

**Reportable/Not reportable**

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE, GRAHAMSTOWN)**

**CASE NO: 3554/2013  
Date heard: 15 May 2014  
Date delivered: 28 May 2014**

In the matter between

**VRM BOERDERY CC  
MAGRIETA ISABELLA VAN RENSBURG**

**First Plaintiff  
Second Plaintiff**

**vs**

**ANDRE VAN ZYL M.**

**Respondent**

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**JUDGMENT**

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**BROOKS AJ:**

**INTRODUCTION**

[1] On 11 October 2013 plaintiffs issued a combined summons out of this court in which they seek an order:

- 1.1 Directing defendant within 14 (fourteen) days from the date of the order of this court, or within such longer period as may be so directed, to take all necessary steps as may be required to pass transfer to first plaintiff of certain immovable property properly described as portions 8, 9 and 10 of the farm W [.....], also known as “Harmonie”;
- 1.2 Failing compliance with the order by defendant, an order directing the sheriff of this court to take all necessary steps as may be required to effect the transfer;
- 1.3 Directing defendant:
  - 1.3.1 To bear all the costs associated with and attended upon the transfer; and
  - 1.3.2 To pay the costs of suit.

[2] On 16<sup>th</sup> October 2013 defendant entered an appearance to defend the action. This was followed by a notice of exception on 26<sup>th</sup> November 2013, and a notice of intention to amend the exception on 31<sup>st</sup> March 2014. There being no opposition to the latter, an amended notice of exception was produced on 17<sup>th</sup> April 2014. The exception was argued before this court on 15<sup>th</sup> May 2014.

### THE EXCEPTION

[3] In their particulars of claim, plaintiffs alleged the following:

- “1. The first plaintiff is **VRM Boerdery CC**, a Close Corporation duly incorporated under the company laws of the Republic of South Africa on 8 November 1994 under registration number 1994/037151/23 whose principal place of business is situated at the farm De Vlei, Glenconnor in the district of Kirkwood, Eastern Cape Province.
2. The Second Plaintiff is **MAGRIETA ISABELLA VAN RENSBURG**, an adult female business person (ID number: ..... ) residing at the farm [.....].
3. The Second Plaintiff institutes these proceedings against the Defendant personally and on behalf of the First Plaintiff as contemplated in Section 50 of the Close Corporations Act, no 69 of 1984.  
.....
6. On or about 15 October 194, the late J. L. V. R. (ID number: ..... ) (“Van Rensburg”) and the Defendant, both acting personally, concluded an oral agreement, the salient terms of which were the following:
  - 6.1 Van Rensburg acquired the farm De Vlei, including the farming business conducted thereupon at the time, certain livestock, game, tools, equipment and vehicles from one Mervin Comley (“Comley”) on 10 October 1994; registration of transfer from Comley to the First Plaintiff which occurred on 31 May 1996;
  - 6.2 Van Rensburg and the Defendant would conduct certain agricultural business as a joint venture/partnership to which

each would make an equal contribution and equally share the proceeds of the business.

- 6.3 The business of the joint venture/partnership would be conducted by means of a Close Corporation, in pursuance of which the First Plaintiff was formed as set out in paragraph 1 above.
- 6.4 Van Rensburg's 50% (fifty percent) contribution to the First Plaintiff comprised the farm De Vlei, the agricultural business conducted thereupon at the time, the livestock, game, tools, equipment and vehicles as set out in paragraph 6.1 above; van Rensburg's 50% (fifty percent) member's interest in the First Plaintiff having been duly recorded on 8 November 1994.
- 6.5 The value of Van Rensburg's contribution to the First Plaintiff was assessed and agreed with the Defendant to be the sum of R1 069 716,00 (One Million and Sixty Nine Thousand Seven Hundred and Sixteen Rand), which amount constituted the purchase price of the farm De Vlei.
- 6.6 The Defendant conducted an agricultural business on Portions 8,9 and 10 of the farm W [.....], also known as "Harmonie", which property abuts the farm De Vlei; however, Harmonie at the time was the registered property of the late Johannes Theunis M. ("M. Snr."), the Defendant's father.
- 6.7 The Defendant would and indeed did transfer all livestock, tools, equipment and vehicles located at the time on the farm Harmonie to the First Plaintiff, the agreed value being R76 974,00 (Seventy Six Thousand Nine Hundred and Seventy Four Rand) as his initial contribution towards the acquisition of a 50% (fifty percent) member's interest in the First Plaintiff.
- 6.8 The Defendant, who had a *spes* to inherit the farm Harmonie from M. Snr. aforementioned upon the death of the latter, the agreed value of the farm Harmonie at the time being R543 000,00 (Five Hundred and Forty Three Thousand Rand), agreed to transfer the farm Harmonie to the First Plaintiff immediately upon being placed in a position to do so.

