



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: **972/2020**

In the matter between:

SAGADAVA NAIDOO

FIRST APPELLANT

ODORA TRADING CC

SECOND APPELLANT

and

THE DUBE TRADEPORT CORPORATION

FIRST RESPONDENT

SIVARAJ NAIDOO

SECOND RESPONDENT

**THE REGISTRAR OF DEEDS
PIETERMARITZBURG**

THIRD RESPONDENT

Neutral citation: *Naidoo and Another v The Dube Tradeport Corporation and Others* (Case no 972/2020) [2022] ZASCA 14 (27 January 2022)

Coram: MOCUMIE, MAKGOKA, MOTHLE, MABINDLA-BOQWANA JJA and WEINER AJA

Heard: 25 NOVEMBER 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 27th day of January 2022.

Summary: Civil procedure – Exception proceedings – proper approach restated. Close Corporations – common law derivative action – whether available in respect of close corporations – whether an alleged beneficial owner of member's interest in a close corporation can invoke derivative action on behalf of close corporation. Section 54 of Close Corporations Act 69 of 1984 – third party's reliance thereon must be bona fide and innocent.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Lopes J sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and substituted with the following:
'1 The exception is dismissed with costs'.

JUDGMENT

Makgoka JA (Mocumie, Mothle, Mabindla-Boqwana JJA and Weiner AJA concurring):

[1] This is an appeal against the order of the KwaZulu-Natal Division of the High Court, Durban (the high court), which upheld the exception of the first respondent, The Dube Tradeport Corporation (Dube Tradeport), to the appellants' particulars of claim. In the action, the first appellant, Mr Sagadava Naidoo (Sagadava) and the second appellant, Odora Trading CC (Odora), a close corporation, sued the first defendant, Mr Sivaraj Naidoo (Sivaraj) and Dube Tradeport to set aside the sale of certain farms, known as the Penare Farm Properties (the properties) by Odora to Dube Tradeport. Sagadava and Sivaraj are brothers, hence the reference to them by their first names. This is without any disrespect, but solely to distinguish the two brothers.

[2] Sivaraj is the sole registered member of Odora, and accordingly holds the entire member's interest in it. However, it was alleged in the particulars of claim that Sagadava was the actual beneficial owner of the member's interest in Odora, and that Sivaraj holds the member's interest on behalf of Sagadava, and as his nominee. This was alleged to be pursuant to certain oral agreements between Sagadava and Sivaraj. Accordingly, it was alleged, Sivaraj had no right to sell the property to Dube Tradeport without Sagadava's consent. On that basis, it was alleged that Sagadava

had instituted a derivative action on behalf of Odora, and a personal action in his own name to set aside the sale of the properties.

[3] The properties were the sole assets of Odora, and were sold pursuant to a written purchase agreement between Odora (under the controlling mind of Sivaraj) and Dube Tradeport. Pursuant to the sale, the properties were transferred and registered in the name of Dube Tradeport, hence the formal citation of the third respondent, the Registrar of Deeds, against whom no relief was sought, and who, as a result, did not oppose the action and does not participate in this appeal.

[4] In the particulars of claim, Sagadava's claim to be the beneficial owner of the member's interest in Odora and of the properties, was explained as follows. Initially Sagadava held the entire member's interest in Odora. During December 2001 Odora purchased the properties. On 20 January 2001 Sagadava and Sivaraj concluded an oral agreement in terms of which certain assets in Sagadava's possession, were to be divided between the two brothers on a 50/50 percent basis (the 2001 agreement). Those assets included Sagadava member's interest and loan account in Odora. As already stated, the properties in issue were already the assets of Odora at that stage. Accordingly, the properties became part of the 2001 agreement. The ultimate agreement was that the assets would be registered in the personal names of Sagadava and Sivaraj. However, the latter repudiated the 2001 agreement and refused to sign any record of it. In response, Sagadava refused to accept Sivaraj's repudiation and elected to hold him liable to the agreement.

