

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO. 1817/2020**

In the matter between:

**DEBORAH JOUBERT N.O.**

Applicant

and

**SOLEIL KOMMADAGGA (PTY) LTD**

First Respondent

**MARIA JOHANNA GROENEWALD**

Second Respondent

**FIRSTRAND BANK LIMITED**

Third Respondent

**THE REGISTRAR OF DEEDS**

Fourth Respondent

**H. BADENHORST**

Fifth Respondent

**JACOBUS FREDERICK VILJOEN**

Sixth Respondent

**M. KROG**

Seventh Respondent

**ABSA BANK LIMITED**

Eighth Respondent

**CONRAD ALEXANDER STARBUCK N.O.**

(in his capacity as liquidator of F & J Consultants CC

(in liquidation))

Ninth Respondent

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**JUDGMENT**

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**Rugunanan J**

[1] The heart of this application concerns the sale of four adjoining farm properties (they are collectively referred to as 'the subject properties' or where contextually appropriate, 'the farm properties' or 'the properties), namely:

- (i) Farm Rhenosterfontein, remaining extent Farm 306;
- (ii) Farm Rhenosterfontein, Portion 1 of Farm 306;
- (iii) Farm Rhenosterfontein, Portion 2 of Farm 307; and
- (iv) Farm Rhenosterfontein, Portion 0 of 449.

[2] The subject properties are situated in the Blue Crane Route Municipality between Somerset East and Paterson within the area of jurisdiction of this court.

[3] The present application was launched on 1 September 2020. The deponent to the founding affidavit is Deborah Joubert N.O. She acts in her official capacity as 'duly appointed final trustee for and in respect of the Smangaliso Trust' ('the Trust'). On 22 February 2022, and by order of this court, Nareshviran Vandayar N.O. was granted leave in his position as the jointly appointed final insolvency co-trustee of the Trust to intervene in the matter as second applicant. His joinder as co-applicant or second applicant is not reflected in the indices and filing notices giving cover to the papers in this application.

[4] In the circumstances dealt with later in this judgment the Trust was sequestrated on 6 November 2018. Of the all the respondents cited in this application the relief claimed by the applicants is primarily aimed at the first, second, third and sixth respondents.

[5] In clarification of their status:

(i) The first respondent is Soleil Kommadagga (Pty) Ltd ('Soleil'), a private company duly registered in accordance with the company laws of the Republic of South Africa;

(ii) The second respondent is Maria Johanna Groenewald ('Ms Groenewald'), a resident of Gauteng who has since 22 July 2020 been the sole director of Soleil;

(iii) The third respondent is Firststrand Bank Ltd ('FRB'), a commercial entity that conducts the business of a bank;

(iv) The sixth respondent is Jacobus Frederick Viljoen ('Viljoen Snr'), a resident of Gqeberha (formerly Port Elizabeth), and a brother of the second respondent. Viljoen Snr is an erstwhile trustee of the Trust. He conducted a game farming enterprise on the subject properties and on a fifth property known as Farm Rhenosterfontein, Portion 3 of Farm 304 ('the Farm').

[6] Of the abovementioned respondents, only FRB opposes these proceedings.

[7] It does so in defence of a registered bond that it holds over the subject properties.

[8] Shorn of inconsequential matter the notice of motion indicates that the applicants seek the following relief in addition to which they seek attorney and client costs against any opposing party or parties:

8.1 A declaration that the Trust is the lawful owner of the subject properties;

8.2 An order that the registrar of deeds be directed to amend the title deeds to reflect the Trust as the true owner of the subject properties; Alternatively to the above,

8.3.1 That the sale and transfer of the subject properties by the Trust to Soleil be set aside in terms of section 31 of the Insolvency Act<sup>1</sup> and that Soleil be ordered to retransfer the subject properties to the Trust;

8.3.2 That Soleil as well as the second and sixth respondents be declared to have forfeited any claim that they may have had against the Trust; and that they be ordered to sign and execute all documents to give effect to any of the above orders failing which the sheriff be authorised to do so on their behalf;

8.3 That Soleil be deemed not to be a juristic person and be collapsed into the Trust and its assets be declared to form part of the assets of the Trust;

8.4 That the mortgage bonds registered over the subject properties in favour of FRB be cancelled ('bond cancellation').

### **Background**

[9] On 13 July 2017, summary judgment was granted by this court, per Beshe J, against the Trust in favour of Griewakwaland Wes Korporatief Limited ('GWK'), a creditor, for the amount of R7.5 million.

