

SOUTH AFRICA / JUDGMENT

Marquand and Another v Van Aardt and Others (37288/2009)

[2010] ZAGPPHC 531 (19 April 2010)

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COURT

North Gauteng High Court, Pretoria

BEFORE

TLHAPI VV

CASE / FILE NUMBER

37288/2009

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Policy**IN**

THE HIGH COURT OF SOUTH AFRICA
(NORTH
GAUTENG HIGH COURT. PRETORIA)

CASE NUMBER:

37288/2009

DATE: 19 APRIL 2010

In the matter

between:

CHRISTOPHER IAN

MARQUAND.....FIRST

APPLICANT

CHARLES ALFRED LE

FEURVRE.....SECOND

APPLICANT

And

FRANS JOHANNES VAN

AARDT

I.D.:

5[...]......FIRST

RESPONDENT

NYABELA CABINS (PTY)

LTD
REG. NO:
1978/02806/07.....SECOND
RESPONDENT
SIVER WATERS GAME
AND HOLIDAY
FARMS (PTY)
LTD.....THIRD
RESPONDENT
REG. NO:
1998/016906/07
ERNA VAN
AARDT.....FOURTH
RESPONDENT
EAGLE VALLEY
PROPERTIES 139
CC.....FIFTH
RESPONDENT
REG. NO:
2004/087346/23
JOHANNES FRANS VAN
AARDT.....SIXTH
RESPONDENT
I.D.: 7[...]

JUDGMENT

TLHAPI. V V

[1] An interim order ('anti dissipation interdict') by way of an ex parte application was granted in favour of the applicants against the respondents, who had to show why the said order should not be made final on the return date.

The order read as follows:

1. That an interim order with immediate effect be granted, pending the return date:

1.1. Interdicting the First Respondent from ceding, pledging, alienating, disposing or in any way encumbering any of his assets, excluding stock in trade of businesses which may be sold in the ordinary course of business;

1.2. Interdicting the First Respondent from drawing funds out of investment or savings account or in any way reducing the investment or savings held to the credit of the First Respondent at any bank, other financial institution or broker;

1.3. Interdicting the First Respondent from ceding, pledging, alienating disposing or in any way encumbering any shares, interest or loan accounts held by the First Respondent in the Second, Third and Fifth Respondents;

- 1.4. Interdicting the Second and Third Respondents from registering any transfer of shareholding of any shares presently registered in the name of the First Respondent, nor to pay any dividends or repay any portion of any loan account held by the First Respondent in the Second and Third Respondent to the First Respondent, or any other person;
- 1.5. Interdicting the First and Second Respondents from registering any transfer of any shares of which the First Respondent is the beneficial owner, notwithstanding other persons or entities holding such shares as nominee/s on behalf of the First Respondent;
- 1.6. Interdicting the Second and Third Respondents from ceding pledging alienating disposing or in any way encumbering any of their assets excluding stock in trade of businesses which may be sold in the ordinary course of course of businesses;
- 1.7. Interdicting the Fourth Respondent from ceding pledging alienating disposing or in any way encumbering any of her assets excluding stock in trade of businesses which may be sold in the ordinary course of business, alternatively interdicting the Fourth Respondent from ceding pledging alienating or disposing her right title and interest including the right to ask for a transfer into her name of the immovable property known as Erf [...] M[...] Mpumalanga;
- 1.8. Interdicting the Fifth Respondent from ceding pledging alienating disposing or in any way encumbering any of its assets including Portion [...] of the farm D[...] H[...] a portion of Portion [...], Registration Division KS in extent [...], 3058 hectares;
- 1.9. Interdicting the Fifth Respondent from registering any transfer of the member's interest presently registered in the name of the Sixth Respondent, nor pay any dividends or repay any portion of any loan accounts to any person;
- 1.10. Interdicting the Sixth Respondent from selling or ceding his member's interest or any loan accounts held by him in the Fifth Respondent;
- 1.11 Interdicting the First to Fifth Respondents from transferring any money out of the Republic of South Africa;
- 1.11. The interdicts in prayers 1.1 to 1.11 will not apply if the Respondents either obtain the prior written consent of the Applicants, which consent will not be unreasonably withheld, or the leave of the above Honourable Court;
- 1.12. The First, the Fourth and Fifth Respondents are to furnish to the Applicants within 5 days of the granting of this order, an inventory of all assets held by them be it directly or indirectly. It is recorded that after such inventory has been furnished the Applicants and the Deputy Sheriff are authorised to enter and inspect what ever premises are necessary in order to verify the information on the inventories;