- 6.9 The Defendant would manage the combined agricultural business on the farms De Vlei and Harmonie on behalf of the First Plaintiff and for the equal benefit of the latter's members.
  - 6.10 The farm Harmonie, the livestock, tools, equipment and vehicles situated thereupon at the time and the Defendant's management of the combined agricultural business would constitute the Defendant's contribution to the business of the First Plaintiff in exchange for which the Defendant would acquire a 50% (fifty percent) member's interest in the First Plaintiff.
  - 6.11 At all material times and with effect from 8 November 1994, the Defendant was recorded as enjoying a 50% (fifty percent) member's interest in the First Plaintiff, which membership persists.
  - 6.12 During December 1994 and for purposes of fulfilling his obligations under the agreement, the Defendant relocated from the farm Harmonie to the farm De Vlei where the Defendant remains resident.
7. Van Rensburg became deceased on 11 December 2000 whereupon Van Rensburg's 50% (fifty percent) member's interest in the First Plaintiff devolved upon the Second Plaintiff on 20 May 2005.
8. During or about January 2005 the Second Plaintiff and the Defendant, both acting personally, concluded an express oral agreement, the salient terms of which were the following:
- 8.1 In preference to dissolving the First Plaintiff, the Second Plaintiff would retain van Rensburg's member's interest in the First Plaintiff and would continue the business of the First Plaintiff in substitution of Van Rensburg on the same terms and conditions as set out in paragraph 6 above, including the agreement that the Defendant, who had a *spes* to inherit the farm Harmonie from M. Snr. aforementioned upon the death of the latter, the agreed value of the farm Harmonie at the time being R543

000,00(Five Hundred and Forty Three Thousand Rand), would transfer the farm Harmonie to the First Plaintiff immediately upon being placed in a position to do so.

9. M. Snr. became deceased on 14 November 2009 and in pursuance of the approved liquidation and distribution account in the deceased estate of M. Snr., the farm Harmonie was registered in the name of the Defendant on 19 October 2010 under Title Deed number T [...].
10. With effect from 19 October 2010 the Defendant could and should have transferred the farm Harmonie to the First Plaintiff in fulfillment of his obligations under the oral agreements as set out in paragraphs 6 and 8 above.”

[4] Defendant’s exception is founded on two bases. The first attacks the *locus standi* of second plaintiff. It is expressed in the following manner:

- “1. Second Plaintiff does not have *locus standi* to institute this action for the following reasons:
  - 1.1 Defendant’s alleged contribution is a liability towards First Plaintiff and not towards Second Plaintiff;
  - 1.2 In paragraph 6.8 and 8.1 of the Particulars of Claim it is alleged that Defendant agreed to transfer the farm Harmony to First Plaintiff.
  - 1.3 In paragraph 3 of the Particulars of Claim Plaintiffs rely on section 50 of the Close Corporations, 69 of 1984 (“the Act”), which stipulates that where a member is liable to a corporation to make an initial contribution or any additional contribution any other member of the corporation may institute proceedings in respect of such liability on behalf of the corporation.” (sic)

The second basis on which the exception is founded attacks the particulars of claim as not disclosing a cause of action. The interconnected reasoning finds expression in the following manner:

“2. Plaintiffs’ Particulars of Claim do not disclose a cause of action for the following reasons:

2.1 Plaintiffs rely on an oral agreement which was allegedly concluded between Van Rensburg and Defendant on or about 15 October 1994, in terms of which Defendant agreed to transfer the farm Harmony to First Plaintiff ‘upon being placed in a position to do so’.

