

A. 57/2000

C.H. KANDJOU & 2 OTHER vs SATJNDERSON ASSOCIATES & 5 OTHER

Levy. AJ 2000-

12-13

Transfer of shares in a private company contrary to the provisions of the Articles of Association. Shares to be re-transferred against payment of the purchase price.

Case No.: A. 57/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FIRST APPLICANT

SECONDDAPPLICANT

THIRDAPPLICANT

C.H. KANDJOU

G. HOVEKA

N. NDAZAPO (previously BUTKUS)

and

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

LTD

SIXTH RESPONDENT

SAUNDERSON & ASSOCIATES

E. RATJAMA

C. NGUAPIA

CI. M. KATJIUONGUA

CII. A.S. KANGOOTUI

NGEUEMANGA TRADING COMPANY (PTY)

CORAM: LEVY, AJ Heard On: 4th December 2000

Delivered on: 13th December 2000 JUDGMENT

LEVY, AJ: In this application the applicants are represented by Mr C Mouton and third respondent is represented by Mr J Schickerling.

On 18^h January 2000, applicants instituted proceedings against respondents by way of Notice of Motion for:

- "1. An order in terms whereof the sale of the Third Respondent's 1500 shares in the Sixth Respondent to the Second Respondent be declared *null and void*.
2. An order in terms whereof the Second Respondent is ordered to take all the necessary steps to retransfer the said 1500 shares to the Third Respondent against repayment of the purchase price thereof.
3. An order in terms whereof the sale of the Fourth Respondent's 500 shares in the Sixth Respondent to the Third Respondent be declared *null and void*.
4. An order in terms whereof the Third Respondent is ordered to take all the necessary steps to retransfer the said 500 shares to the Fourth Respondent against repayment of the purchase price thereof.
5. An order declaring the sale of Fifth Respondent's 500 shares in the Sixth Respondent to the Third Respondent *null and void*.
6. An order in terms whereof the Third Respondent is ordered to take all the necessary steps to retransfer the said 500 shares to the Fifth Respondent against repayment of the purchase price thereof.
7. An order in terms whereof the First Respondent, as the auditors of the Sixth Respondent,

be directed and authorised to take all the necessary steps to give effect to the transfer of shares in accordance with the above orders of this Honourable Court.

8. An order in terms whereof the Second Respondent is directed to pay the costs of this application on the attorney and client scale.
9. An order in terms whereof any other Respondents opposing this application are directed to pay the costs of this application jointly and severally."

Second, third and sixth respondents gave notice of opposition and affidavits were deposed to and served by second and third respondents only. On 24th October 2000, second respondent gave notice of the withdrawal of his opposition and tendered wasted costs.

Sixth Respondent is a private company with limited liability duly incorporated according to the Company laws of Namibia and with registered offices at the offices of Saunderson and Associates, 34, Pasteur Street, Windhoek West.

Mr Schickerling says in argument that it is common cause that when sixth respondent was registered on 15th January 1993 it had an issued share capital of 3,300 ordinary shares held as follows:

First Applicant	500
Second Applicant	500
Third Applicant	300
Third Respondent	500
Fourth Respondent	500
Fifth Respondent	500
One A. Katjimuisse	500

This being so it is clear that second respondent was not an original member of sixth respondent and only became a member when he purchased 1500 shares from third respondent for N\$ 150,000,00 on or about 2nd June 1999.

In their founding affidavit applicants say:

- "11. During July 1999 it came to my knowledge that:
10. the Fifth Respondent had resigned as a director of The Sixth Respondent;
 11. the Third Respondent had been appointed as director of The Sixth Respondent;
 12. the Fourth Respondent had sold to the Third Respondent his 500 shares in The Sixth Respondent and that these shares had been transferred;
 13. the Fifth Respondent had sold to the Third Respondent his 500 shares in The Sixth Respondent which shares were transferred to the Third Respondent. This all allegedly occurred on the 28th of November 1997.
 14. the Third Respondent had sold to the Second Respondent 1,500 shares in The Sixth Respondent which were transferred to the Second Respondent;
 15. the Third Respondent has resigned as director of The Sixth Respondent.
 16. the Second Respondent had been appointed as director of The Sixth Respondent and this all allegedly happened on the 7th of July 1999."

Save for an inconsequential amendment, Table B of Schedule 1, constitute the registered Articles of Association of Sixth Respondent. Articles 21 and 22 of the Articles of Association provide:

"21. If a member of the company desires to sell all or any of his shares in the company he shall give notice in writing, of his intention to sell, to the directors of the company, and state the price he requires for the shares.

22. The directors shall within one month of the date of receipt of the notice referred to in art 21 advise every other member of the company of the contents thereof and each such member shall be entitled to acquire the shares so offered within one month after the date of receipt of such advice; provided that if more than one

23. member makes an offer for all of the shares offered, the shares shall be sold to each such member in equal proportions, and where fractional proportions of shares remain, such members shall become joint holders of such fractional proportions of the shares."

Articles of Association, when registered bind a company and its members to the same extent as if each and every member had signed them.

(See Section 65(2) of the Companies Act 61 of 1973)

They constitute a contract between the company and its members and between the members inter se regulating their conduct in respect of certain matters between themselves and any member can apply to Court to enforce compliance with the Articles should one of the members commit a breach of a particular provision of the articles.

At the time when fourth and fifth respondents intended to sell their shares they were by reason of the aforesaid provisions of Article 21, obliged to give written notice of such intention to the directors. Fifth respondent who was a director has made an affidavit saying that he was not so informed nor did he have any notice concerning the price of the shares.