1.13. Alternatively and in the event of the First, the Fourth and the Fifth Respondents failing to forthwith comply with prayer 1.13 supra, then and in that event, the Applicants, and/or their deputy authorised South African representatives and the Deputy Sheriff are authorised to enter and inspect whatever premises are necessary to compile the necessary inventories without releasing in any way the First, the Fourth and the Fifth Respondents from their obligation of this order to do so;

1.14. That a rule nisi be issued calling upon the Respondents to show cause, if any, on the 31 July 2009 why the interim order as set out in prayer 1 above, should not be made final, pending the finalization of the following proceedings which may be instituted:

1.15. An action be instituted by the Applicants within 30 days of the finalisation of this application for an order containing inter alia relief substantially as follows:

- i) Piercing the corporate veil between the First Respondent, the Second Respondent the Third Respondent and the Fifth Respondent; and or
- ii) Declaring the assets presently held by the Fourth and Fifth Respondents executable in satisfaction of the Applicants' claim of £483 829.00; and or
- iii) Declaring the shareholding and loan accounts of the First Respondent in the Second and Third Respondents executable in satisfaction of the Applicants' claim of £483 829.00 against the First Respondent; and or
- iv) Declaring the member's interest held by the Sixth Respondent in the Fifth Respondent, and any possible loan account by the Sixth Respondent in the Fifth respondent executable in satisfaction of the Applicants' claim of £483 829.00 against the First Respondent; and or
- v) An Order against the First Respondent for the payment of £448 696.90 to the First Applicant together with mora interest and costs, together with mora interest and costs; and/or
- vi) Setting aside , in terms of the action pauliana, the acquisition by the Fourth Respondent of the right to acquire ownership of Erf [...] M[...], Mpumalanga, and against the Fifth Respondent the acquisition of Portion [...] of the farm D[...] H[...], a Portion [...] Registration Division KS in extent [...], 3058 hectares and held by the Fifth Respondent under the title 2[...] and against the Sixth Respondent the acquisition by him of the member's interest in the Fifth Respondent; and or
- vii) An application by the Applicants, provided that it is instituted within 30 days of the finalisation of this application, for an order sequestrating the First Respondent and, it granted, the appointment of a final trustee for the First Respondent and then, the finalisation of proceedings to be instituted by the trustee within one month of his appointment as such to set aside in terms of Sections, 26, 29, 30, 31, or any other provision of the Insolvency Act 24 of 1936, alternatively the common law, any disposition by the First Respondent to any of the Second to Sixth Respondents, alternatively, and if the Fifth Respondents trustee fails to institute such proceedings, then pending the finalisation of such proceedings to be instituted by the . Applicants within one month and failure by the trustee to institute such proceedings, acting in

terms of the provisions of Section 32 of the Insolvency Act, 24 of 1936;

The purpose of this application was for the protection of assets in which the first respondent had interest. A final relief would enable the applicants to apply for the first respondent's sequestration and a duly appointed trustee or, creditors would be enabled to set aside impeachable dispositions or, the applicants would be in a position to invoke section 32 of Act 24 of 1936, alternatively to institute action against the first respondent based on breach of contract.

THE FACTS

- [2] The applicants are peregrines. The founding affidavit was deposed to by the second applicant having been duly authorised to do so by the first applicant.

The first, fourth and sixth respondents were South African citizens and were related to each other. The fourth respondent was the wife of the first respondent and was married to him out of community of property, the sixth respondent was the son of the first and fourth respondents. The second and third respondents were private companies in which the first respondent, either directly or indirectly held shares. The fifth respondent is a closed corporation in which the sixth respondent held the member's interest.

- [3] The second applicant was introduced to the first respondent by a mutual friend a certain Mr Botes ('Botes') who lived in Jersey with his wife. Botes recommended that the second applicant invest in property in South Africa and invited him to be part of a development project, in the picturesque D[...] H[...] D[...] V[...],('D[...] H[...]') engaged by the first respondent for a select few, that is, 'a few friends and handpicked investors.' The applicants showed interest and the second applicant travelled to South Africa to see for himself. He accompanied the first respondent to D[...] H[...]. The first respondent told him that he owned immovable property adjacent to the water frontage, but but did not inform him in which capacity he held such ownership. The second applicant was impressed by the area and, it was not important at the time to him whether he held shares in a company which had an interest in the immovable property or whether he owned a portion of the immovable property. Rouleti Investments (Pty) Ltd was later mentioned as a company which would acquire land for the investors. He was brought under the impression that he would acquire exclusive use of a plot or stand so purchased. He was impressed by the representations made to him by the first respondent. He discussed the investment prospects with his family and, he communicated their approval to the first respondent who was so pleased that he promised to procure a free stand for the second applicant and send the paperwork. There was a delay in obtaining these papers. Second applicant travelled to Jersey to prepare for payment of the initial amount.
- [4] The second applicant returned to South Africa in June 2007 in order to finalize the necessary paper work. He again met up with the first respondent who assured him that everything was going according to plan. In order to avoid regulatory processes for importing funds into South Africa and ,to facilitate payment of his initial deposit into the investment, he was instructed to pay £35 132.10 into the bank of Ms Use Eiselen, wife of Botes, who held a bank