2.2 The alleged agreed contribution by Defendant is an initial contribution as contemplated in section 24(1) of Close Corporations Act, 69 of 1984 (“the Act”).

2.3 The alleged agreement is void in that it is inconsistent with the provisions of section 24(4)(a) of the Act, which stipulates that property, which forms part of an initial contribution shall be transferred to the close corporation within a period of 90 days after the date of registration of the corporation.

3. Plaintiffs’ Particulars of Claim do not disclose a cause of action for the following reasons:

3.1 In terms of the Particulars of Claim Plaintiffs rely on oral agreements which were allegedly concluded between Van Rensburg and Defendant and subsequently between Second Plaintiff and Defendant.

3.2 The alleged oral agreements do not comply with section 2(1) of Alienation of Land Act, 68 of 1981, in that:

3.2.1 it is not contained in a deed of alienation signed by the parties thereto; and

3.2.2 it is not alleged that Van Rensburg or Second Plaintiff was acting on the written authority of First Plaintiff when the agreement was concluded.

3.3 The oral agreements on which Plaintiffs rely are therefore void and unenforceable.

4. Plaintiffs' Particulars of Claim furthermore do not disclose a cause of action for the following reasons:

4.1 In paragraphs 6.8 and 8.1 of the Particulars of Claim it is alleged that:

4.1.1 Defendant had a *spes* to inherit the farm Harmonie from M. Snr upon the death of the latter; and

4.1.2 Defendant agreed to transfer the said farm to First Plaintiff immediately upon being placed in a position to do so.

4.2 If Defendant only had a *spes* to inherit the said farm as opposed to a contingent right of ownership, any agreement to transfer the said farm to First Plaintiff is therefore void and unenforceable."

[5] Defendant seeks an order that:

1. The exception be upheld;
2. Plaintiffs' claim be dismissed with costs, plaintiffs to be jointly and severally liable therefor and such costs to include the travelling and accommodation costs of defendant's counsel.

#### LEGAL PRINCIPLES APPLICABLE TO EXCEPTIONS

[6] By its very nature, an exception amounts to a legal objection to a pleading. It addresses a defect inherent in the pleading. Assuming for the purposes of the argument that all the allegations made in the pleading are true, the exception asserts that even if all the allegations in the pleading are true, the pleading does not disclose either a cause of action, or a defence as the case may be. Accordingly, when consideration is given to an exception, the court must examine the pleading as it stands. No consideration can be given to any factual material extraneous to the pleading complained of. In order to succeed on exception, the excipient has the duty to persuade the court that upon every interpretation on which the pleading is based, no cause of action or defence is disclosed.<sup>1</sup> The principle that for purposes of

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<sup>1</sup> Erasmus, Superior Court Practice B1 - 151

determination of the exception the facts in the relevant pleading must be accepted as correct does not extend to inferences and conclusions not warranted by allegations of fact. The court is not obliged to stultify itself by accepting allegations of “fact” which are manifestly false i.e. allegations which are so removed from reality that they cannot possibly be proved.<sup>2</sup>

## FIRST GROUND OF EXCEPTION – SECOND PLAINTIFF’S LOCUS STANDI IN HER PERSONAL CAPACITY

### APPLICABLE LEGISLATION

[7] Defendant’s first ground of exception is based upon the provisions of s 24 as read with s 50 of the Close Corporations Act, 69 of 1984, which provide the following:

#### “24 Contributions by members

- (1) Every person who is to become a member of a corporation upon its registration, shall make to the corporation an initial contribution of money, of property (whether corporeal or incorporeal), or of services rendered in connection with and for the purposes of the formation and incorporation of the corporation, and particulars of such contribution shall be stated in the founding statement of the corporation referred to in section 12, as required by paragraph (f) of that section.
- (2) The amount or value of the members' contributions, or of the contribution of any one or more members, may from time to time by agreement among all the members-
  - (a) be increased by additional contributions of money or property (whether corporeal or incorporeal) to the corporation by existing members or, in terms of section 33 (1) (b), by a person becoming a member of a registered corporation; or

