THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 934/2017

In the matter between:

EWAN RONALD SIMMONDS N O	
(in his capacity as the executor of the estate	
of the late John Owen Brankin)	**APPELLANT**

and

GRANVILLE ESSAFRAU	**FIRST RESPONDENT**
KOSTA BABICH	**SECOND RESPONDENT**
GILLIAN LEE	**THIRD RESPONDENT**
ROBERT CAPPER	**FOURTH RESPONDENT**
BURCHELLS BUSH LODGE SHAREBLOCK LIMITED	**FIFTH RESPONDENT**

IN RE:

JOHN OWEN BRANKIN	**APPELLANT**

and

GRANVILLE ESSAFRAU	**FIRST RESPONDENT**
KOSTA BABICH	**SECOND RESPONDENT**
GILLIAN LEE	**THIRD RESPONDENT**
ROBERT CAPPER	**FOURTH RESPONDENT**
BURCHELLS BUSH LODGE SHAREBLOCK LIMITED	**FIFTH RESPONDENT**

Neutral citation: *Ewan Ronald Simmonds N O v Granville Essafrau & others* (934/2017) [2018] ZASCA 113 (14 September 2018)

Coram: Ponnan, Tshiqi and Swain JJA and Mothle and Nicholls AJJA

Heard: 27 August 2018

Delivered: 14 September 2018

Summary: Motion proceedings – vindication of shares – no common cause facts to establish ownership – appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Msimang AJ, sitting as court of first instance):

1 Ewan Ronald Simmonds N O is substituted as the appellant for John Owen Brankin in these proceedings.

2 The name of the appellant wherever it occurs in the appeal under case number 9334/2017 is amended to read Ewan Ronald Simmonds N O.

3 The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Swain JA (Ponnan and Tshiqi JJA and Mothle and Nicholls AJJA concurring):

[1] This appeal concerns the vindication of shares by the appellant, Mr Ewan Simmonds N O the executor of the estate of the late Mr John Brankin (the deceased). The shares are held by the first respondent, Mr Granville Essafrau, the second respondent, Mr Kosta Babich, the third respondent, Ms Gillian Lee and the fourth respondent, Mr Robert Capper (hereafter collectively referred to as the respondents), in the fifth respondent, Burchells Bush Lodge Shareblock Ltd (Burchells). Proceedings instituted by the deceased before the Gauteng Local Division of the High Court, Johannesburg were unsuccessful, the application being dismissed with costs. Leave to appeal to this Court was thereafter granted by the court a quo, but in the interim the deceased passed away. An order was therefore sought at the hearing of the appeal to substitute the appellant, in his capacity as the executor of the estate of the deceased, for the deceased, in these proceedings.

[2] The relief sought before the court a quo was for an order declaring the deceased the lawful owner of the class 'A' shares (the shares) in Burchells, which were registered in the names of the respondents. Orders were also sought directing the first, second and third respondents to transfer and deliver the shares to the deceased and that Burchells cancel their registration in the respondents' names and issue to the deceased a share certificate recording that the deceased was the holder of all 5500 shares. Certain of the relief was not sought against the fourth respondent as he had agreed prior to the launch of the proceedings, to transfer his shares to the deceased.

[3] The deceased alleged that he was the registered owner of the shares and that during 2005 he transferred some of the shares to the respondents as directors of Burchells, for no value. Before the court a quo, the deceased challenged the validity of his transfer of the shares to the respondents on a number of grounds, only one of which was persisted in on appeal. This was that the transfer of the shares to the respondents in Karos Lodge Shareblock Ltd (Karos Lodge), (which had changed its name to Burchells), which were previously owned by Karos Leisure (Pty) Ltd (Karos Leisure), were invalid as they had been effected in contravention of Article 9 of the articles of association of Karos Lodge. The relevant portion of this article states that:

'No share may be transferred except simultaneously with and to the same transferee as the whole of the other shares included in the same share block. . . .'

The deceased therefore submitted that Article 9 required all of the shares to be transferred simultaneously to one transferee, with the result that the transfers to the respondents were void and should be set aside.

[4] However, a more fundamental obstacle lay in the path of the deceased. This was whether the essential requirement that the deceased was the owner of the shares before he purportedly transferred them to the respondents was established on the facts. The correct approach to the assessment of evidence in motion proceedings was described in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (1) SACR 361 (SCA) paras 26 and 27, by Harms JA as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP'S version.

. . . In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies. . . .'

[5] As will be seen, the founding affidavit of the deceased contains contradictory statements as to how he came to acquire ownership of the shares in the first place. The problem is compounded by contradictory admissions and statements on this issue by the respondents in their answering affidavit.