account in Jersey. The Botes were friends of the first respondent and, the second applicant believed that the funds would reach the first respondent. The second applicant got his friend, the first applicant, interested in the project. They travelled to South Africa during September 2007 and were accompanied by Botes. Construction at D[...] H[...] had begun. The first respondent made the same representations to the first applicant and relying upon them, first applicant arranged for a deposit of £100 000.00 to be paid to the first respondent, £85 000.00 was for the D[...] H[...] project and £15 000.00 for the Mozambique project.

- [5] The second applicant later learnt through a Mr Steenkamp and his legal representative that the D[...] H[...] D[...] Project was a public project under the Department of Water Affairs and Forestry, Government of the Republic of South Africa ('the government'). The first respondent had acquired Land adjacent to the Farm D[...] H[...] which was registered in the name of the fifth respondent under title 2[...] (the farm'). Furthermore, the land pointed out by the first respondent to the second applicant, as the land over which he had rights, was not in the same area covered by the farm, and it appeared as if another piece of land was acquired.

The first respondent acquired the farm from a Mr Davel, acting as a trustee for a closed corporation or a company to be established. The lay out plan of the D[...] h[...] Dam basin depicted the farm as part of the general development and it was situated in a 'north western direction to a south eastern direction. The layout plan depicted, a purchase line, a township boundary, servitude lines, a full supply line of the dam and, a high flood line of the dam. It became apparent from the lay out plan that the land pointed out by the first respondent could not be acquired by the second applicant because it was identifiable as belonging to others as far back as the 29 August 2005, a date appearing on the lay out plan.

- [6] The agreements entered into by the applicants for the purchase of land were invalid because they were not in writing, furthermore, no consent was obtained from the Minister of Agriculture (Republic of South Africa) for the subdivision of agricultural land. Consequently, the applicants claimed that they were defrauded by the first respondent into parting with their money. They averred that the first respondent should have been aware of the legal requirements regarding the purchase of immovable property. It also came to the second

applicant's attention that the first respondent had placed advertisements offering the public, stands for sale on the D[...]

H[...] Dam Project. As a result of the alleged fraud the applicants had a claim against the first respondent in the amounts £85,

000.00 and £35 132.10 respectively.

- [7] The first respondent and his wife invited the Botes', and applicants on holiday to Bara island in Mozambique and there again first respondent offered the applicants a share in the holiday home he intended to construct. The first applicant agreed to acquire an interest for £15,000.00 and the first respondent acknowledged receipt of monies paid in this regard. Payment was made from the balance of monies paid in for the D[...] H[...] project.
- [8] Another investment opportunity was put on the table by the first respondent and Botes, it being an opportunity to invest in a Gold Mine, ('the gold mine project') for an equivalent of R5 million. Arrangements were made by both applicants to pay the said sum into the account of Ms Eiselen (mrs Botes) who would in turn transfer to the first respondent. The applicants were informed that they would acquire a 10% stake in the mine while the first respondent would acquire a 100% interest on behalf of a consortium of investors. No paper work was finalized. The applicants met the first respondent and Botes on 22 August 2008 at Belfast Mpumalanga where they were assured that the legal documents would be viewed and finalized. The only document which was produced, was a hand written document titled an agreement. It mentioned applicants and first respondent as the contracting parties. The document was annexed to the application as annexure 'M'. According to the second applicant the said document was fraudulent. Option 2 of the said document was confusing and nonsensical. However, the document served to prove that R5million had been paid over to the first respondent.
- [9] Another hand written document was obtained from Ms Eiselen marked annexure 'N'. The document was signed by the first respondent and a certain JJ van Aarde, described as the seller. The document stated that the funds for the payment of 10% shares in the gold mine situated at Giyani in the Limpopo Province, would be paid by Botes into a designated account which was actually the account of the first respondent and not that of the seller. The seller further undertook to pay an amount of R200 000.00 to the first respondent. Furthermore, the document indicated that a 'share certificate or a member's interest' in the first respondent's immovable property would serve as security to the investors.
- [10] JJ van Aarde was traced to Tzaneen. He denied knowledge of the signature on annexure 'M'. However he had held 20% interest in the gold mine at Giyani and the agreement entered into between him and first respondent did not resemble the one conveyed to the applicants as their interest in the mine. The rest of the shares belonged to a black empowerment group and that 10% of the 20% shares were indeed up for sale for R5million. The first respondent paid a sum of R780 000.00 only to JJ van Aarde, but represented to the applicants that R5million had been used for the acquisition of shares in the mine.
- [11] With regard to the three transactions therefore applicants had a claim against the first respondent for £483 829.00. The crux of the matter was that the applicants believed that they were defrauded by the first respondent. They were under the impression that they were dealing with a wealthy South African possessed of significant assets, in particular immovable assets.