[5] In the alternative to the 2001 agreement, it was pleaded that during 1998, Sagadava and Sivaraj concluded an agreement in terms of which Sivaraj would hold certain assets on behalf of Sagadava, as his nominee (the 1998 agreement). Shortly thereafter, in 2001, Odora purchased the properties, which became part of the 1998 agreement. On 13 January 2014, Sagadava instituted action in the high court against Sivaraj seeking an order that his (Sagadava's) member's interest in Odora be transferred and delivered to him. Sivaraj defended the action, also claiming to act on behalf of Odora. While that action was pending, on 18 December 2015, Sivaraj,

purportedly on behalf of Odora, sold the properties to Dube. This is the impugned purchase agreement.

[6] Regarding locus standi, it was alleged that Odora was being prevented from pursuing its rights itself by virtue of the alleged unlawful actions of Sivaraj, as the registered holder of the entire member's interest in Odora. Thus, it was averred, Sagadava brought a 'partially derivative action' on behalf of Odora in relation to the purchase agreement referred to above, and a personal action in respect of his own rights. Accordingly, an order was sought declaring the purchase agreement to be null and void, and for directing the properties to be re-transferred to Odora, together with certain ancillary relief.

[7] In response to the summons, both Dube Tradeport and Sivaraj filed notices of intention to defend, and later, exceptions to the particulars of claim. Before the matter was argued in the high court, Sivaraj withdrew his exception. Accordingly, the court only considered Dube Tradeport's exception, which was predicated on the contention that because Sagadava was not a member of Odora he could not bring an action on its behalf, and that, in any event, s 54 of the Close Corporations Act 69 of 1984 (the Close Corporations Act) protected Dube Tradeport. That section provides that a member of a close corporation is an agent of the close corporation in dealings with a third party and has the power to bind the close corporation, except where a third party knows or ought to have known of the member's lack of authority to transact on behalf of the close corporation. I consider the provisions of this section in more detail later.

[8] In its judgment, the high court first considered whether a common law derivative action is available in respect of close corporations, and held that it was. However, it concluded that because Sagadava was not a registered member of Odora, he was not entitled, in terms of that law, to institute an action on its behalf or in its name. According to the high court, neither s 49 nor s 50 of the Close Corporations Act granted Sagadava the right to institute an action in the name of Odora. In any event, concluded the high court, as Sagadava had relied on the

common law derivative action to advance the suit of Odora, he could not rely on s 50.

[9] The high court also considered s 54 of the Close Corporations Act. It held that its provisions preclude the action by both Sagadava and Odora against Dube Tradeport, as the latter had transacted with Sivaraj, the sole member of Odora, and who, as its agent, had the power to bind it. Thus, the high court reasoned, Dube Tradeport was protected against the negative effects of the ultra vires doctrine and the doctrine of constructive notice.

[10] On these findings, the high court concluded that the appellants' pleaded case did not set out a cause of action against Dube Tradeport. It accordingly upheld the exception with costs. Based on its finding in respect of s 54, the high court found it pointless to afford the appellants leave to amend their particulars of claim, 'as they cannot amend to succeed against [Dube Tradeport]'. The issue in the appeal, with the leave of the high court, is whether its findings and conclusion are correct.

[11] Before I consider the contentions before us, it is necessary to briefly explain the origin and nature of the common law derivative action. It is an exception to the rule enunciated in the English decision of *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought by the corporation itself. The exception is available where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. Although there has not been an express adoption by this Court of the English law of derivative actions as part of our common law, it has been consistently applied.

In *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A) the question was left open as it was deemed unnecessary to determine it because the court considered that the facts of the case did not fall within the exception. However, as noted in *Lewis Group Ltd v Woollam & Others* [2017] 1 All SA 192 (WCC); 2017 (2) SA 547 (WCC) para 30, subsequent

decisions of this Court appear to have accepted, without discussion, that the common law exception forms part of our law.¹

[12] In this Court, the following contentions were advanced on behalf of Dube Tradeport. Because the common law derivative action was abolished in s 165(1) of the Companies Act 71 of 2008 and replaced with a statutory derivative action, there was no common law derivative action applicable to close corporations. In any event, the appellants were barred from bringing the action by reason of ss 49 and 50 of the Close Corporation Act. Both sections are expressly limited to proceedings being instituted by registered members of a close corporation designated in the founding statement. Section 49(1) provides that:

‘Any member of a corporation who alleges that any particular act or omission of the corporation or one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section.’