[6] Initially the deceased claimed ownership of the shares, on the basis that the liquidator of Karos Leisure had sold them to him, in terms of a sale agreement annexed to the founding affidavit, marked 'FA1'. This was despite there being no indication in the sale agreement, that the liquidator was a party to the agreement. The deceased described his acquisition of the shares as follows:

'The "A" shares were all initially owned by Karos Leisure (Pty) Limited, which formed part of the Karos Group. The "A" shares entitled Karos, as the owner of the property, and as the developer, to develop the property and build 45 timeshare chalets. In fact only 30 chalets were built. As Karos was placed under a winding-up order, the ownership of all its class "A" shares vested in the liquidator. (The liquidator subsequently sold all the "A" shares to me.) This was in terms of the sale agreement dated 13 August 2003 and which has been attached, marked "FA1". Karos Leisure ceded its "A" shares to International Bank of South Africa Limited whose name was changed to Boundary Finance ("Boundary Finance").'

[7] However, later in his founding affidavit the deceased claimed that the shares had been sold to him by Boundary Finance, to whom the shares had been pledged as security for a loan made to Karos Leisure, by Boundary Finance. He described the way in which he acquired the shares as follows:

'Arising from a bona fide and reasonable error on my part and on the part of Boundary Financing and without due regard being had to article 9 of the articles of association of the Fifth Respondent, Boundary Finance sold and transferred the 5400 issued class "A" shares with a par value of R1,00 per share, to myself, for a purchase price of 1 cent per share being R55,00. Attached marked "FA2" is a copy of the articles. I deal later with the legal implications of article 9.

Karos (represented by its liquidator, Mr Moses) was the owner of the "A" shares and the remaining "B" shares in Karos Shareblock, which had not been sold. All these shares were pledged together to the mortgagee, Boundary Financing Ltd ("Boundary Financing") (formerly known as International Bank of Southern Africa Limited) as security for a loan which Karos had obtained from Boundary Financing. Karos also passed a mortgage bond over its immovable property in favour of Boundary Financing.'

[8] The confusion was compounded when the deceased later in his affidavit, reverted to his initial claim that he had acquired the shares in terms of clause 6.2 of the sale agreement:

'Arising from clause 6.2 of the agreement of sale ("FA1") I acquired and became the registered owner of all the class "A" shares held by Karos (in liquidation) the developer of the property. A share certificate was issued to me, by the then company secretary of the Fifth Respondent, Mr Nick Wellman in respect of my 5500 shares. I do not have a copy of the share certificate. Mr Wellman subsequently committed suicide and all the documents relating to my holding of the "A" shares which were in his possession, could not be found and have still not been found. I had the share certificate in respect of all the class "A" shares. I was the registered owner of 5500 of the issued "A" shares.

As I was the registered owner of 5500 issued "A" shares, during 2005, I transferred, for no value, the "A" shares to the then directors of the Fifth Respondent. . . .'

[9] However, an examination of the provisions of clause 6.2 of the agreement of sale relied upon by the deceased, only serves to increase the confusion. The clause provides as follows:

'6.2 Boundary, KKS and KLS shall procure the transfer to John Brankin of all of the Karos Leisure A shares (in respect of both KKS and KLS) at a price of R0,01 per share and undertake to take all reasonable steps that may be necessary to effect delivery and transfer of such shares within 60 (sixty) days after the signature date.'

In other words, Boundary Finance and 'KKS', being Karos Kruger Shareblock Ltd and 'KLS', being Karos Lodge, were to 'procure the transfer' to the deceased of the shares in Karos Lodge, by taking 'all reasonable steps that may be necessary to effect delivery and transfer of such shares', within 60 days of signature of the agreement. No explanation is furnished by the deceased to establish the legal entitlement of these entities to transfer ownership in the shares to him, nor does he describe the legal steps which enabled them to 'procure' the transfer and delivery of the shares to him.

[10] The contradictions in the founding affidavit of the manner in which the deceased acquired ownership of the shares are manifest. It is uncertain whether they were purchased by the deceased from the liquidator of Karos Leisure, or whether he purchased them from Boundary Finance, or whether he purchased them following procurement by Boundary Finance, Karos Kruger Shareblock Ltd and Karos Lodge.

[11] The contradictory allegations by the deceased and the resultant confusion as to how he acquired ownership of the shares, had the result that the important legal consequences of the pledge of the shares to Boundary Finance, as security for a loan which Boundary Finance had granted to Karos Leisure, were overlooked. The legal consequences of a pledge of shares as security for due performance of obligations by the holder of such shares, is described by H S Cilliers et al, *Corporate Law*, 3 ed (2000) at 292 para 18.23, in the following terms:

'If cession of shares as with a **pledge** of shares is intended, the analogy of the law of pledge is to the effect that the pledgor remains owner of the shares while the pledgee has to keep the share certificate and a signed blank transfer form in his possession to protect his real right in the rights of action deriving from the shares serving as security. If the pledgor defaults, the pledgee has to obtain a court order before he can realise his security unless informal execution (*parate executie*) has been agreed to by the pledgor.'