The investigation by their attorney revealed that not a single immovable property was registered in first respondent's name. The conduct of the first respondent was such that no creditor could obtain judgment against him nor could a creditor execute against his assets.

[12] Extensive litigation would have to be instituted in order to identify first respondent's assets, either litigation including piercing the corporate veil, alternatively sequestration proceedings against the remainder of the respondents. Assets obtained by the fourth and sixth respondents from the first respondent were invalid in title against the first respondent's creditors. The applicants give the following reasons for their contention:

1. The first respondent is the sole director of the second respondent which owns three immovable properties:

1.1 Remaining extent of Farm M[...] 5[...] Registration Division JS under title T2[...];

1.2 Farm M[...] 5[...] Registration Division JS in extent [...], 0472 hectares under title T2[...];

1.3 Portion of farm M[...] in extent 13628 hectares under Title T4[...]

The mineral rights on the above properties are the subject of a dispute between the second respondent and Bethlehem Eiendome (Pty) Ltd, while another company Marlyn Granite acquired mineral rights in the same properties and, are currently paying R10 000.00 to the second respondent for the benefit of the first respondent. The applicants' prima facie view was that the first respondent was receiving payments as a share holder of the second respondent and, that the truth of such fact could only be established by a trustee if the first respondent is sequestrated, consequently it the applicants would have a claim against the first respondent that is why it was necessary to preserve first respondent's shareholding in the second respondent.

[13] The first respondent is one of five directors in the third respondent and he might own direct or indirectly hold shares in the properties owned by the third respondent. These assets have to be preserved to satisfy the applicants claims and the assets are:

1.1. Another portion of Farm M[...] 5[...] in extent [...], 6808 hectares under title T6[...]

1.2. Portion [...] of the farm M[...] 5[...] in extent [...], 4361 hectares under title T1[...]

[14] Although the fourth respondent had not defrauded the applicants nor made any misrepresentations, the applicants contend that as spouse of the first respondent she owned assets which were invalid in title to the first respondent's creditors. One such asset was the property at M[...], which according to Mr Steenkamp was purchased from funds deposited by Botes into the account of the first respondent. This occurred during the time that they were defrauded by the first respondent, therefore it appeared to be a gift between spouses which is a disposition without value by the first respondent. In an application for the sequestration of the first respondent it was possible to trace the funds used to purchase the property to the applicants and the entire assets of the fourth respondent would fall to be administered under the insolvent estate until she can prove that her acquisitions in title were valid to the first respondent's creditors. The fourth respondents assets had to be

preserved because the applicants feared that she might conceal the assets of the first respondent before an application for sequestration was brought.

- [15] The first respondent was instrumental in funding the acquisition of the farm owned by the fifth respondent. The applicants believed that the sixth respondent merely held the members interest for the first respondent.

The loan accounts and the farm had to be preserved and applicants believed that they had prospects in 'piercing the corporate veil' in respect of the fifth respondent.

- [16] The first respondent was authorised by the second to the sixth respondents to depose to the answering affidavit. He denied having defrauded the applicants. According to him this application was premature and vexatious; he denied that the applicants ever became his creditors and contended that they entered into the transactions of their own free will; he denied ever having communicated to Botes that the D[...] H[...] project was reserved for a select few; He denied making any misrepresentations which caused applicants to part with their money; he however admitted to having met the applicants during their visits to South Africa.
- [17] First respondent contended that the court had no jurisdiction to adjudicate on the Mozambique project because the entire cause of action arose in Mozambique. He denied having made any payments to the second and sixth respondents and that if any payments were made they were not invalid in title to his creditors. It was common business practice that different entities would be used to run separate business. On 23 August 1998 second respondent purchased shares from the estate of Late Yvonne Grobler. At the time of purchase the farms mentioned in paragraph 11 above were assets of the second respondent. The third respondent was a shelf company which purchased the assets mentioned in paragraph 12 above from the estate of Late Yvonne Grobler. The fifth respondent was a shelf company purchased during 2005 to register ownership of Portion [...] of D[...] h[...]. Part of D[...] H[...] had been expropriated and registration in favour of the fifth respondent would only be finalized as soon as subdivision had been completed. The first respondent as trustee for a close corporation to be established acquired from Mr Chris Davel for the fifth respondent property at D[...] H[...], a Portion of Portion [...] Division KS in extent [...] 3058 ha. Held under T[...].
- [18] The first respondent averred that he was introduced to the first respondent by Botes. At a meeting with the second applicant he clearly mentioned that the property pointed out, being Portion [...] of the farm Uitvlug [...] Division KS Province Mpumalanga ('Portion 1'), had been registered under Rouleti Investments (Pty) ('Rouleti') Ltd as far back as the 4 December 2005 under title T1[...]. The intentions for the future regarding this land were recorded in a shareholders meeting of the 24 April 2005. The first respondent denied having made any promise to give the second applicant an extra plot. Furthermore, he had no reason to make representations to the second applicant that transfer was still going to occur. A portion of this farm had been expropriated during 2007 and the process of registration had