[10] GWK also sought relief that the Farm be declared specially executable and that the issue of a writ of execution be authorised.

[11] The Trust was provisionally sequestrated on 18 September 2018.

[12] A final order issued on 6 November 2018.

[13] The sequestration ensued at the instance of GWK.

[14] In the course of events set out below FRB caused Soleil to be provisionally liquidated on 8 September 2020 – a final order followed on 9 December 2020.

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<sup>1</sup> Act 24 of 1936.

[15] The events and circumstances that preceded the sequestration and liquidation are detailed hereunder only insofar as is considered relevant for present purposes.

[16] To begin with, the Trust's indebtedness to GWK arose essentially from a security bond registered in favour of GWK over the Farm, and a credit agreement between itself and GWK, as also agreements of suretyship in which it, including Viljoen Snr and his spouse, bound themselves jointly and severally with an entity known as KNB Farming (Pty) Ltd in favour of GWK for the due and punctual payment of all financial obligations owed to the latter by KNB.

[17] Subsequent to the grant of summary judgment, an agreement concluded between the Trust and Soleil on 6 February 2018 initiated the sale of the subject properties to Soleil for the amount of R4 million. In the founding affidavit it is asserted that the amount was never paid by Soleil to the Trust, that Soleil did not apply for finance as it was obliged to do, nor did it secure the purchase price by way of bank guarantees which it failed to put up, but that the subject properties were notwithstanding transferred from the Trust to Soleil on 31 July 2018. To the contrary, the version by FRB is that the amount of R4 million was paid by it by means of the honouring of guarantees, one of which was in favour of ABSA Bank for the credit of the account of the Trust for the amount of R1.1 million. This amount was paid to cancel the bond over the subject properties in favour of ABSA.

[18] Although there is a dispute about the payment of the purchase price to the Trust, upon transfer of the subject properties a bond was simultaneously registered over the properties in favour of FRB. I add that the dispute regarding payment of the purchase price is resolved in favour of FRB on the basis of the well-known *Plascon-Evans* rule.<sup>2</sup> It is stated elsewhere in the founding affidavit that the bond secured FRB in respect of a loan of R4 million to Soleil and an overdraft facility of R500 000 extended to Soleil.

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<sup>2</sup> *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

[19] In pursuance of its judgment GWK instructed the sheriff to sell the Farm. A sale in execution was scheduled to take place on 3 August 2018 but on 30 July 2018 the Trust launched an (urgent) application in which it sought an order to stay the sale in execution of the Farm. That application was dismissed. The sale in execution proceeded, though the highest offer made for the Farm approximated to 20% of GWK's claim.

[20] In the application for the stay of the execution of the judgment, Viljoen Snr – at the time a trustee of the Trust – deposed to an affidavit. That affidavit together with its annexures is attached to the founding affidavit to the present application. Extracts from Viljoen Snr's affidavit which are quoted in the founding affidavit are reproduced herein, omitting of course irrelevant wording:

'10. The Trust had previously been represented by ... an attorney ... in an ongoing transaction wherein the Trust property was to be sold. The Trust property comprise five farms ... with a total value in excess of R100 000 ...

...

22. As the Trust required money to ensure that it continued to be a going concern, it entered into an agreement of sale of the remaining 4 farms with Soleil ... of which my sister Maria Johanna Groenewald, is the only shareholder and director, for a very low price of R4 000 000 ...