[12] Clause 6.1 of the agreement of sale makes it clear that a pledge of the shares was intended. It records that Boundary Finance holds signed, blank share-transfer forms in relation to the Karos Lodge class 'A' shares. In this manner, the real right of Boundary Finance in the rights of action deriving from the shares was protected. Karos Leisure, however, retained ownership of the shares. As pointed out by Brand JA in *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) para 20, in terms of the pledge theory a claim ceded in *securitatem debiti* automatically reverts to the cedent once the secured debt is extinguished and in such event a re-cession by the cessionary is not required. Consequently, if the loan from Boundary Finance was repaid these rights would automatically revert to Karos Leisure. Conversely, if Karos Leisure defaulted in repayment of the loan, Boundary Finance would be entitled to realise the security of the shares by selling them.

[13] The founding affidavit is however silent on the crucial issue of whether the loan was repaid. Although the fact that Karos Leisure was placed in liquidation suggests it was not, this is pure speculation. It therefore cannot be determined on the facts in the founding affidavit whether the liquidator of Karos Leisure, or whether Boundary Finance, was legally entitled to sell and cede and thereby transfer ownership of the incorporeal rights in the shares in Karos Lodge, to the deceased.

[14] Consequently, when counsel for the appellant was asked whether the issue of the deceased's acquisition of ownership of the shares could be resolved on the facts, he submitted that ownership of the shares by the deceased was common cause. In support of this submission he referred to an admission in the answering affidavit, in response to the allegations in the founding affidavit (as set out in paragraph 7 supra), in the following terms:

'I admit the allegation that the development shares were sold and transferred to Applicant.'

In the context of the allegations made in paragraph 33 of the founding affidavit, what was admitted was that Boundary Finance had sold and transferred the shares to the deceased.

[15] However, this admission must be considered in the context of other contradictory admissions and allegations made on this issue, in the answering

affidavit. In contradiction to the admission that Boundary Finance sold and transferred the shares to the deceased, the respondents admitted earlier in their answering affidavit that it was the liquidator who had in fact done so, in the following terms:

'It is common cause that the liquidator of Karos sold all development shares in Fifth Respondent to Applicant in terms of an agreement of sale dated 13 August 2003 and in this regard reference is made to the contents of annex "FA-1" to the founding affidavit and to the contents of paragraph 21 of that affidavit.

It is common cause that Applicant became the owner of the development shares which was registered in his name and in this regard reference is made to the contents of founding affidavit paragraph 38.'

[16] The admission that it was the liquidator who sold the shares to the deceased in terms of the sale agreement, is inconsistent with clause 6.2 in which Boundary Finance, Karos Kruger Shareblock Ltd and Karos Lodge undertook to 'procure' the sale, delivery and transfer of the shares to the deceased. It is also inconsistent with the fact that the liquidator was not a party to the agreement.

[17] The problem of determining precisely what the respondents admitted in respect of this important issue is further complicated in the answering affidavit, by the following denial:

'First – Third Respondents and I deny the following allegations wherever they appear in the founding affidavit:

. . .

That Applicant is the owner of the development shares.'

[18] Accordingly, it cannot be determined what facts, if any, are common cause between the parties as to the manner in which the deceased acquired ownership of the shares in Burchells. A consideration of the probabilities is precluded and the central legal issue of whether the deceased acquired ownership of the shares, cannot be determined on the affidavits.

[19] Counsel for the appellant also submitted that the deceased had acquired ownership of the shares as a result of the performance by Boundary Finance, Karos Kruger Shareblock Ltd and Karos Lodge, of their obligations in terms of clause 6.2 of the sale agreement, but that was pure speculation. In any event, for the reasons set out above the submission is without foundation.

[20] The appeal accordingly fails. I grant the following order:

1 Ewan Ronald Simmonds N O is substituted as the appellant for John Owen Brankin in these proceedings.

2 The name of the appellant wherever it occurs in the appeal under case number 9334/2017 is amended to read Ewan Ronald Simmonds N O.

3 The appeal is dismissed with costs, such costs to include the costs of two counsel.

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K G B Swain

Judge of Appeal

Appearances:

For the Appellant:	P Pauw and R G Cohen
	Instructed by:
	Glynnis Cohen Attorney, Johannesburg
	Lovius Block Attorneys, Bloemfontein
For the First, Second, Third and Fifth Respondent:	S J Du Plessis SC and F J Wilke
	Instructed by:
	Manong Badenhorst Abbott Van Tonder, Randburg
	Phatshoane Henny Attorneys, Bloemfontein