not yet been finalized. The second applicant was advised that his entitlement was subject to the expropriation being finalized. Botes was aware of such fact.

- [19] According to the first respondent he never informed the second applicant what the purchase price in pound sterling would be. The proposal was that R500 000.00 would entitle second applicant to 4% share in Rouleti and conditions of how the land could be utilized by him were explained. Payment was made through Ms Eiselen on 23 April 2007, and not after June as averred by the second applicant. He played no role in how the transfer of monies through Use Eiselen's account was effected. He did however receive payment and a share certificate representing 4% was issued and handed over to Botes for transmission to the second applicant. Botes lost the certificate and a second one was issued .

The applicants were aware at all times that the land was the property of Rouleti. The application was therefore defective in that they had failed to join it as a party to the proceedings.

Furthermore as purchasers of shares in Rouleti, it was not required by law that the agreement for such purchase be reduced to writing.

- [20] The first respondent averred that the first applicant was introduced by Botes. He denied having made any misrepresentations to the applicants inducing them to part with their money. The first respondent contended that apart from the fact that he acted in a representative capacity in as far as portion 4 D[...] H[...] [...] KS was concerned, he was not the author of the lay out plan (V19) which depicted him as the owner. The lay out plan indicated the purchase line and which properties would be taken in expropriation and which would be retained by the purchaser. The layout plan could only be concluded on the finalization of the process of expropriation. Portion 1 which was left to the purchase line, marked V19 on the diagram was shown to the applicants as that portion which could be utilized by them. The Government would take the property to the right of the purchase line. The entitlement to the exclusive use of a plot arose from their purchase of shares in Rouleti, it was therefore not a requirement that such agreement be reduced to writing. The applicants purchased shares in a company which would entitle them to use and develop,

according to certain stipulations, one hectare of land on Portion 1 as will exist after expropriation. The registration of the property into the name of Rouleti would also be finalized after expropriation by the issue of a new Title Deed. The shareholders agreement had not been concluded due to the outstanding finalization of the expropriation.

- [21] The first respondent was not prepared to deal with Steenkamp with whom he had 'an axe to grind' until he was satisfied that applicants had properly mandated him. He denied that his attorneys Brandmuller-Taljaard received an e-mail outlining Steenkamps mandate.

- [22] According to the first respondent, Portion [...] of the farm D[...] H[...] was purchased in the name of the fifth respondent by way of loan funding. It was never intended that the applicants would acquire interest in the fifth respondent. The land adjacent to the D[...] H[...] Dam project did not belong to him or to any of the companies in which he was involved and he denied that he was responsible for the placement of the advertisement for the sale of

public stands adjacent to the D[...] H[...] Dam project. The first respondent averred that applicants had not acquired any claims against him because he was not in breach of the sale of share agreement, and as a result applicants were not entitled to cancellation of the agreement.

- [23] The first respondent denied having purchased the property at Bara, Mozambique. He had acquired an interest in the property to establish a 'Holiday House and this was subject to a 99 year lease. Together with Botes and Steenkamp it was intended to establish a company in which four shareholders would be involved, with each contributing an initial sum of R200 000.00. Both applicants were approached as possible investors.

The first applicant expressed interest and paid over a sum of R200 000.00. The land was lost to a property developer due to delays on their part to secure investors. Closer to the latter property, there was another property to which he had sole personal use and because this land did not require other investors he developed it. He informed the Botes that he was agreeable to making this property available to potential investors. First respondent maintained further that this court lacked jurisdiction to deal with any claim arising out of the Mozambique project.

