenities. Secondly, they became timeshare schemes on the advice of an estate agent in order to enhance the businesses' financial viability.

[8] Several agreements were concluded on 10 August 1990 following the establishment of the two holiday clubs. Separate management contracts were concluded between them and two management corporations, namely the fifth plaintiff and Libertas Bestuursonderneming CC, which was not a party to the proceedings. It is common cause that after amalgamation, the fifth plaintiff, in terms of the contract concluded with Klub Lekkerrus, managed the affairs of the amalgamated Club. One of the claims against the latter was in fact based on this agreement.

[9] Separate lease agreements were likewise concluded between Klub Lekkerrus and the second plaintiff and between Klub Libertas and the third plaintiff for periods of 9 years and 11 months, each for a different portion of Welgevonden. These leases contained a non-variation clause. In spite of this it was common cause on the pleadings that the Club was the lessee until 2007. A claim upheld by the court below was based on the common assumption that these agreements survived the amalgamation and that the Club was the lessee. This is only possible if one accepts, as one has to do, that tacit agreements were entered into between Mr van Tonder and the amalgamated Club in the same terms.

[10] On that same date Klub Lekkerrus purchased all the issued shares and the loan accounts of Mr van Tonder in the second plaintiff and Klub Libertas all the issued shares and loan accounts of Mr van Tonder in the third plaintiff. These agreements will be referred to as agreements 'E' and 'F' respectively. The respective sales of shares agreements were referred to in and linked to the corresponding lease agreements. The terms of these agreements were identical, save that the minimum purchase price for the second plaintiff's shares and loan accounts was R4.5 million and for the third plaintiff it was R2.5 million. Both agreements stipulated that the purchase price had to be paid within 60 months from the date of the signature of the agreements. The purchase price provision read 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. [For second plaintiff; in respect of third plaintiff the sum was R2 500 000.00].

2.2 Betaling van voormelde som 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.'

[11] Ownership of the shares passed immediately and effect was given to the sale of shares agreements by transferring the shares to the respective purchasers, but the share certificates and blank transfer forms were held in pledge for Mr van Tonder by Mr Woite as security for the outstanding purchase prices. The share registers reflect that the shares were later, on 19 January 1998, registered in the Club's name.

[12] The sixty-month period for payment of the purchase price expired on 9 August 1995. It is common cause that the full purchase price was not paid by that date, due to insufficient timeshare sales. No demand for payment or threatened cancellation by reason of non-payment was however made by Mr van Tonder. Towards the end of 1995, Mr van Tonder began experiencing severe financial hardship due to unrelated failed business ventures and the poor timeshare sales in the holiday clubs. He passed away in July 1997, while there was a sequestration application, instituted by Absa Bank against him, pending. After Mr van Tonder's death, Mrs van Tonder and Mr Woite effectively assumed control of the Club's business affairs. Mrs van Tonder succeeded her late husband as president of the Club.

[13] In spite of the amalgamation all the parties to the sale agreements acted on the assumption that the amalgamated club had stepped into the shoes of the original clubs. This was in the face of non-variation clauses in terms identical to those contained in the leases.

[14] It was only after the death of Mr van Tonder that the continued existence of the sale agreements became an issue - probably due to Mr Woite's poor understanding of the law. He believed that agreements 'E' and 'F' had come to an end because of Mr van Tonder's demise – long after the final date for payment and many years after the amalgamation. As indicated, Mr Woite during all those years kept the original clubs as owners on the share registers. Acting on this belief, the Club (represented by Mrs van Tonder) and Mr van Tonder's estate (represented by the executor Mr Woite) purported to enter into a new written agreement during November 1997 in terms of which the Club purchased the shares in the second and third plaintiffs from the estate. Mrs van Tonder, believing that because she as chairman was entitled to do so, signed on behalf of the Club. It was common cause that this agreement (agreement 'G') was null and void due to the fact that the purchase price of the shares was indeterminable. The plaintiffs contend, however, that clause 2.5 thereof was severable from the rest of the agreement because it did not concern the purchase price of the shares but was instead an undertaking by the Club with no counter obligation. It read as follows:

'Die partye kom verder ooreen dat 60% van die akkommodasiegelde van Jaarlede aan die VERKOPER betaal word in kontant vir 'n onbepaalde tydperk vanaf 16 November 1996 op 'n maandelikse basis.'

This clause formed the basis of the claim by the plaintiffs for payment by the Club of some R 15 million, which was successful.