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<sup>2</sup> Natal Fresh Produce Growers’ Association and Others v Agroserve (Pty) Ltd and Others 1990 (4) SA 749 (NDP) at 754J – 755B  
Van Zyl N.O. v Bolton 1994 (4) SA 648 (CPD) at 651E



- (b) be reduced, provided that a reduction by way of a repayment to any member shall comply with the provisions of section 51 (1).
- (3) Particulars of any increase or reduction of a member's contribution in terms of subsection (2) shall be furnished in an amended founding statement referred to in section 15 (1).
- (4) Money or property referred to in subsection (1) or (2) (a) shall, in order to vest ownership thereof in the corporation, be paid, delivered or transferred, as the case may be, to the corporation within a period of 90 days-
- (a) after the date of registration of the corporation, in the case of an initial contribution referred to in subsection (1); or
- (b) after the date of the registration of an amended founding statement in connection with any additional contribution referred to in subsection (2) (a).
- (5) An undertaking by a member to make an initial or an additional contribution to a corporation shall be enforceable by the corporation in legal proceedings.”

#### Section 50:

##### “50 Proceedings against fellow-members on behalf of corporation

- (1) Where a member or a former member of a corporation is liable to the corporation-
- (a) to make an initial contribution or any additional contribution contemplated in subsections (1) and (2) (a), respectively, of section 24; or
- (b) on account of-
- (i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or
- (ii) negligence in terms of section 43,

any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so.

[Sub-s. (1) amended by [s. 4](#) of [Act 25 of 2005](#).]

(2) After the institution of such proceedings by a member the leave of the Court concerned shall be required for a withdrawal of the proceedings or for any settlement of the claim, and the Court may in connection with such withdrawal or settlement make such orders as it may deem fit.

(3) If a Court in any particular case finds that the proceedings, if unsuccessful, have been instituted without *prima facie* grounds, it may order the member who has instituted them on behalf of the corporation, himself or herself to pay the costs of the corporation and of the defendant in question in such manner as the Court may determine.

[Sub-s. (3) amended by [s. 4](#) of [Act 25 of 2005](#).]"

#### THE PARTICULARS OF CLAIM RELATING TO SECOND PLAINTIFF'S *LOCUS STANDI* IN HER PERSONAL CAPACITY

[8] Paragraph 3 of the particulars of claim is unambiguous. Second plaintiff instituted the proceedings against defendant personally and on behalf of first plaintiff as contemplated in s 50 of the Close Corporations Act. Paragraph 6 of the particulars of claim pleads the oral agreement concluded on 15 October 1994 which underpins plaintiffs claim. Mr. Coetzee, who appeared on behalf of defendant, argued that an assessment of the allegations made in paragraph 6 of the particulars of claim leads to the inevitable conclusion that the oral agreement related to a single initial contribution. He argues that the agreement relates to the initial contributions to be made by both Van Rensburg and defendant to the Close Corporation. Those contributions would be equal, and would each consist of a farm, the agricultural business conducted thereon, the livestock and certain movable on each farm. In Van Rensburg's case, the 50% contribution to first plaintiff comprised the farm De Vlei, the agricultural business conducted thereupon, together with the livestock and

movables on the farm. In defendant's case, the 50% contribution comprised the livestock and movables on the farm Harmonie. In addition, defendant, who had a *spes* to inherit the farm Harmonie from his father upon the death of the latter, agreed to transfer the farm Harmonie to first plaintiff immediately upon being placed in the position to do so.

[9] Mr. Theron, who appeared on behalf of plaintiffs, has urged the court to find that defendant's characterization of the agreement to transfer the property as an initial contribution is fallacious and ignores the content of paragraph 6.7 of the particulars of claim which appears to restrict the description of the initial contribution to the transfer of livestock, tools, equipment and vehicles located on the farm Harmonie with an agreed value of R76 974,00. This argument is developed by the submission that s 24(5) of the Close Corporations Act clearly envisages that a member may undertake to make an initial or an additional contribution to a corporation, both of which may be enforced by the close corporation against such a member. Mr. Theron submitted that having made the initial contribution as reflected in paragraph 6.7 of the Particulars of Claim, defendant was free to agree further to an additional contribution in the form the transfer of the farm Harmonie, with an agreed value of R543 000,00, to the first plaintiff at a later date.