- [24] The first respondent averred that the purchase of the Ospery Goldmine at Giyane was preceded by discussions between himself, Mr Joost van Aarde (van Aarde) and Mr Dries van Rooyen on 6 December 2007. He concluded the transaction with van Aarde and obtained a three month option to purchase the said mine for a sum of R5 million rand. It was agreed that partial payments could be made if his funds became available, however, if the funds were not available, he would have the right of first refusal in respect of the transaction and, the purchase price would not remain at R5 million rand. Van Aarde had agreed to include his 20% interest in Palala Resources (Pty) Ltd, (Palala) into the transaction. It was first respondent's intention to obtain investors within the said three months so that the stipulated purchase price was paid. He discovered during January 2008 that van Rooyen had offered the same mine for sale to Botes for R400 000.00. The first respondent denied having made any representations to the applicants and stated that Botes had on his own approached them about the 'golden opportunity investment' after realizing that the mine had indeed been sold to the first respondent. The applicants' purchase, that is, in respect of the sums of money paid to him,

represented 10% interest in the said mine. It had always been his intention to acquire 100% of the mine on behalf of a consortium of investors.

- [25] The first respondent averred that he became aware, subsequent to the agreement being entered into that there was a dispute about the ownership of Osprey Goldmine, that is , whether it vested with Palala or with van Aarde. A substantial amount of the purchase price had been paid over to van Aarde in his personal capacity as owner of the mine. The funds included those sourced from the applicants and those of the first respondent. It turned out that van Aarde had misled him and van Rooyen about the ownership of the mine and, in seeking to protect the interests of the investors which included himself and the applicants,

he entered into an agreement with Palala to be appointed transaction advisor, for the purpose of concluding the sale of 80% of Osprey. The first respondent tendered transfer of the 10% shares in Osprey to the applicants.

- [26] According to the first respondent, the meeting in Belfast of August 2008 was not meant to sign any legal documents pertaining to the mine because there was no clarity regarding ownership thereof. The options put forward by him in annexure 'M' were an attempt at finding a way in which the applicants' 10% investment could be secured. Furthermore, the first respondent maintained that applicants and Botes had at all times been appraised of developments herein. He maintained that Osprey and van Aarde should have been joined as parties in this application. The first respondent stated that the applicants had no claim against him and that in as far as it transpired that he had now acquired only 20% shareholding in the mine. He was prepared to transfer 50% of his shareholding to the applicants, which was what was paid for as per agreement.
- [27] The first respondent averred that the applicants had failed to provide sufficient probable evidence to entitle an action for piercing of the corporate veil, that the issues involved herein were of a civil nature, which he was capable of defending successfully. He had no creditors and had been free of debt for the past three years. Furthermore, the applicants had failed to prove a nexus between him and the other respondents; they had failed to prove that funds paid to him by the applicants were used for settling his creditors. He stated that there was nothing suspicious in his involvement with the second respondent which was a property owning company which did not have a bank account and that his sequestration would be futile. Monies paid in respect of the long lease were paid into the 4th respondents Absa account and the amounts were dealt by way of loan account in the books of the 2nd and 4th respondents. He was one of five directors in the 3rd respondent and that the properties owned by it were purchased from Estate Late Yvonne Grobler long before his association with the applicants.
- [28] The first respondent averred he was married out of community of property to the 4th respondent and that the M[...] property was purchased by her before any claims against him by the applicants and, that the Steenkamp's knowledge regarding the purchase amounted to hearsay. Applicants had failed to show that there had been a disposition by him without title to the 4th respondent. The 6th respondent had acquired the property registered in the name of the 5th respondent from proceeds of sale of a farm he owned in the Roosenkal area. No grounds were established for the relief sought by the applicants in respect of the 3rd and 4th 5th and 6th respondents.
- [29] It was averred by the applicants in reply that it was always the understanding that they would acquire the properties at D[...] H[...] in their personal capacities, and should the version of the first respondent be accepted, the contracts were as such void and first respondent had contravened the Share Blocks Control Act, 58 of 1980 (sections 5, 5A, 9, 11 and 16 thereof). The said Act provided them with a remedy of restitution plus interest. Consequently there was no dispute of fact regarding their claim against the First

Respondent. Furthermore, the first respondent's had blatantly ignored Steenkamp's letter and his entire responses were vague and evasive. The applicants contend that the minutes of the shareholders meeting 'in VA14' reflect the manner in which the first respondent was entitled to allocate 1 hectare plots and how the monies paid in by investors had to be deposited into an interest bearing Trust account. The said monies would be paid over to the developer, identified as the first respondent after registration of the land.