[15] A further written agreement, linked to agreement 'G', was concluded during January 1998 between Mr Woite *qua* executor and Mrs van Tonder on behalf of Troye Villa, a company belonging to Mrs van Tonder, in terms of which the latter purchased Mr van Tonder's entire interest in agreement 'G' for a sum of R2,355 million. The objective appears to have been for Mrs van

Tonder to step into her late husband's shoes as seller and developer. The interest of the deceased estate in the Club was thereafter purportedly transferred to Troye Villa. The parties were agreed at the trial that this agreement was tainted by the invalidity of agreement 'G' so that it, too, was of no force and effect.

[16] The minutes of the Club contain a repeated recordal during the period prior to the change in trustees referred to below, that part of the purchase price in respect of the sale of shares remained unpaid. From around 2005 relations between Mr Woite and Mrs van Tonder on the one part and Club members on the other began to sour. Club members became increasingly hostile, the primary bone of contention being the outstanding purchase price. The Club members elected a small committee to take issues up with Mr Woite and Mrs van Tonder. Matters came to a head in 2007 when, in a palace revolt, a new board of trustees was elected, effectively deposing Mr Woite and Mrs van Tonder. The management agreement with fifth plaintiff was cancelled. Shortly thereafter the Club was notified in writing by an attorney acting for the second and third plaintiffs of the termination of the lease agreements, effective six months later, namely on 10 August 2007. The Club was asked to vacate the properties on that date. The demand was not met.

[17] The court below granted the plaintiffs' claims by ordering as follows:
(a) A declarator that Mr van Tonder's estate is entitled to the possession and registration of all issued shares in the second and third plaintiffs in the name of the estate as well as cession of all the loan accounts of the Club in the said plaintiffs and rectification of their share registers accordingly. This was based on the finding that the sale agreements between Mr van Tonder and the two clubs had lapsed when they came to an end at the time of amalgamation; that the amalgamated Club had no contract with him; that the 1998 share sale was void because of the uncertainty of the price; and that the subsequent sale to Troye Villa was also void.
(b) An order that the aforementioned transfer and cession be effected only upon payment of the sum of R3 198 688.80 by the estate to the Club. This

was ordered because of a tender by the plaintiffs, allegedly to assure that they were not enriched at the expense of Club members.

(c) An order declaring that the estate is entitled to payment by the Club of the sum of R15 699 576.00 with interest from 1 January 2007 to date of payment. This order was based on the finding that the quoted clause 2.5 was divisible from the rest of the agreement.

(d) Declarators that the lease agreements had been lawfully terminated with effect from 10 August 2007 and that with effect from that date the second and third plaintiffs were entitled to full possession, control and occupation of the properties in question and that the Club had no such rights. It was common cause that the leases had come to an end. The right to occupation depended on who was in control of the two property-owning companies.

(e) An order that the Club and its members vacate the properties within 30 days of the date of the order. This order was not sought but if the first declaratory should stand it would have followed. However, if the first declarator fails, it cannot remain.

(f) A declaration that the Club and its members were, 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, 25 and portion 32 (a portion of portion 12) of the farm Welgevonden. These are adjoining properties that have been used by the Club *precario* and to which the Club had no legal entitlement. It was not really an issue during the trial and its correctness has not been in issue on appeal.

[18] Apart from costs orders the court below also dismissed the Club's counterclaim. The counterclaim was based on the allegation that the amalgamated Club was the purchaser in terms of the two sale agreements 'E' and 'F' and that the agreements stood and that the Club was entitled to rectification of the share registers to reflect it as owner.

[19] The plaintiffs' claim, as originally framed, was based on the tacit supposition that the sale agreements had survived the amalgamation but had been cancelled due to non-payment. How or why they had survived was not,

as in the case of the leases and the management contract, an issue. The original plea responded to the original averments in the particulars of claim by admitting the conclusion of agreements 'E' and 'F' followed by an averment that the Club had fulfilled all its obligations in terms of the said agreements. Survival, as a matter of fact and law, was common cause.

[20] However, shortly before the trial date the plaintiffs amended the particulars of claim substantially. As will be indicated, the amendment only affected the sale agreements and not the leases which were on all fours with them. There was also not a consequent amendment of the plea to the counterclaim. That amendment introduced new material averments that:

(a) Klub Lekkerrus and Klub Libertas had come to an end in 1991 and that a new entity, namely the Club, was established;

(b) agreements 'E' and 'F' contained a non-variation clause;

(c) the Club was never substituted as party to these agreements;

(d) no lawful delegation of rights and obligations had taken place from Klub Lekkerrus and Klub Libertas to the Club;

(e) the said agreements had come to an end in 1991 so that all the issued shares fell into the deceased estate.