Section 50 gives the right to a member to institute proceedings against fellow-members on behalf of corporation, where among other things, a member or a former member of a corporation is liable to the corporation for (a) breach of a duty arising from his or her fiduciary relationship to the corporation in terms of s 42; or (b) negligence in terms of s 43.

[13] The contention on behalf of Dube Tradeport was that, as Sagadava is not a member of Odora, he is excluded from pursuing any legal proceedings on behalf of Odora. It was also incompetent, so was the contention, for Odora to bring an action itself or to be assisted by a non-member, Sagadava.

¹ In *Lewis Group Ltd v Woollam & Others* [2017] 1 All SA 192 (WCC); 2017 (2) SA 547 (C) para 30, reference is made to: *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* 2003 (5) SA 315 (SCA); [2003] 2 All SA 179 (SCA), *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 (SCA); *Letseng Diamonds Ltd v JCI Ltd and Others* 2009 (4) SA 58 (SCA); *Cassim and Another v Voyager Property Management and Others* 2011 (6) SA 544 (SCA); *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA); *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA) and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA).

[14] It seems to me there are three issues for determination. The anterior issue is the locus standi of both Sagadava and Odora. That is dependent on Sagadava's claim that he is the 'beneficial owner' of the member's interest in Odora. The second issue is whether a common law derivative action upon which Sagadava relies, is available in respect of close corporations. If it is, a subset of that is whether Sagadava is entitled to bring such action on behalf of Odora. The third is whether s 54 of the Close Corporations Act protects Dube Tradeport. Needless to say, both the second and third issues arise only if the anterior issue is answered in the affirmative.

[15] With regard to the anterior issue, regard must be had to the pleadings. As mentioned already, Sagadava was cited in the summons as the first plaintiff and Odora as the second plaintiff. The complaint in the exception is that Sagadava should have brought the action in his own name on behalf of Odora, and not in Odora's name. To consider this complaint, the allegations in the particulars of claim must be read as a whole and in context. In relevant parts, the particulars of claim contain the following allegations:

'[3] As pleaded more fully below this action is partially a derivative action by [Sagadava] on behalf of [Odora] which is prevented from pursuing its rights itself by virtue of the unlawful actions of [Sivaraj] as the present registered member of the entire members' interest in [Odora].

...

[20] The present action is a derivative action in respect of [Odora's] rights in relation to the purchase agreement and is also a personal action by [Sagadava] in respect of his own rights.

...

(31) [Odora] is prevented by [Sivaraj's] said unlawful control and actions from taking action itself in relation to the purchase agreement, and [Sivaraj], purporting to act on behalf of [Odora], has refused to do so.

[32] [Sagadava] is accordingly entitled, by derivative action, to do so on behalf of [Odora].'

[16] On a simple and sensible reading of these allegations, the essence is clear that it is not Odora itself that is suing, but Sagadava suing on its behalf, and in his own name. Thus, Sagadava was suing in two capacities, namely in his personal capacity as a victim of an alleged fraud perpetrated against him by Sivaraj, and in his

representative capacity on behalf of Odora. On the basis of established principles of derivative action, Odora was not supposed to be cited as a plaintiff. But merely because it has been cited, does not detract from the fact that Sagadava purported to sue on behalf of Odora. This is expressly averred. However, despite the imperfections, the essence of Sagadava's locus standi was clear. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.² On the face of it, Sagadava's case cannot be classified in the category of those 'without legal merit'.

[17] I have earlier detailed Sagadava's claims to the membership of Odora. To recap, he alleges that he was in fact, the sole member, alternatively, a 50 percent member, of Odora and that there was an oral agreement between him and Sivaraj that the latter would hold the membership of Odora on his behalf as his nominee. The high court seemingly doubted Sagadava's assertions in this regard. It said:

'[Sagadava] is not the registered member of Odora, and accordingly, he is not capable of passing a resolution as a member authorising the institution of such an action. An acceptance by me that he is in fact the sole member or a 50 per cent member, (for the purpose of the exception) does not solve the [his] problem. As a legal stranger to Odora, albeit one who claims a right to be a member, does not enable him to authorise the institution of proceedings in the name of Odora.'