[10] In my view, the conclusion argued for by Mr. Theron, that defendant's initial contribution was restricted to the livestock, tools, equipment and vehicles located on the farm Harmonie, with an agreed value of R76 974,00, and excluding the farm "Harmonie" itself, cannot be supported. Such a restricted interpretation of the pleading ignores the content of paragraphs 6.10 and 6.11 of the particulars of claim. The former paragraph is unequivocal in establishing that the farm Harmonie, the livestock, tools, equipment and vehicles situated thereupon at the time and defendant's management of the combined agricultural business would constitute defendant's contribution to the business of first plaintiff, in exchange for which defendant would acquire a 50% member's interest in first plaintiff. In my view, this paragraph of the particulars of claim can only be interpreted as a description of defendant's initial contribution. This interpretation appears to be borne out by the following paragraph of the pleading, which records that with effect from 8 November

1994 (the date upon which Van Rensburg 50% member's interest in first plaintiff was recorded) defendant is recorded as enjoying a 50% member's interest in first plaintiff.

[11] In my view, the end result of an objective consideration of the manner in which the terms of the agreement entered into by Van Rensburg and defendant on 15 October 1994 have been expressed in the particulars of claim, leads irresistibly to the conclusion that the agreement relates to an initial contribution as contemplated by the provisions of s 50 of the Close Corporations Act.

[12] The principle that in appropriate circumstances a member of a close corporation may institute proceedings on behalf of the close corporation against any other member where the latter is liable to the close corporation to make an initial contribution, is emphasized and expressed afresh in the provisions of s 24(5) of the Close Corporations Act. It is plain that the claim is a claim in the hands of the close corporation, and that the legislature intended only to permit a competent member of the close corporation to pursue such claim on behalf of the close corporation. No right to proceed against a fellow member accrues in his or her personal capacity to a member of a close corporation whom may seek to pursue a fellow member in such circumstances. Mr. Theron referred the court to an unreported decision in the WLD as it then was<sup>3</sup>. It was submitted that this judgment made it clear that a partner may exercise real and personal rights in relation to immovable property which is a partnership asset notwithstanding the fact that registration may only be in the name of one of the partners. This was the basis for the development of the argument to submit that an agreement between parties that property would be brought into a partnership once defendant was able to do so creates personal rights as between the parties which may be enforced as between them. This, as I understand the argument, is the basis upon which the relief is claimed against defendant in the particulars of claim by second plaintiff in her personal capacity. In the judgment referred to, the immovable property was indeed an asset registered in the name of a partner. However, that case did not concern itself with relief relating to the transfer of ownership of this asset. It was confined to an assessment of the nature of personal rights *inter partes* arising from an agreement to treat the asset as a

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<sup>3</sup> Kieck v Kieck case no 99/13474 WLD

partnership asset. Whatever the rights were in respect of the immovable property itself, it was registered in the name of one of the partners and no agreement was referred to in the judgment which envisaged the transfer of the immovable property to a third party such as a close corporation. Accordingly, in my view, the matter is distinguishable on the facts from the facts which emerged from the particulars of claim in this matter.

[13] In my view, on a plain reading of the provisions of s 24(5) of the Close Corporations Act, to the extent that second plaintiff pleads in paragraph 3 of the particulars of claim that she instituted proceedings against defendant personally, her claim must fail.

## SECOND GROUND OF EXCEPTION – NO CAUSE OF ACTION

### APPLICABLE LEGISLATION

[14] S 24 of the Close Corporations Act is again of application to the second leg of the exception. So, too, are the provisions of s 44 of the Close Corporations Act. This section provides:

#### “44 Association agreements

- (1) The members of a corporation having two or more members may at any time enter into a written association agreement signed by or on behalf of each member, which regulates-
  - (a) any matter which in terms of this Act may be set out or agreed upon in an association agreement; and
  - (b) any other matter relating to the internal relationship between the members, or the members and the corporation, in a manner not inconsistent with the provisions of this Act.
- (2) A corporation shall keep any association agreement at the registered office of the corporation where any member may inspect it and may make extracts therefrom or copies thereof.