- [30] The valuation report 'VA17' annexed to the first respondent's papers confirmed that monies paid over for the D[...] H[...] project had to be held in trust. The applicants contend that on the increase in value of the shares first respondent initially held in Rouleti he was liable for capital gains tax he had not charged. If on the version of the first respondent the applicants had become shareholders in Rouletti before expropriation date, he had not disclosed their entitlements and he had not allowed them participation in the proceeds of expropriation. Of concern was that Rouleti had not commenced business neither did it have a bank account when a considerable part of D[...] H[...] was expropriated.
- [31] An investigation on behalf of the applicants conducted on the 18 August 2009 regarding the register of members in Rouleti revealed that neither the first respondent nor the applicants were recorded as shareholders in the Rouleti. Therefore, first respondent could not purport to transfer any shareholding to the applicants. Furthermore, according to the auditors the shares were held by JAP Trust ('the trust') and they denied any participation in the issue of shares to the applicants.

The applicants contend that the first respondent had also lied about his involvement with the advertisement placed for the sale of property at D[...] H[...]. In response to enquires by Mr Klopper relating to the advertisements for the sale property at D[...] H[...], the first respondent in an e-mail dated 2 April 2009 stated the following:

"Indien jy nou inkoop, koop jy aandele in 'n privaatmaatskappy was skuldvry is en die grond besit. Jou % aandele sal gelyk wees aan die hoeveehied erwe was jy besit. Jy sal ook van die Gps punte van jou erf voorsien word. Wanneer jou erf se titelakte aan jou oorhandig word, gee jy jou aandele sertifikaat terug en verval jou aandele in die maatskappy"

The estate agents dealing with the sale of the properties was Seeff Estate Agents, Lydenburg and the proprietor was Early Moon Trading 311 CC of which first respondent was the sole member. The first respondent was also the licensee of the said agency. The sixth respondent was the attending to the transfers.

- [32] According to the applicants there was sufficient evidence to pierce the corporate veil. They had been defrauded by the first respondent who had been aware of the dispute concerning the shares in Osprey prior to him receiving R5million from the applicants for the acquisition of 10% interest in the mine. He had failed to account for the balance of approximately R4 million which remained after R794 000.00 had been paid to paid to van Aarde. The applicants believed that the monies had been spirited away to 'corporate structures close corporations and trusts referred to by him. The first respondent had not provided the

applicants with an inventory of his assets.

- [33] The applicants averred that they were unable to trace any meaningful assets registered in the first respondent's personal name, that whatever assets were present were linked to corporate companies in the form of loan accounts in or personal claims to shares.

THE LAW

- [34] It was submitted on behalf of the respondents that for purposes of this Application, the aspect of the lack of jurisdiction of this court to deal with the Mozambique project would not be pursued. The issue whether certain parties should have been joined as contended by the first respondent shall be dealt during my consideration. Furthermore, without saying much the matter pertaining to the Ospery Gold mine would not be considered in detail because it is my prima facie view, that from the versions of the parties a number of disputes of facts arise which was in any event conceded on behalf of the parties.
- [35] It is trite that in an application for an 'anti-dissipation interdict in securitatem debiti', the applicant must prima facie satisfy the court that the 'respondent had no bona fide defence to the action and that, objectively considered, there were good grounds for fearing that he intended to make away with his assets in order to defeat the applicant's claim', *Bester v Van Niekerk* 1960(2) SA 363 (E) at 365 H and *Knox D'Arcy Ltd And Others v Jamieson and Other's* 1994 (3) SA 700 (WLD) at 706 B-D.
- [36] It was submitted by Mr Van der Merwe that the applicants had on the facts established on a preponderance of probabilities that they were creditors of the first respondent and that there was likelihood that first respondent, through the remaining respondents, intended disposing of assets in order to defeat the applicants claims. Mr Cilliers argued that the applicants had failed to deal with the most important element being, to prove such facts from which the court could conclude that the respondents intended or, were in the process of getting rid of any of their assets in order to defeat any claims the applicants might have against them.
- [37] It was common cause that the applicants paid £85 000 and £35 132.10 respectively to the first respondent in respect of their interest in the D[...] H[...] project. The four versions on the D[...] H[...] project were the following:
- (a) According to the second applicant it did not concern him under which title he would have acquired the property, whether in his personal capacity or as a shareholder. It was also clear from his version that at an early stage of the negotiations the possibility of the property being transferred into a company for the benefit of investors was discussed with the first respondent and only later was the company identified as Rouleti.