[18] With respect, the high court erred. This being an exception stage, the factual averments by Sagadava must have been accepted as correct, unless they are manifestly false,³ which fact is not apparent from the pleadings. The high court should not have gone beyond the allegations. It could well be that at the trial, the allegations turn out to be false. But for the purposes of the exception, their truthfulness should have been accepted. The high court's reasoning also suffers an internal contradiction. The high court said that even if it accepts that Sagadava is the sole, or 50 percent member of Odora, he is 'a stranger to Odora' who could not institute an action on its behalf. It defies logic that as a member, even a sole

² *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) [2006] 1 All SA 6 (SCA) para 3.

³ *Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 754J-755B; *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) para 9; *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Limited* [2008] ZASCA 158; 2009 (4) SA 89 (SCA); [2009] 2 All SA 449 (SCA) para 55.

member, Sagadava could, in the same breadth, be 'a stranger' to it. It follows that for the purposes of the exception, facts regarding Sagadava's membership of Odora, and therefore his locus standi to bring a derivative action on its behalf, had been established and should therefore have been accepted by the high court.

[19] This brings me to the second issue, namely, whether a common law derivative action is available in respect of close corporations. As already mentioned, the high court answered this question in the affirmative. That conclusion was assailed in this Court on behalf of Dube Tradeport on the basis that such action is excluded by ss 49 and 50 of the Close Corporations Act. It is therefore necessary to consider this contention.

[20] Prior to the promulgation of the Companies Act, a common law derivative action was recognised in respect of companies, and by extension, to close corporations.⁴ Statutorily, ss 266-268 of the repealed Companies Act 61 of 1973, offered rights to members to take legal proceedings, or cause legal proceedings to be taken on behalf of the company when, acting through its directors, the company failed to take such proceedings. In respect of close corporations, ss 49 and 50, to which I have already referred, provide members with similar rights. These statutory rights, have always been parallel, and complimentary to, the common law rights of shareholders of companies and members of close corporations to pursue derivative actions on behalf of their respective corporate entities. They were never meant to oust those common law rights.

[21] The Companies Act, however, abolished the common law right of derivative action in s 165, and substituted it with a statutory right.⁵ This, however, has not affected the common law rights in respect of close corporations which were incorporated prior to the commencement of the Companies Act but which have not

⁴ In *TWK Agriculture Ltd v NCT Forestry Co-Operative Ltd & Others* 2006 (6) SA 20 (N) the common law derivative action was extended in respect of co-operatives. It was there decided that the common law principles of minority protection in companies are applicable to co-operatives, and that, accordingly, a common derivative action is available to a member of a co-operative..

⁵ Section 165 of the Companies Act 71 of 2008 reads:

'Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

converted to companies pursuant to that Act.⁶ The comparison sought to be drawn by the respondent between ss 49 and 50 of the Close Corporations Act and s 165 of the Companies Act is misplaced. Not only is the abolition of common law derivative actions expressly stated in s 165(1) of the Companies Act, s 165(d) provides for a third party right, which is not found in ss 49 and 50 of the Close Corporations Act. The situation remains therefore that the common law rights of members of close corporations, including an actual, unregistered owner of a member's interest, to bring a derivative action, are still available.

[22] In the particulars of claim it was averred that Odora has not converted to a company, and that s 165 of the Companies Act therefore does not apply to it. It follows that Sagadava is entitled, as he has done, to pursue a derivative action according to the common law on behalf of Odora. It is important to point out that Sagadava has not purported to rely on ss 49 or 50. He pursues his common law rights as the actual and factual, albeit unregistered, member of Odora.

[23] I now turn to the third issue, which concerns s 54 of the Close Corporations Act, and whether Dube Tradeport is protected by it. The section deals with the powers of members to bind a close corporation. It reads:

'1. Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

2. Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the members so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals, has or ought reasonably to have knowledge of the fact that the member has no such power.'

⁶ In terms of Schedule 3(3) of the Companies Act, close corporations will continue to exist indefinitely until they are deregistered or dissolved under the current Close Corporations Act, or converted to a company under in terms of s 1(1) of Schedule 2 of the Act. The current Close Corporations Act (with slight amendments) and the new Companies Act will exist concurrently and close corporations will be required to comply with the provisions of both Acts.

[24] Evidently, the purpose of this section is to protect third parties who had bona fide transacted with a member of a close corporation, against the negative effects of the ultra vires doctrine and the doctrine of constructive notice. It was submitted on behalf of Dube Tradeport that it was protected under this section as it transacted with a member of Odora, Sivaraj, who, on the basis of s 54, was an agent of Odora and had the authority to bind it. Also, because he was the sole registered member.