- (3) Whether or not an association agreement exists, any other agreement, express or implied, between all the members of a corporation on any matter that may be regulated by an association agreement shall be valid, provided that such express or implied agreement-
- (a) is not inconsistent with any provision of an association agreement;
  - (b) does not affect any person other than the corporation or a member who is a party to it; and
  - (c) ceases to have any effect when any party to it ceases to be a member of the corporation.
- (4) Subject to the provisions of this Act, an association agreement or an agreement referred to in subsection (3) shall bind the corporation to every member in his or her capacity as a member of that corporation and, in such capacity, every member to the corporation and to every other member.
- [Sub-s. (4) amended by [s. 4](#) of [Act 25 of 2005](#).]
- (5) A new member of a corporation shall be bound by an existing association agreement between the other members as if he or she has signed it as a party thereto. [Sub-s. (5) amended by [s. 4](#) of [Act 25 of 2005](#).]
- (6) Any amendment to, or the dissolution of, an association agreement shall be in writing and signed by or on behalf of each member, including a new member referred to in subsection (5)."

[15] This leg of the exception also relies upon the provisions of s 2 as read with part of s 1 of the Alienation of Land Act, 68 of 1981. S 2(1) provides:

"2 Formalities in respect of alienation of land.

- (1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect

unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

The relevant definitions lifted from s 1 of the Alienation of Land Act are:

“‘alienate’ - in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and ‘alienation’ has a corresponding meaning;

...

‘deed of alienation’ – means a document or documents under which land is alienated;

...

‘land’ – (a) includes -

(i) ...

(ii) Any right to claim transfer of land;

(b) includes, ... any interest in land...”

## PARTICULARS OF CLAIM RELATING TO THE CAUSE OF ACTION

[16] Mr. Coetzee has argued that it appears from the particulars of claim that it was neither the intention of defendant, nor was it possible for him, to transfer the farm Harmonie to first plaintiff within the 90 day period referred in s 24(4) of the Close Corporations Act for the following reasons:

16.1 The agreement was concluded on 15<sup>th</sup> October 1994;

16.2 First plaintiff was registered on 8<sup>th</sup> November 1994;

16.3 The 90 day period expired on or about 8<sup>th</sup> February 1995;

16.4 When the agreement was concluded, defendant only had a *spes* to inherit the farm Harmonie on the death of his father, whereafter the farm then had to be transferred to defendant before it could be transferred to first plaintiff.

For these reasons, he submits, it was necessary in the particulars of claim to allege that transfer of the farm Harmonie to first plaintiff would take place only when defendant was in a position to do so.

[17] Two issues arise. The first relates to the nature of the right created by the oral agreement concluded on 15<sup>th</sup> October 1994 in respect of the farm Harmonie. The second relates to the extent to which the right can be enforced on behalf of first plaintiff.

#### The nature of the right

[18] It is plain that in terms of the oral agreement concluded on 15<sup>th</sup> October 1994, Van Rensburg and defendant agreed to enter into a partnership or joint venture in respect of the conduct of an agricultural enterprise to their mutual economic benefit. The initial contribution from each bears this out. Van Rensburg's contribution included the farm De Vlei. However, a partnership is not a legal persona and cannot as such own immovable property as a separate entity<sup>4</sup>. It is competent for the participants in a partnership to agree to treat immovable property as a partnership asset, and personal rights can in this manner be created in respect thereof<sup>5</sup>. It is equally competent for the participants in a partnership to agree to transfer immovable property registered in one of their names to, for example, a close corporation. In such an instance, a real right may be created between the close corporation and the immovable property. This would appear to be the basis upon which Van Rensburg and defendant agreed that their partnership or joint venture would be conducted by a close corporation, first plaintiff, in which they would each hold a 50% member's interest.

[19] In my view, it is the real right in the farm Harmonie which plaintiffs seek to enforce. If it accrues at all, this real right accrues to first plaintiff. The inability of second plaintiff to enforce this real right in her personal capacity has already been identified earlier in this judgment.