- (b) The first respondent averred that from the beginning the property pointed out as the property over which the second applicant would acquire interest was held by Rouleti and that the purchase price would entitle the second applicant to 4% shares in Rouletti. The shares would entitle the second applicant to the exclusive use of 1 hectare on a portion of portion 1 of the Farm Uitvlugt.
- (c) In his confirmatory affidavit Botes admits to having informed the second applicant of the project and that he introduced him to the first respondent. He averred further that during 2005 he acquired an interest in the project in the form of 4% shares in Rouleti and the first respondent had informed him that 'the members' interest in the company which is the registered owner of the land, belonged to him and a partner.
- (d) Then the first respondent's explanation to Mr Klopper also identified the purchase of shares in a company, which shares were equivalent to the number of properties a purchaser was entitled to and which shares would be exchanged for the title deed on registration.

The purpose for which shares would be sold to obtain interest in the immovable property were recorded in minutes of the shareholders meeting in annexure 'VA14'.

[38] Having regard to the above versions and the common factor being, the sale or purchase of shares to gain an interest in the immovable property, the likelihood is that such shares were purchased from Rouleti, in whose name the immovable property was registered. While not seeking to question the route of payment via Mrs Eilsellen, this was regardless of the fact that payment had been made to the first respondent in his personal capacity. Having arrived at this conclusion and, as correctly submitted for the respondents, it would have become necessary in my view, for the applicants to have joined Rouleti as a respondent.

[39] It was submitted for the applicants that it made no difference which version was accepted and that in the event that the respondents

version was accepted then, the transactions for the acquisition of shares in the project was in contravention of sections 16 and 18 of the Share Block Control Act, consequently the transactions were void and the applicants were entitled to restitution. In my view it was only if Rouleti was joined as one of the respondents that one would gain a better understanding of the history of shareholding of the company and whether any of the respondents benefitted in any manner from Rouleti direct or via the trust to the prejudice of the applicants; an explanation of the sale of shares in Rouleti and if the conduct of the first respondent in as far as it related to the applicants was fraudulent; whether or not the sale of shares and interest in the immovable property at D[...] H[...] constituted a contravention of the Share Block Control Act 59 of 1980; an explanation of which shareholders stood to gain from the expropriation and against whom the applicants had a claim.

[40] While it would seem that certain explanations of the first respondent were evasive, for example, his refusal to respond to enquiries by Mr Steenkamp who acted on behalf of the applicants, it would serve no purpose in giving the applicants the opportunity to join

Rouleti. The question that needs to be asked is whether the applicants have satisfied the second leg of the application being to prove on a balance of probabilities that the first respondent was depleting his assets or interests in the other respondent in order to frustrate the applicants in their intended claims against the first respondent. In the Knox D'Arcy 1996(4) SA 348 at 372 E-F, an extract from *Mcitiki and Another v Maweni* 1913 CPD 684 at 687 is quoted with approval as establishing the standard:

"...(T)hey all proceed upon the wish of the court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to so do" (my underlining)

It is my view that even where it is alleged that the first respondent does not have property registered in his personal capacity, he seems to be a man of some substantial wealth through his shareholding in certain companies, e.g. in Rouleti, in second and third respondent's and the Ospery Gold Mine. The applicants have not satisfied me that there exists sufficient facts from the founding and replying affidavits from which I could objectively determine an intent harmful to the cause of the applicants, by the respondents. In as far as the fourth to the sixth respondent are concerned it would be speculation to assume that the source for funding of the acquisition of the Marlothpark property and that acquired at D[...] H[...] by the sixth respondent were through income acquired from the applicants by the first respondent. Information acquired by the applicants in this regard amounted to hearsay and could not be used to confirm their version of how these properties were funded. It is evident from the founding affidavit that the first respondent in all likelihood may not be the sole shareholder in the in the second and third respondent.

It was therefore correctly submitted by Mr Cilliers that an order such as the one sought had far reaching implications and would in all probability infringe upon the Bill of Rights in the Constitution, of individuals likely to be affected by the order and reference was made to the following passage by Stegmann J in the Knox D'Arcy matters 1994 (3) at 708 B-D and (1996) at 380 A-B:

"The exercise of such power must be attended with due caution; with all practical safeguards against abuse; and with a careful attempt to visualise the ways in which the order may prove to be needlessly oppressive to the intended defendant. Consideration must also be given to the manner in which the order may interfere with the rights and obligations of third parties, such as banks or other debtors of the intended defendant, or other custodians of the intended defendants assets. Both the oppressiveness of the order to the intended defendant and its interference with the rights and obligations of third parties must be kept to the minimum...."

[41] Even if the applicants paid the money directly to the first respondent, which could be viewed as a ground for *prima facie* establishing that the applicants were entitled to the interdict, the fact that there was a genuine apprehension of injury did not entitle the applicant to an order unless the requirements for the interdict were proved on a balance of probabilities.

[42] In the premises the following order is made:

“ The interim interdict in respect of the respondents is discharged with costs.”

TLHAPI VV

(JUDGE OF THE HIGH COURT)

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