23. The seller and the purchaser entered into an agreement that the Trust or another entity or person nominated by the Trust is entitled to repurchase the property at R4 000 000. Thus enabling the Trust to sell all the farms as a unit when a purchaser is found.

24. These favourable terms were given to the Trust because of the close relationship I have with my sister.

25. The Trust received a deposit of R1 000 000 from Soleil on 16 June 2018, and a portion thereof was provided to our attorney to cover his prior expenses that had yet to be paid.'

[21] Whereas Viljoen Snr suggested that the subject properties together with the Farm are valued in excess of at R100 million, a valuation proffered by FRB came in at R20.1 million. That valuation is attached to the founding affidavit in the stay application.

[22] After the transfer to Soleil, Viljoen Snr carried on farming operations on the subject properties just as he had done before.

[23] Against this background the applicants contend that the circumstances in which the subject properties were transferred to Soleil bear the hallmarks of a simulated transaction – the properties were sold below value – there was no genuine intention for Soleil to assume ownership of the subject properties, it being the Trust's and Soleil's true intention to create the appearance that Soleil was the owner thereof. It is Evident from the affidavit by Viljoen Snr that the Trust and Soleil agreed that the Trust or another entity or person nominated by it would be entitled to repurchase the subject properties together with the Farm for the same purchase consideration that Soleil had acquired it. Hence, it is contended in the founding affidavit that the intention was clearly that Soleil did not intend, nor was it intended by the true protagonists (Viljoen Snr and Ms Groenewald), that Soleil permanently assumes ownership of the subject properties. As the sale of the subject properties occurred after the summary judgment proceedings and in the midst of GWK's efforts to pursue with execution of its judgment, the Trust and Soleil did so to thwart GWK's efforts to extract payment of a debt.

[24] Whereas the present application was launched on 1 September 2020, winding-up proceedings against Soleil commenced on 10 June 2020 at instance of FRB. A provisional liquidation order ensued on 8 September 2020. A final liquidation order issued on 9 December 2020.

[25] While this chronology assumes relevance elsewhere in this judgment, it only suffices to mention that the liquidators of Soleil have not entered the dispute in these proceedings and abide this court's pronouncement in the matter.

[26] FRB's liquidation of Soleil was founded on the latter's indebtedness to FRB for the loan amount of R4 million and the overdraft of R500 000. The liquidation proceedings were pillared on section 344 of the Companies Act<sup>3</sup> on the basis of Soleil's inability to pay its debts and that its liquidation would be just and equitable. The motivation in the latter regard appears to have been that the collective value of the properties is more than 20 million which substantially exceeds the purchase price of R4 million. It may be added that the liquidation proceedings occurred while an agreement (envisaged in paragraph 23 of Viljoen Snr's affidavit *supra*) was in the making between Ms Groenewald and various complainants/investors and creditors of an entity known as F & J Consultants CC (the ninth respondent, also in liquidation) whereby each would be granted shares in a new company into which the subject properties would be transferred.

### **The arguments**

[27] In support of the relief claimed in 8.1 and 8.2 hereinabove the applicants contend that the sale of the subject properties was a simulated transaction<sup>4</sup>. This categorisation was raised for the first time in argument and is nowhere mentioned in the founding affidavit.

[28] In relation to the relief sought 8.3.1 and 8.3.2 reliance is placed on section 31 of the Insolvency Act.

[29] Relevant to the relief claimed in 8.4 further reliance is placed on section 20(9) of the Companies Act<sup>5</sup>.

[30] Before turning to address these arguments, FRB's opposition commenced with two issues *in limine*.

### ***Failure to include co-trustee as co-applicant***

[31] At the time of this application being launched it was not brought by both the duly appointed insolvency trustees notwithstanding the fact that their joint

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<sup>3</sup> Act 61 of 1973

<sup>4</sup> Reliance initially placed on section 34 and section 26 of the Insolvency Act, was abandoned during argument.

<sup>5</sup> 71 of 2008.



appointment as trustees was made final by way of a certificate of appointment issued by the Master of the high court on 8 April 2019.