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<sup>4</sup> Michalow N.O. v Premier Milling Co Ltd 1960 (2) SA 59 (W) at 61 D

<sup>5</sup> Cussons en Andere v Kroon 2001 (4) SA 833 (HHA) at 838 E – H  
Kieck v Kieck case no 99/13474 WLD



### Enforceability of the real right on behalf of first plaintiff

[20] It is trite law that the effect of non-compliance with the requirements of s 2(1) of the Alienation of Land Act, 68 of 1981, is that the contract “shall not be of any force and effect”. This means that it is necessarily void *ab initio* and can under no circumstances confer any right of action<sup>6</sup>. The provision that the inchoate transaction is void is peremptory and the transaction is void not only *inter partes* but also insofar as third parties are concerned. The voidness cannot be surmounted on the grounds that there is no dispute between the parties<sup>7</sup>; that there has been part performance by either party<sup>8</sup>; that there has been a waiver by a party of his rights under the statutes<sup>9</sup>; that there has been a validation by ratification or subsequent performance<sup>10</sup> or that one party will suffer great hardship if the transaction is void.<sup>11</sup> As a result of the voidness, either party may resile at any time from the agreement.<sup>12</sup>

[21] It is a well-entrenched principle of our law that a future right or *spes* (the hope or expectation that a right in future materialize) is capable of cession<sup>13</sup>. If the cession of a *spes* is taken at face value, the right, when it does accrue, will vest in the cessionary. In terms of the transfer agreement *in anticipando* it passes to the cessionary forthwith. It is a two stage procedure.<sup>14</sup> To be effective as a cession *in anticipando* the agreement must comply with all the substantive and formal requirements of a transfer agreement, including, where applicable, the Alienation of Land Act, 68 of 1981.

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<sup>6</sup> Wilken v Kohler 1913 AD 135 at 143

<sup>7</sup> Kourie v Bean 1949 (2) SA 567 (T)

<sup>8</sup> Botha v Kelder 1948 (3) SA 248 (T)

Kourie v Bean (supra)

Jammie v Lowrie 1958 (2) SA 430 (T)

<sup>9</sup> Wepener v Schrader 1903 TS 629

<sup>10</sup> Jammie v Lowrie (supra)

<sup>11</sup> Kourie v Bean (supra)

<sup>12</sup> Jolly v Hermans Executors 1903 TS 515

<sup>13</sup> Rishworth v Secretary for Inland Revenue 1964 (4) SA 493 (A)

Bank of Lisbon and SA Limited v The Master and Others 1987 (1) SA 276 (A) at 294

Arico Engineering (Pty) Ltd v Ensor N.O. 1988 (2) SA 367 (N) at 371

Erasmus v Michael James (Pty) Ltd and Others 1994 (2) SA 528 (C) at 556

Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller and Manning Attorneys and Others 2001 (4) SA 360 (W) at 368

<sup>14</sup> Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 12

Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller and Manning Attorneys and Others (supra) at 368

[22] On behalf of defendant, Mr. Coetzee submits that according to the definitions of “alienate” and “land” in s 1 of the Alienation of Land Act, the agreement referred to in paragraph 6 of the particulars of claim to transfer the farm Harmonie to first plaintiff qualifies as “alienation of land” as contemplated in s 2 of the Act. He submits that the agreement does not comply with s 2 of the Act in that it is not in writing and is therefore void and unenforceable. He submits further that plaintiffs do not rely upon a cession or transfer in *anticipando* of defendant’s *spes* to inherit the farm Harmonie. Even if they were to, this, too, is an “interest in land” as defined in s 1 of the Alienation of Land Act and the agreement to cede the *spes* and/or transfer the *spes in anticipando* must comply with the formalities prescribed by the provisions of s 2 of the Alienation of Land Act. A failure to comply with these formalities renders the agreement of no force or effect. In my view, there is merit in this argument.

[23] A further obstacle to first plaintiff’s enforcement of any right against defendant is raised in the exception and stressed by Mr. Coetzee in argument. The effect of the provisions of s 24(4) of the Close Corporations Act is to require that any immovable property to be transferred to a close corporation as part of the initial contribution shall, in order to vest ownership thereof in a corporation, be transferred to the corporation within a period of 90 days after the date of registration of the corporation.