In terms of Article 22 whoever was a director at the time should have advised every shareholder of the contents of the notice aforesaid so that members who wished so to do could acquire the shares within one month.

Applicants say they did not receive any notice that third, fourth or fifth respondents were selling their shares or were offering their shares for sale. This is not disputed.

Therefore there was no compliance with the provisions of Articles 21 and 22 of sixth respondent.

Mr Schickerling argues that by reason of the judgment of *Greenacre & Others v Falkrik Iron Co Ltd & Others* 1953(4) SA 289 compliance was unnecessary as the sale was from one member to another and that the provisions of the Articles were only applicable where there was an intended sale to a non-member of sixth respondent.

I pointed out above that second respondent was not an original member of sixth respondent and only became a member on transfer to him of 1500 shares sold to him by third respondent. Unquestionably therefore the Articles were applicable to him and notice had to be given in respect of shares to be acquired by him.

In any event the *Greenacre* case is distinguishable on the facts. In the said case Table B of Schedule 1 of the Companies Act and the provisions of Article 21 and 22 were not applicable. The Company concerned had drafted its own Articles of Association which the learned judge interpreted to mean that members could sell and transfer to each other without the restrictions which only applied where a non-member wished to buy shares.

Furthermore and in any event, Articles 21 and 22 are certainly applicable to members inter se. It could indeed be a great concern and prejudicial to those members who join a private company having an equal shareholding with others to find suddenly that one member has secretly acquired the shares of other members and has a majority shareholding entitling him to outvote all other members.

I point out that in paragraph 11.1 of his affidavit, third respondent himself says;

"It was incumbent upon those shareholders as aforementioned who intended to sell their shares in Sixth Respondent to comply with the provisions of Article 21 of Table B of Schedule 1 of the Companies Act 1973."

It is therefore essential that there be compliance with the Articles of Association by members who wish to sell shares even to other members of the company.

Van den Berg v Transkei Development Corporation 1991(4) SA 78;

Mendonides v Mendonides and Others 1962(2) SA 190 (D);

Estate Milne v Donohoe Investments (Pty) Ltd and Others 1967(2) SA 359 (A);

Lombard v Suid-Afrikaanse Vroue-Federasie, Transvaal 1968(3) SA 473 (A);

Swart v Cilliers 1976(2) PH E10.

Third respondent says he in fact gave the Notice which the Article required from him and he refers to a letter dated 2nd June 1999 copy whereof applicant annexed to its affidavit (CHK5).

In terms of the Articles the notice had to be given to the directors of sixth respondent. This letter, however is addressed to:

"The Chairman
Omuhuka Holdings Co (Pty) Ltd
P.O. Box 20855
Windhoek".

The Chairman of that company may have been a director of sixth respondent at the time. This letter, however, is certainly not the notice required by the Articles. It is a letter to a separate and distinct persona and reference to the letter dated 8th June 1999 written by the Chairman aforesaid in response to third respondent's said letter (CN9 to third respondent's affidavit) shows that the Chairman himself did not receive the letter as a director of sixth respondent but as the Chairman of Omuhuka Holdings Co (Pty) Ltd and submitted third respondent's offer to his Board of Directors who decided "to take it up".

Applicants, however, only asked for costs against those respondents who opposed.

Second respondent who was not a member of sixth respondent at the time he purchased the shares says he believed that those members who sold him shares had complied with the Articles. Prior to becoming a member, he was entitled to believe that this had been done without checking the internal activities of sixth respondent. This is certainly not a defence and had he not withdrawn his opposition he would have been mulcted in costs to the same extent as third respondent.

Third respondent was at all material times in a position to verify the situation and to follow the same course as the other respondents. However, no case for a special order as to costs has been made out against him. Second respondent, must pay costs on the usual scale up to 24th October 2000 when he withdrew his opposition as no case for a special order as to costs has been made out against him.

The Order of this Court therefore is:

1. That the sale of 1500 shares by Third Respondent in Sixth Respondent to the Second Respondent is declared *null and void*.
17. That Second Respondent is ordered to take all necessary steps to retransfer the said 1500 shares to Third Respondent who is hereby ordered to repay the purchase price of NS 150,000-00 against transfer of the shares.
18. That the sale by Fourth Respondent of 500 shares to Third Respondent is declared *null and void*.
19. Third Respondent is ordered to take all necessary steps to retransfer the said 500 shares to the Fourth Respondent against repayment of the purchase price thereof and Fourth Respondent is ordered to repay to Third Respondent the purchase price in respect thereof.
20. That the sale by Fifth Respondent of 500 shares to Third Respondent is hereby declared *null and void*.

21. That Third Respondent is ordered to take all necessary steps to retransfer the said 500 shares to Fifth Respondent against repayment of the purchase price and Fifth Respondent is ordered to repay such purchase price to Third Respondent.

22. That First Respondent is ordered to give effect to the above orders in so far as is necessary to comply with the Articles of Association.

8. That, in the event of any Respondent failing to transfer shares as ordered, the Deputy

Sheriff is hereby authorised to sign whatever document may be necessary to effect transfer and if necessary to sign such shares and deliver same in terms of this order.

9. That Third Respondent shall pay the costs of this action jointly and severally with Second Respondent who, however is liable for costs only up to 24th October 2000.

For the Applicants: **Advocate C J Mouton**

Instructed by: **Messrs P F Koep & CO**

For the **Respondent: J** **Advocate**
Third **Schickerl** **ing** **Messrs van**
INSRUCTED **BY:** **Messrs van**
BY: **Partners**