[32] The founding affidavit to which Ms Joubert had deposed makes no mention, express or otherwise, that she had been authorised by her co-trustee Mr Vandayar to bring the application and that he has consented to the institution of these proceedings.<sup>6</sup>

[33] Joint trustees are one persona.<sup>7</sup> They must act jointly – they are the channel through which the insolvent estate can sue.<sup>8</sup> Where Mr Vandayar had not been before this court as co-trustee at the time of the institution of these proceedings, the defect cannot be regarded as anything formal which is capable of being condoned.<sup>9</sup>

[34] Accordingly, the institution of this application by Ms Joubert ostensibly as sole trustee, is a nullity.

#### ***‘Vested rights’***

[35] It is not in dispute that Soleil was placed under provisional liquidation by this court on 8 September 2020 on the basis of its inability to pay its debts, nor is it disputed that the application for the winding up of Soleil was lodged and issued on 10 June 2020.

[36] For purposes of section 348 of the Companies Act of 1973<sup>10</sup> a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up. This means that the winding up commences when the application has been duly lodged with the registrar of the court.

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<sup>6</sup> Murphy N.O and Benjamin N.O. v Semphill and Others 1954 (3) SA 450 (WLD) at 451E.

<sup>7</sup> Goldseller v Hill 1908 TS 822 at 827.

<sup>8</sup> Millman N.O. v Goosen 1975 (3) SA 141 (O) at 145A-C.

<sup>9</sup> Murphy N.O and Benjamin N.O. v Semphill and Others supra

<sup>10</sup> Act 61 of 1973

[37] Under section 341(2) of the Act aforementioned every disposition of its property by a company being wound-up and unable to pay its debts made after the commencement of the winding-up shall be void unless the court otherwise orders.

[38] It has been held that the effect of section 348 is to establish the *concurso creditorum* at the time when the application for winding-up is lodged. It has been held further that section 341(2) of the 1973 Act proscribes the disposition of a company's assets after the lodging of an application to wind-up and that such disposition is void unless the court otherwise orders.<sup>11</sup> The legislation retrospectively avoids transactions that may have been legitimate when they were entered into. Relief, however, cannot be granted to compel performance by an insolvent company after commencement of a winding-up for the reason that such an order would create rights and obligations and render valid what had become void.<sup>12</sup>

[39] Upon the grant of a provisional order a *concurso creditorum* is established – the effect whereof is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted.<sup>13</sup> Put otherwise, once the *concurso creditorum* is established the rights of creditors become vested and complete<sup>14</sup> which means that the power a court has under section 342(2) is only exercisable in relation to dispositions made between the lodging of an application for winding-up and the grant of a provisional order.<sup>15</sup>

[40] It is on the basis of the aforementioned analyses that counsel for FRB submitted that it is not competent for a trustee to assume that a completed disposition be treated as a nullity. He submitted that a trustee should accept the legal position as he finds it and must give effect thereto, unless the trustee succeeds on motion brought in the proper manner to have the disposition set aside. The proceedings for the winding-up of Soleil commenced on 10 June 2020 well before

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<sup>11</sup> [2021] ZAWCHC 20 para

<sup>12</sup> International Shipping Company Ltd v Affinity Ltd 1983 (1) SA 79 (CPD) at 84H-85H.

<sup>13</sup> Pride Milling CO (Pty) Ltd v Bekker NO and Another 2022 (2) SA 410 (SCA) para 19.

<sup>14</sup> Pride Milling *supra* para 16.

<sup>15</sup> Pride Milling *supra* para 31.

the present application was launched on 1 September 2020. Soleil therefore had the right and the authority, prior to its liquidation, to bond the subject properties.

[41] At the date of the commencement of the winding-up proceedings against Soleil the position is that Soleil was the registered owner of the subject properties that were bonded in favour of FRB, the latter a secured creditor whose rights are vested and complete.

[42] The submission by FRB that this court does not have the power to grant any relief to the applicants that would constitute a disposition of Soleil's property is not without merit. A transfer of the subject properties as prayed for would amount to such a disposition.