[24] The effect of the provisions of s 44 of the Close Corporations Act permits members of a close corporation to enter into any other agreement expressly or impliedly, between themselves, provided that such agreement is not inconsistent with any provisions of an association agreement. The argument advanced on behalf of plaintiff by Mr. Theron seeks to persuade the court that the obligation to transfer the farm Harmonie into the name of first plaintiff is not affected by the provisions of s 24(4) of the Close Corporations Act. The argument is that this is because the obligation arises from a separate agreement concluded in January 2005 and pleaded in paragraph 8 of the particulars of claim, relating to the continuation of the business of the close corporation in circumstances where second plaintiff stood to inherit van Rensburg’s member’s interest in the close corporation in the light of his death on 11<sup>th</sup> December 2000, the main thrust of the 2005 agreement being the preservation of the

terms of the original agreement including the terms relating to defendant's *spes* to inherit the farm Harmonie. I have already rejected the argument that the agreement pertaining to the transfer of the farm Harmonie was an agreement separate and distinct from the agreement regulating the original contribution. In my view, there was only one agreement relating to the transfer of the farm Harmonie, and that is, as pleaded, the oral agreement concluded on 15<sup>th</sup> October 1994 and set out in paragraph 6 of the particulars of claim.

[25] Mr. Coetzee's argument on the point is succinct. He submits that it is not competent for parties to agree that a member's undertaking to make a contribution towards the close corporation may be performed on a date which is later than 90 days after registration of the corporation and an agreement to this effect is to be treated as void and unenforceable. This is because such an agreement would purport to regulate a matter relating to the relationship between members and the close corporation in a manner inconsistent with s 44(1) of the Close Corporations Act<sup>15</sup>.

[26] In my view, the argument against plaintiffs on the point must succeed. No agreement which purports to extend the date of performance of any obligation arising out of the association agreement beyond the 90 day period referred to in s 24(4) of the Close Corporations Act is permissible. Such agreement is expressly prohibited by the provisions of s44 of the Close Corporations Act.

[27] Moreover, from whichever perspective, an application of the principles pertaining to the requirement that the transfer of the real right in the farm Harmonie to first plaintiff could only be accomplished by due compliance initially with the provisions of s 2(1) of the Alienation of Land Act, 68 of 1981, to the facts of this matter as pleaded in paragraphs 6, 7 and 8 of the particulars of claim, produces the inevitable conclusion that to the extent that it purported to create a real right in respect of the farm Harmonie in favour of first plaintiff, the oral agreement between van Rensburg and defendant concluded on 15<sup>th</sup> October 1994 was void *ab initio*.

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<sup>15</sup> Meskin Henochsberg on the Close Corporations Act (vol 3) Com - 55

[28] In the circumstances, on an analysis of both elements of the enquiry, I am of the view that no right exists in respect of the farm Harmonie which is enforceable on behalf of first plaintiff.

[29] It follows that the exception based on the assertion that the particulars of claim do not disclose a cause of action must also succeed.

### ORDER

[30] The provisions of s 50 (3) of the Close Corporations Act permit of the exercise of a wide discretion in respect of the appropriate order relating to costs in a matter such as this. Both Mr. Theron and Mr. Coetzee are in agreement that in the event of this court issuing a costs order, it would be appropriate were such order to include the travelling and accommodation costs of counsel. In this matter, both counsel have been involved with the matter *ab initio* and are based outside the geographical area of jurisdiction of this court. In my view, the inclusion of travel and accommodation costs in a costs order in this matter would be apposite.

[31] In the circumstances, I make the following order:

“The exception is upheld with costs, such costs to include the travelling and accommodation costs of counsel and to be paid by first plaintiff and second plaintiff jointly and severally, the one paying the other to be absolved.”

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**R.W.N. BROOKS**  
**JUDGE OF THE HIGH COURT (ACTING)**

Appearing on behalf of Plaintiffs: Adv. W.P. Coetzee  
Instructed by: Netteltons Attorneys, Mr. Hart

Appearing on behalf of Defendant: Adv. E.L. Theron  
Instructed by: Nolte Smith Attorneys, Ms. Amm