[21] Surprisingly, no consequential amendment of the Club's original plea ensued in the face of the substantial amendments and new averments in the particulars of claim. But at the beginning of the trial the Club sought leave to amend its plea to deal with the plaintiffs' new stance. The plaintiffs objected to the proposed amendment on the basis that it amounted to the withdrawal of an admission, namely that the two constituent clubs had been dissolved and that, as a consequence, the agreements had been terminated at that time. This implied admission emanates from the Club's failure to plead in particular to the new averments in the amended particulars of claim.[1] In refusing the application for amendment, the trial judge described the result as a 'technical

[1] Uniform Rule 22(3) reads 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 not admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.'

knockout' to the Club's case. There can be little doubt that the refusal did indeed have a severe adverse impact on the Club's case.

[22] The court below found that the plaintiffs would be prejudiced by the introduction of new defences in the proposed amended plea, such as waiver and estoppel. But such prejudice was irrelevant for present purposes, because the court below did not deal at all with the aspect of prejudice in the context of the withdrawal of the admission. As will be shown, there was no conceivable prejudice to the plaintiffs, except that they could lose the case, which is not a factor.

[23] The Club was ready to introduce its application for amendment at the commencement of the hearing and before any evidence was led, but the court below, at the behest of the plaintiffs, permitted the hearing of this substantive application only during Mrs van Tonder's evidence. As it turned out, the particular issue, namely whether the sale agreements ‘survived’ the amalgamation was fully canvassed with Mrs van Tonder in chief and during cross-examination and was based on common cause facts. The plaintiffs did not seek a postponement and during argument before this court their counsel was singularly unable to point to any evidence which could have been led to address the so-called new issue. There simply was no such evidence and there was no prejudice to the plaintiffs. The Club's alleged admission was in any event inconsistent with:

(a) its counterclaim that the Club, based on agreements ‘E’ and ‘F’, be reflected on the share registers as sole shareholder of the second and third plaintiffs and the lack of a plea thereto that the agreements had fallen away;

(b) the plaintiffs' averments in their particulars of claim that the management agreement continued in respect of the Club as it did previously in respect of the two constituent clubs because of the amalgamation;

(c) the plaintiffs' claims, granted by the court below, that the lease agreements were lawfully terminated on 10 August 2007, which implied that, until then, the lease agreements had simply continued as before with the Club (which in any event became a common cause fact at the trial).

[24] Moreover, and in any event, the conclusion concerning the dissolution of the two constituent clubs and the consequent termination of agreements 'E' and 'F' as pleaded in the amended particulars of claim, is legal and not factual. A court is not bound to a party's admission on a legal issue ─ it has to bring its own assessment to bear on it and to apply the law in that assessment.[2] The trial judge erred in refusing the application for amendment in relation to the withdrawal of the admission.

[25] Turning to the merits ─ the kernel of the dispute is whether agreements 'E' and 'F' had lapsed on amalgamation which, in turn, would answer the enquiry as to where the shares in second and third plaintiffs vest. The plaintiffs' argument, which found favour with the court below, was that the constituent clubs had dissolved upon amalgamation, thereby terminating agreements 'E' and 'F'. The court below found further that because of the non-variation clause there had to be a written cession and delegation of rights and obligations to change the name of the purchaser in agreements 'E' and 'F' to that of the Club. It also found that the agreements had in any event lapsed because the purchase prices had not been paid within 60 months. These findings are supported neither by the law nor the facts. I discuss first the applicable legal principles before turning to the facts which underlie them.

[26] A transfer of rights and obligations (generally referred to as an 'assignment' in our law) must be assessed in the context of each case to ascertain whether both rights and obligations or only the one or the other are to be transferred.[3] The intention of the parties must be ascertained in this regard.[4] Our law recognizes that agreements can be concluded tacitly to replace previous agreements.[5] The non-variation clauses in agreements 'E' and 'F' on which strong reliance was placed by the plaintiffs, do not preclude the application of this principle. As Harms JA put it in *Telcordia*:[6]

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[2] *Saayman v Road Accident Fund* 2011 (1) SA 106 (SCA) paras 28 and 29.
[3] *Simon NO v Air Operations of Europe AB & others* 1999 (1) SA 217 (SCA) at 228I-J.
[4] *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12A.
[5] *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC & others* 2002 (1) SA 822 (SCA) para 7; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 12.
[6] Ibid.

'[T]he principle [that is of the effect of a non-variation clause in a contract] does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate.'

The example cited in this passage is apposite in this matter, as will presently appear.