[43] I shall however consider the further arguments on the basis that I may be mistaken in regard to the conclusions arrived at as regards the *in limine* issues.

#### ***A simulated transaction?***

[44] Against the background of the facts summarised hereinabove applicants' counsel submitted that the circumstances in which the subject properties were transferred to Soleil bear the hallmarks of a simulated transaction in which the intention to transfer ownership was lacking. The simulation, he contended, was to produce a title deed reflecting Soleil as the owner of the subject properties. The Trust and Soleil did so to thwart pending execution proceedings.

[45] Relying on *CSARS v NWK Ltd*<sup>16</sup> counsel submitted that the test for simulation is not solely limited to intention – it goes further and requires an examination of the commercial sense of the transaction. On this leg of the test, he contended that because Soleil was not in the business of conducting farming operations, it made no commercial sense for Soleil to have acquired the properties. Indications elsewhere in the applicants' papers are that the Trust received no payment of the purchase price for the reason that more than half was paid directly to Viljoen Snr. I pause to state that the latter consideration constitutes new matter that surfaced in the replying

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<sup>16</sup> [2011] 2 All Sa 347 (SCA)

affidavit – this being contrary to the prescript that the foundation of an applicant's case must be laid out in its founding papers.

[46] Two points need to be made about this argument:

[47] First, the production of a title deed reflecting Soleil as the owner of the subject properties could only have materialised if the Trust and Soleil consciously intended for ownership in the properties to be transferred. On the material before this court, the present is not a case in which the participating parties were misled into changing ownership – in which event the transfer will be of no effect.<sup>17</sup> The present is a situation in which they acted in accordance with the intention to give and receive and in doing so, to transfer ownership. On this leg of the test, the simulation argument fails.

[48] Second, the applicants' case in the founding affidavit is based squarely on an asserted 'fraudulent and contrived stratagem' employed by the protagonists of the Trust and Soleil to asset-strip the Trust.

[49] On this aspect the applicants are bound by the case put forward in the founding affidavit and from what follows, the simulation argument fails.

[50] The Applicants' papers convey that the Trust and Soleil fraudulently represented that Soleil would and did assume ownership of the subject properties and that this false representation was made to FRB who acted thereupon to its own detriment when it advanced funds under security of a bond that would be invalid.

[51] It is trite that a party – in this instance, the Trust – cannot rely on its own fraudulent conduct to obtain relief.

[52] In *ABSA Bank Ltd v Moore and Another*<sup>18</sup>, Cameron J stated:

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<sup>17</sup> *ABSA Bank Limited v Moore and another* 2016 (3) SA 97 (SCA) para 27.

<sup>18</sup> [2016] ZACC 34 para 39.

'Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.'

[53] On the applicants' version, the Trust is not a victim but a perpetrator; and FRB (on their construction) is a victim.

[54] FRB correctly asserts that it does not rely on any fraud.

### ***Section 31<sup>19</sup> of the Insolvency Act***

[55] The section essentially provides for the payment of a penalty by a party that was privy to a collusive disposition/transaction entered into before sequestration and which had the effect of prejudicing creditors. The submission is made in the applicants' heads of argument that if the transfer of the properties is held to have been effective, then it was by collusion between the Trust and Soleil. Barring the amount of R1.1 million applicants maintain that the Trust received nothing in return for the sale of the subject properties – the disposal of the properties was to the prejudice of Trust creditors. Furthermore, even if the full purchase price of R4 million was paid it would nonetheless have been to the prejudice of creditors for the reason that the properties were sold below their true value. The contention is that the loss caused to the insolvent Trust estate shall be made good.

[56] For reasons that follow reliance on section 31 is misplaced.

[57] If it is assumed that this court were inclined to set aside the sale and transfer of the properties, the section does not clothe the court with the power to order

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<sup>19</sup> Section 31 reads as follows: 'Collusive dealings before sequestration -

(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another. (2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate. (3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

retransfer of the subject properties. On a plain reading of the section the applicants would at best have a claim for the value thereof against the insolvent estate of Soleil.

