REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2019/00004

In the matter between:

GEORG WOHLFART	**APPLICANT**

and

MICHELLE BERGH	**1ST RESPONDENT**
WILLIAM RICHARD KLEMP	**2ND RESPONDENT**
OLEA INVESTMENTS NUMBER FIFTEEN (PTY) LTD	**3RD RESPONDENT**
WEISSDORN FARMING (PTY) LTD	**4TH RESPONDENT**
THE MINISTER OF LAND REFORM	**5TH RESPONDENT**
THE REGISTRAR OF COMPANIES	**6TH RESPONDENT**
HEIKE SYBILE KASH	**7TH RESPONDENT**
FRANCOIS BERGH	**8TH RESPONDENT**

Neutral Citation*:* *Wohlfart v Bergh* (HC-MD-CIV-MOT-GEN-2019/00004 [2019] NAHCMD 264 (28 May 2021)

CORAM: MILLER AJ

Heard: **05 February 2021**

Delivered: **28 May 2021**

ORDER

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(1) Declaring that the transfer of shares in the third respondent to the first and second respondents is simulated or sham transaction and that, accordingly, the share register of the third respondent be rectified to reflect the applicant as the only shareholder of third respondent.

(2) That the first and second respondents be removed as directors of the third and fourth respondents.

(3) Declaring the purported lease agreement concluded with the second respondent in respect of Farm Eensgezind No. 97, District of Okahandja, a nullity.

(4) An order evicting the first and second respondents from Farm Eensgezind No. 97, District of Okahandja.

(5) That:

5.1 a loan agreement purportedly concluded between the applicant and the first and second respondents as per annexures GW 8 and GW 9 to this application; and

5.2 a management agreement in respect of the third and fourth respondents as per annexures GW 10 and GW 11 to this application; is set aside.

(6) Declaring the acquisition of Farm Eensgezind No. 97, District of Okahandja an illegal and simulated transaction in contravention of the provisions of sections 58 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 and that the fifth

respondent be directed to act in accordance with the provisions of section 60 of the Agricultural (Commercial) Land Reform Act, 6 of 1995.

(7) There is no order as to costs.

Judgment

MILLER AJ:

[1] 'Eengezind' is a word in the Dutch language which freely translated into the English language means "like-minded" or "in agreement". It also happens to be the name of a farm situated in the Namibian district of Okahandja. As matters stand a company, cited as the third respondent owns the farm, pursuant to certain agreements to which I will refer to in due course. The validity of the agreements is now in issue and it will be fair to say that the parties to those agreements are decidedly no longer "eensgezind"

[2] By way of Notice of Motion dated 11 January, 2019 the applicant seeks a variety orders both in the main and alternative. For the sake of completeness I cite the prayers being sought:

'1. Declaring that the transfer of shares in the third respondent to the first and second respondents is simulated or sham transaction and that, accordingly, the share register of the third respondent be rectified to reflect the applicant as the only shareholder of third respondent.

2. That the first and second respondents be removed as directors of the third and fourth respondents.

3. Declaring the purported lease agreement concluded with the second respondent in respect of Farm Eensgezind No. 97, District of Okahandja, a nullity.

4. An order evicting the first and second respondents evicted from Farm Eensgezind No. 97, District of Okahandja.

5. That:

5.1 a loan agreement purportedly concluded between the applicant and the first and second respondents as per annexures GW 8 and GW 9 to this application; and

5.2 a management agreement in respect of the third and fourth respondents as per annexures GW 10 and GW 11 to this application; be set aside.

6. Declaring the acquisition of Farm Eensgezind No. 97, District of Okahandja an illegal and simulated or sham transaction in contravention of the provisions of sections 17 and 58 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 and that the fifth respondent be directed to act in accordance with the provisions of section 60 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 and that:

6.1 the proceeds of any expropriation or sale of the farm as contemplated by section 60 of the Agricultural (Commercial) Land Reform act, 6 of 1995 (and after the charges and any debts as contemplated by section 60 (8) or section 30 of the Agricultural (Commercial) Land Reform Act, 6 of 1995, whichever may be applicable) be paid to the third respondent, after rectification of the share register and the removal of the first and second

6.2 alternatively, that in the event that the court does not order that the share register be rectified and the first and second respondents not be removed as directors as aforesaid, that the proceeds as aforementioned be paid to the applicant.