[27] It is also trite that a contracting party, when faced with breach of the contract by the other party, must elect whether to terminate or to enforce the contract. Once an election is made, the party is bound by it. A party who elects to cancel must clearly and unequivocally express an intent to do so.[7] Whether or not there has been such an election to cancel is a factual issue.[8]

[28] In applying these principles to the facts the following emerge: First, it became common cause during the trial that the Club was formed by unanimous decision of the members of the two constituent clubs to merge. It follows that, in law, the Club became the successor to the two clubs. The evidence overwhelmingly supports this conclusion. It is not in issue that the management contract with the fifth plaintiff simply continued after amalgamation as before. It is further common cause that the lease agreements also continued as before after amalgamation. This continuation could only have been possible if the Club had as a matter of law stepped into the shoes of its predecessors. Like agreements 'E' and 'F', the lease agreements also contained non-variation clauses. The minutes of the members' meetings after amalgamation and Mrs van Tonder's own evidence lend further support to this conclusion. One example will suffice to illustrate the point. The minutes of the Club's seventh annual general meeting on 15 November 1997 (ie the first such meeting after Mr van Tonder's death) reflect that Mr Woite delivered the presidential address in which he declared as follows:

'Ten opsigte van die voortbestaan van die Klub moet ons meld dat die Klub ongestoord voortgaan. Daar bestaan nog steeds huurkontrakte vir die eiendom en die Klub kan dus nog die Oorde benut soos voorheen. Die kontrak met die

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[7] *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 954A.
[8] *Peters & others NNO v Schoeman & others* 2001 (1) SA 872 (SCA) para 12.

Bestuursonderneming, om die klubsake te hanteer, is nog steeds in plek en gaan gewoonweg voort.'

When questioned on this in her evidence in chief, Mrs van Tonder confirmed the correctness of these recordals and confirmed that 'everything carried on as normal'. This conclusion is further buttressed by the Club's plea and counterclaim. To conclude ─ there can be little doubt on the evidence that tacitly new agreements of sale on the same terms as agreements ‘E’ and ‘F’ had been concluded between the parties. The above references provide ample evidence of the parties' conduct justifying the inference that the parties had the requisite consensus.[9] New agreements had therefore tacitly come into being.[10] The plaintiffs' reliance on the non-variation clauses cannot be upheld. The Club is therefore the lawful owner of all the issued shares in the second and third plaintiffs.

[29] The second aspect is Mr van Tonder's election in respect of the non-payment of the purchase price of the shares by the due date. The evidence is overwhelming that he elected to keep the agreements, including the new tacit agreements, extant. As stated above, he did not threaten cancellation, nor did he demand immediate payment of the outstanding balance. On the contrary, Mr van Tonder continued to collect payments made towards the purchase price, he decided where such payments should go and at the 1996 annual general meeting granted the Club an indefinite extension of time for payment of the balance of the purchase price. On the evidence this conduct signifying an election to continue with the contract, continued for well over ten years. I therefore find that there was a clear and unequivocal approbation on the part of Mr van Tonder.

[30] There is considerable merit in the contention advanced by its counsel that the Club has on the evidence paid the minimum purchase price in respect of second and third plaintiffs. We have not been asked to make such a finding, but it is nonetheless clear in the light of our finding that clause 2.5 is not divisible and in the fact that large sums of money were paid over to the estate

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[9]See *Gordon Lloyd Page & Associates v Rivera & another* 2001 (1) SA 88 (SCA) para 11.
[10]*Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC & others* supra para 7.

that this contention is correct. In view of these findings, the plaintiffs' claim for rectification and attendant orders cannot stand while, in turn, the counterclaim for rectification of the share registers must be upheld.

[31] What remains are the claim for R15 699 576.00, the declarator that the two lease agreements had been lawfully terminated with effect from 10 August 2007, and the ejectment of the appellant from the properties. The claim for R15 699 576.00 was based on clause 2.5 of agreement 'G', signed by Mrs van Tonder as trustee on behalf of the Club. She apparently believed that since she took over from her husband as chairman of the Club she could do as she wished, including entering into contracts. However, the constitution of the Club provided otherwise. In spite of a clear challenge to her authority, there was no evidence that she was authorised by the board of trustees to enter into this agreement. Absent an authority, the question whether the agreement was divisible does not arise because clause 2.5 was also not authorised. But, in any event, even if clause 2.5 survived this lack of authority, it is clearly not severable. This is apparent not only from the text of agreement 'G' but also from the context, that is the factual matrix in which the parties operated.[11] Agreement 'G' is an agreement for the sale of shares as its heading indicates. Clause 1 deals with the merx and clause 2 with the purchase price. Clauses 2.1, 2.2, 2.3 and 2.4 concern the purchase price and its calculation. Clause 2.5 is inserted in the clause dealing with the price. The word 'verder' is significant and suggests that it is a further provision dealing with the price. There is no provision for any other consideration for the undertaking in clause 2.5, and the conclusion seems inescapable that it is an integral part of agreement 'G'. It cannot be severed from the rest of the agreement. The context also supports this construction. The accommodation fees referred to in that clause were payable by non-members ('jaarlede') for accommodation at the resorts. Members paid joining fees ('intreegelde') to purchase timeshare and also paid annual levies ('jaargelde') and in return received free accommodation at the resorts. Clause 2.5 purportedly replaced the purchase price provision in agreements 'E' and 'F' in terms of which the