[58] On the other hand if it is assumed that this court does have the power to order retransfer, the applicants have not indemnified FRB against the loss of its right against Soleil and its security as provided for in section 33(1)<sup>20</sup> of the Insolvency Act. There is, moreover, no allegation by the applicants that FRB did not act in good faith in its dealings with Soleil, nor is it disputed that the sums advanced to Soleil were covered by the security of a bond over the subject properties.

[59] Accordingly, FRB is not obliged to restore the benefit received (i.e. by way of cancelling the secured claim).

### ***Section 20(9) of the Companies Act***

[60] Section 20 of the Companies Act deals with the validity of company actions.

[61] Subsection 9 reads as follows:

‘(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

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<sup>20</sup> Section 33 reads as follows: 'Improper disposition does not affect certain rights -

(1) A person who, in return for any disposition which is liable to be set aside under section twenty-six, twenty-nine, thirty, or thirty-one, has parted with any property or security which he held or who has lost any right against another person, shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the trustee has indemnified him for parting with such property or security or for losing such a right. (2) Section twenty-six, twenty-nine, thirty, or thirty-one shall not affect the rights of any person who acquired property in good faith and for value from any person other than a person whose estate was subsequently sequestrated.'

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).’

[62] On its plain wording section 20(9) permits a court to disregard the separate juristic personality of the company where its incorporation, use or any act performed by or on behalf of the company constitutes an unconscionable abuse of its juristic personality as a separate legal entity.

[63] Maintaining in the founding affidavit that the section is applicable, the applicants’ recourse thereto moves from the following premises (I extrapolate from the founding affidavit and in part from the summary in FRB’s heads of argument):

(i) the sale and transfer of the subject properties are void, fraudulent and otherwise in want of legality and fall to be set aside;

(ii) section 20 (9) authorises a statutory basis for piercing the corporate veil of otherwise separate and distinct legal entities and provides a court with a wide<sup>21</sup> discretion to make any appropriate order to give effect to a declaration contemplated under the section;

(iii) the present application, undeniably has its genesis in an unconscionable abuse of the separate juristic personality of Soleil;

(iv) the unconscionable abuse manifests itself in the fact that Soleil was always intended, interposed and utilised as a conduit vehicle through which Viljoen Snr aided by his sister and one Bester (an attorney), siphoned off and unlawfully misappropriated and dissipated millions of Rand’s worth of Trust assets in

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<sup>21</sup> A court is given ‘the widest powers to grant consequential relief’: *Ex parte Gore and Others* NNO 2013 (3) SA 382 (WCC) para 34.

circumstances where both the Trust and Soleil were seemingly but conduits for Viljoen Snr;

(v) this was done in a manner envisaged in section 20(9) and in contravention of the common law and the statutory provision<sup>22</sup> that a company must not carry on its business recklessly, with gross negligence, with intent to defraud or for fraudulent purposes.

[64] In argument counsel for FRB submitted that the founding affidavit lacks primary facts to substantiate the factual and legal conclusions set out therein. That this is immediately apparent even from a cursory glance of the affidavit cannot be gainsaid. It is trite that a party has to plead with sufficient clarity and particularity the material facts upon which it relies for the conclusions of law it wishes the court to draw from those facts – it is not sufficient to plead the conclusion of law without pleading the material facts giving rise to it.<sup>23</sup>

[65] Furthermore, the deponent makes no mention of the creditors of Soleil considering that their position would be substantially affected given the statutory basis of the relief contended for. The applicants cannot claim the subject properties without any obligation towards creditors.

[66] An order under section 20(9) may be justified in circumstances such as those in *City Capital v Chavonnes Badenhorst*<sup>24</sup> in which controllers of companies in a group had used those companies for a dishonest or improper purpose and in that way drew no distinction between the separate juristic personalities of the members of the group. In the present matter the converse is the position. For the alleged fraudulent scheme to work it was at all times imperative that the separate juristic personality of Soleil be used, recognised and maintained. A clear distinction between the Trust and Soleil was therefore of cardinal importance; and it is this distinction which in my view goes to the very root of the intention to transfer ownership of the subject properties to Soleil.