[25] At face value, this submission is attractive. However, the caveat in sub-rule (2) is equally important. Where the third party knows, or ought reasonably to know, that the member he or she is dealing with has no power to act for the close corporation, such third party does not enjoy the protection afforded by the section. In the present case, in their particulars of claim, the appellants alluded to the dispute between Sagadava and Sivaraj in respect of the membership of Odora and the ownership of the properties. They pointed out that Sagadava had, pursuant to that dispute, instituted an action for, among others, an order directing Sivaraj to transfer and deliver to him, Odora's member's interest, which action was pending. The appellants went on to make extensive allegations of fraud, unlawfulness and misrepresentations against Sivaraj in relation to Odora and in particular, the sale of the properties to Dube Tradeport.

[26] Importantly, in respect of Dube Tradeport, the appellants alleged that Dube Tradeport (a) was aware of the dispute between Sagadava and Sivaraj, and the pending action in respect thereof; (b) accordingly knew or ought to have known of Sagadava's claimed rights; and (c) was therefore not a bona fide possessor who was unaware of Sagadava's prior claims. In essence, the appellants alleged that Sivaraj had no actual power to sell the properties on behalf of Odora because he was a 50% member of Odora or alternatively a mere nominee of Sagadava, and that Dube Tradeport knew it, or in the circumstances, ought to have known it. In this regard, it is important to have regard to the impugned purchase agreement between Odora and Dube Tradeport, which is attached to the particulars of claim and therefore part of the exception proceedings. Clause 4.3 thereof is a so-called 'escape clause', created in favour of Dube Tradeport, in the event Odora was unable to deliver the purchased properties to it. It reads as follows:

‘4.3 In the event that this Agreement is cancelled or set aside, or the transfer of the Properties to [Dube Tradeport] is cancelled or set aside, (either before or after the Registration Date), or [Odora] being unable to deliver the Properties to [Dube Tradeport] for any reason, (whether as a result of the said dispute, or for any other reason), then [Odora] will repay the Purchase Price and interest to [Dube Tradeport], no occupational rental will be paid by [Dube Tradeport], and [Odora] will refund [Dube Tradeport] any costs or rates paid by [Dube Tradeport].

[27] The high court accepted that Dube was aware of the dispute between Sagadava and Sivaraj over the membership of Odora and the properties when it concluded the impugned purchase agreement with Odora. It also accepted that the ‘escape clause’ was inserted with this in mind. However, it concluded that this was not enough for Dube Tradeport to lose the protection afforded in s 54, ‘because of the lack of knowledge of [Dube Tradeport] as to the truth of the membership ownership.’ The high court further said:

‘... [I] cannot conclude that [Dube] knew, or reasonably ought to have known the truth of the membership arrangement between [Sagadava] and [Sivaraj]. [Dube Tradeport] was plainly aware that the two brothers were in dispute. That is clear from the incorporation of the dispute in the sale agreement as a mechanism for the first respondent to escape from the sale agreement. Even so, does that mean that Dube TradePort knew of the truth, or reasonably should have done so? Surely they probably did not - that is why the escape clause was included in the sale agreement - just in case they were being misled. Had they known, or been capable of establishing the truth, they would almost certainly have done so. The sale agreement was, after all, no trifling matter.’

[28] I am in respectful disagreement with this reasoning. Section 54 has two requirements as pertains to the knowledge of a third party of a member of a close corporation’s lack of authority: actual or imputed knowledge. These requirements are in the alternative. The appellants relied on the latter. Whether a third party knew or ought to have known of the member’s lack of power to act for the corporation is a factual question, the truthfulness of which can only be determined at the trial. The court said that Dube Tradeport ‘... surely ... probably did not know...’. The high court was not sitting in the trial of the main action. It was therefore in no position to determine probabilities or throw doubt on the facts alleged in the particulars of claim, for the simple reason that it had only one version before it, namely that of the

appellants. As stated already, it had to accept that version, unless it was patently false, which is not the case here.