[11]See *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Swart & 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C-D.

purchase price was calculated as 60% of members' joining fees collected for a period of 60 months from date of signature of the agreements (with the proviso that for Lekkerrus the minimum purchase price was R4.5 million and for Libertas it was R2.5 million). The change in the price formula was brought about by the extremely poor timeshare sales. The provision that the purchase price was to be recovered from income derived from non-members' accommodation fees was therefore introduced to meet the shortfall. It is plain from the aforegoing that clause 2.5 forms an integral and inseparable part of the purchase price provision, which is a material term of the contract. It is thus not severable from the rest of agreement 'G'.

[32] I therefore conclude on the main issue that tacit agreements in the terms set out in ‘E’ and ‘F’ between the Club and Mr van Tonder were concluded upon the amalgamation of the clubs; that they survived the payment date; that they were not affected by Mr van Tonder’s death; that the shares were properly transferred to the Club; that the agreements were not replaced by the later sale agreement; that Mrs van Tonder and Mr Woite were not entitled to transfer the shares to anyone save the Club; and that the Club is entitled to rectification of the share registers.

[33] I do recognise the fact that neither party has relied in explicit terms on tacit agreements, but to deny their reality after nearly two decades of acceptance by everyone of their existence would amount to a travesty of justice.

[34] The finding of the court below that the lease agreements had been validly terminated with effect from 10 August 2007, was not challenged on appeal, correctly so. No order to that effect was, however, required. The issue is academic in the light of my finding that the Club is the lawful owner of all the issued shares in the second and third plaintiffs which own the resorts. It is therefore for the Club as sole shareholder to make a decision on eviction and the use of the resorts. For the same reason the eviction order cannot stand.

[35] As mentioned, it was not in issue that the Club had made use of facilities on properties belonging to Troye Villa and Wernico, namely staff accommodation, a walking trail, a sewerage treatment plant, a refuse dump and a lapa, without any agreement between the parties in respect thereof. The relief sought, namely that access to these properties and use of the facilities had been lawfully cancelled on 10 August 2007 and that, consequently, the Club and its members thereafter had no right to access of such property, was also not in issue. The order to that effect has to be retained.

[36] Lastly, the costs order warrants consideration. The Club has been substantially successful, inasmuch as the appeal is to be upheld. Ordinarily the plaintiffs, having met with some success on appeal to the limited extent set out in the previous paragraph would have been entitled to a portion of their costs. But there was hardly any dispute on these aspects at the trial, nor did they add measurably to the litigation costs. It seems that, in exercising a discretion on costs, it should follow the outcome, that is that the Club was successful on all those matters which were in issue. The first, sixth, seventh and eighth plaintiffs litigated in the names of the second and third plaintiffs, while they were not entitled to the shares in those companies. It would consequently be just and equitable for the first, sixth, seventh and eighth plaintiffs to bear the costs.

[37] The following order is made:

(1) The appeal is upheld with costs against the first, sixth and seventh respondents jointly and severally, including the costs of two counsel.

(2) The order of the court below is substituted with the following order:

‘(a) Mr H D Woite is joined as the eighth plaintiff in his capacity as executor in the estate of the late P J H van Tonder, estate no 14453/97.

(b) It is declared 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.

(c) The balance of the plaintiffs' claims is dismissed.

(d) It is declared that the first defendant is the sole shareholder of all the issued shares in the second and third plaintiffs and that the share registers should reflect that fact.

(e) The balance of the first defendant’s counterclaims is dismissed.

(f) The first, sixth, seventh and eighth plaintiffs are ordered jointly and severally to pay the first defendant's costs, including the costs of two counsel.’

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for Appellant	:	N G D Maritz SC
	:	A A Botha
Instructed by	:	Van der Merwe Attorneys Pretoria
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Counsel for Respondent	:	T P Krüger J R Minnaar
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