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<sup>22</sup> i.e. section 22(1) of Act 71 of 2008.

<sup>23</sup> *Trope and Others v SARB* 1993 (3) SA 264 (AD) at 273A-B.

<sup>24</sup> 2018(4) SA 71 (SCA) para 30.



[67] Notwithstanding the case presented in the founding affidavit, this with particular reference to section 20(9), in argument counsel for the applicants contended for the collapse of the Trust into Soleil. Aside from this being a new case belatedly introduced in argument, the contention is unsustainable, and in reply counsel correctly conceded that the founding affidavit was silent thereover.

### ***Bond cancellation***

[68] In support of this relief it is contended in the applicants' heads of argument that the Trust did not consent to the registration of a mortgage bond over the subject properties. The trite position is that only the true owner of immovable property can give consent to the registration of a mortgage bond over its property.<sup>25</sup> Because the Trust did not give such consent, FRB's bond was not validly registered. What puts paid to this argument is the existence of a duly signed resolution by the trustees of the Trust (Viljoen Snr and Clarence Stander), in terms of which Viljoen Snr was expressly authorised to sign all relevant documents which may be necessary for the registration of the transfer of the subject properties into the name of Soleil. It is significant that the applicants have not addressed this issue.

[69] It is stated in the founding affidavit that the registration of the bond is founded on the factual supposition that Soleil could as lawful owner/purchaser of the subject properties consent to the registration of the bond. In the same breath, it is asserted that neither Soleil, Ms Groenewald nor Viljoen Snr could 'for the aforesaid reasons' extend such consent, hence there was never any lawful basis on which the bond could be registered. The 'aforesaid reasons' are not difficult to discern and include *inter alia* the (false) allegation that Viljoen Snr was not authorised to effect the transfer and that the purchase price was not paid for the subject properties. Beyond these reasons, which have been disputed by FRB in its fourth affidavit (filed without objection in response to new matter raised in the applicants' reply), there are no primary facts to support the assertion made by the deponent to the founding affidavit.

[70] It is not in issue that the formalities attendant upon the transfer of the subject properties to Soleil had been complied with, that they were accepted by the Registrar

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<sup>25</sup> ABSA Bank Limited v Moore and another *supra* para 39.

of Deeds, and that transfer had been effected in the deeds registry. In circumstances such as these, where a formally valid transfer had occurred – and although it could be challenged on a number of grounds – the transfer remains valid until set aside by an order of court.<sup>26</sup>

[71] For the above reasons the bond cancellation relief contended for by the applicants is not competent.

[72] Before concluding this judgment, I turn to address the issue of reserved costs. Counsel for FRB submitted that such costs should be awarded to FRB. Save for a date 13 October 2020 appearing in manuscript on the cover of the court file, the material on file is insufficient for determining the circumstances that occasioned a reserved costs order. Indeed, this issue was not canvassed in oral argument nor in the parties' heads of argument. As I find no evidence of a court order to this effect, and given the paucity of information to hand, my sense is that it is preferable to make no order in this regard.

[73] In the result, the application is dismissed with costs.

**M. S. RUGUNANAN**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

For the Applicants: H A van der Merwe  
Instructed by Van Der Merwe Doring Maponya Associates Inc  
Applicants' Attorneys  
c/o Huxtable Attorneys  
Makhanda  
(Ref: O. Huxtable)  
Tel: 046-622 2961

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<sup>26</sup> Knysna Hotel CC v Coetzee 1998 (2) SA 743 (HHA) at 754B-C.

For the Third Respondent: L. M. Olivier SC

Instructed by De Klerck & Van Gend Inc.  
Third Respondent's Attorneys  
c/o Rushmere & Cole Inc.  
Makhanda  
(Ref: M Van Der Veen)  
Tel: 046-622 7005

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