[29] For the purposes of exception proceedings, it was sufficient that the appellants had alleged that Dube Tradeport was aware of: (a) the dispute between the parties; (b) the nature thereof and (c) that it concerned the very properties it purchased from Odora. Accepting these to be true for the purposes of the exception, Dube Tradeport did not have to know the truthfulness of Sagadava's claims regarding the membership of Odora. It is sufficient that it subjectively foresaw the possibility of their truthfulness, but proceeded with the purchase agreement nevertheless.

[30] This is how the doctrine of constructive notice applies. In terms of that doctrine, a person who acquires an asset while aware that someone else has a prior personal right to it, may be held bound to give effect to that right. In *Meridian Bay Restaurant (Pty) Ltd v Mitchell SC NO [2011] ZASCA 30; 2011 (4) SA 1 (SCA)* para 17, it was pointed out that the only requirement for the operation of the doctrine is actual knowledge (or perhaps *dolus eventualis*) with regard to the prior personal right on the part of the acquirer. Once this requirement is satisfied, the holder of the personal right is afforded what is in effect a limited real right against the acquirer. This Court explained at para 18:

'Thus C, the acquirer of the real right, does not need to have actual knowledge of B's prior right. It suffices that C subjectively foresaw the possibility of the existence of B's personal right but proceeded with the acquisition of his real right regardless of the consequences to B's prior personal right...'

[31] Dube Tradeport's position is also akin to a purchaser described thus in *Dhayanunth v Narain* 1983 (1) SA 565 (N) at 565:

'... [A purchaser who] has been apprised, prior to purchasing the property, of the existence of some right in the property vested in a third party in such a way as to make it incumbent upon him to enquire, before purchasing the property, precisely what that right comprised. If he does not do so, he cannot be heard ... to say that he did not know the precise nature of the third party's right. The imperfection of his knowledge is attributable to his own act in wilfully shutting his eyes and failing to see what was perfectly obvious.'

[32] In the present case, there is more than sufficient basis to accept that Dube Tradeport subjectively foresaw the possibility of the truthfulness of Sagadava's claims in respect of Odora and the properties, but proceeded with the acquisition of the properties regardless of the consequences of those claims. Importantly, the dispute concerned the very properties that Dube Tradeport purchased from Odora. What is more, should Sagadava's claim be true, the transaction, being one to dispose of immovable property of a close corporation, would be subject to the provisions of s 46(b)(iv) of the Close Corporations Act, in terms of which the consent in writing of both Sagadava and Sivaraj would be required.

[33] Given the acrimonious nature of the dispute between Sagadava and Sivaraj, of which Dube Tradeport was aware, the latter could not reasonably have believed that the required written consent would be given. By proceeding with the purchase agreement under these circumstances, Dube Tradeport accepted the risk that Sagadava's claims might be upheld. In that event Odora could not deliver the properties, hence the 'escape clause' in the purchase agreement.

[34] The upshot of these considerations is that Dube Tradeport was not a bona fide, innocent purchaser. It had the imputed knowledge envisaged in s 54(2) of the Close Corporations Act. This removed from it the protection of s 54(1). It follows that the s 54 issue should also have been decided against Dube Tradeport.

[35] In sum, the main flaw in the judgment of the high court is the failure to apply the established approach in respect of exceptions, namely to accept as true and correct, the factual averments in the particulars of claim, unless clearly false and untenable. This led to a wrong conclusion that Sagadava is not a member of Odora. Had it adopted the proper approach, it would have accepted the appellants' uncontested averments that Sagadava is the beneficial owner of the member's interest in Odora, and that Sivaraj was his nominee. On that basis, it should have found that Sivaraj had no authority to sell the properties to Dube Tradeport. As regards Dube Tradeport, the high court should have found that given the allegations made against it in the particulars of claim, its reliance on s 54(1) was unavailing.

[36] It must be borne in mind that an excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.⁷ In my view, this cannot be said of the appellants' particulars of claim. In all the circumstances Dube Tradeport's exception should have been dismissed. The appeal must therefore succeed.

[37] In the result the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and substituted with the following:
'1 The exception is dismissed with costs'.

T Makgoka
Judge of Appeal

⁷ *Fairoaks Investment Holdings (Pty) Ltd. and Another v Oliver and Others* [2008] ZASCA 41; [2008] 3 All SA 365 (SCA); 2008 (4) SA 302 (SCA) para 12.

APPEARANCES:

For appellants:

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