7. In the alternative to prayer 6 above:

7.1 That as a result of a contravention of section 17 of the Agricultural (Commercial) Land Reform Act, 6 of 1995, the sale of the shares of the seventh respondent held in the fourth respondent and to the third respondent be set aside, and that the seventh be directed to repay the purchase price of N$5,500,000.00 she had received in respect of the sale of her shares in the fourth respondent:

7.1.1 to the third respondent, in the event of relief being granted to the effect that the share register of the third respondent be rectified to reflect the applicant as the sole shareholder of the third respondent and the first and second respondents be removed as directors of the third respondent;

7.1.2 alternatively, to the applicant in the event of the share register not being rectified and the first and second respondents not being removed as directors as set out in paragraph (7.7.1) above.

7.2 That the shareholding in the fourth respondent be transferred to the seventh respondent against payment of the said amount of N$5,500,000.00 as aforesaid.

7.3 That the applicant and the first and second respondents be removed as directors of the fourth respondent.

7.4 That the lease agreement in favour of the second respondent in respect of Farm Eensgezind No. 97, District of Okahandja, be declared null and void.

7.5 That, in the event of payment as set out in prayer 7.1 not being made within 30 days of the date of the order made in terms of prayer 7.1:

7.5.1 judgment be granted against the seventh respondent for the amount of N$5,500,000.00 in favour of the third respondent in the event of an order made in terms of paragraph 7.1.1, alternatively in favour of the applicant in the event of an order in terms of paragraph 7.1.2;

7.5.2 that transfer of the shares in the fourth respondent as aforementioned be effected to the seventh respondent and that the Deputy Sheriff for the district of Windhoek be authorized and directed to sign and execute all deeds and documents necessary to give effect to such transfer;

7.5.3 that the shares in the fourth respondent, after transfer thereof to the seventh respondent are declared to be executable in favour of the third respondent, alternatively in favour of the applicant in terms of and so as to accord with judgment granted by the court in terms of either paragraphs 7.1.1 or 7.1.2 and that the seventh respondent be directed not to transfer to anyone or otherwise encumber or alienate, those shares in the hands of the seventh respondent until those are judicially attached in terms of the order granted declaring them executable as aforesaid.

8. That such party/parties that may oppose this application bear the costs thereof jointly and severally, such costs to include the cost occasioned by the appointment of one instructing and two instructed counsel.

9. Such further or alternative relief as the Honourable Court may deem fit.’

[3] The first, second, third, fourth, fifth and seventh respondents filed notices to oppose the application. The fifth and seventh respondents filed no answering papers and took no part in the proceedings before me.

[4] Answering papers were filed by the first, second, third and fourth respondents. The applicant filed a replying affidavit.

[5] When the matter was called before me, the applicant was represented by Mr Tötemeyer SC and Mrs van der Westhuizen for the applicant. The first, second, third and fourth respondents were represented by Mr T. Barnard.

[6] In order for me to place the issues in perspective it becomes necessary to record the relevant background and recent history of the farm. They are by way of summary, the following:

6.1 As at the year 2010, the farm was owned by the seventh respondent. It was on the market at a selling price of N$5,500.000.00 (Five million and Five Hundred Thousand Namibian dollars).

6.2 The applicant, who is a German national, contemplated at the time to acquire land in Namibia where he could conduct farming operations upon his retirement, which was imminent, relatively speaking.

6.3 The farm “Eensgezind” appealed to him as an attractive proposition and the set about acquiring it. Given the fact that the applicant is a national of a foreign country, the provisions of sections 58 and 59 of the Agricultural (Commercial) Land Reform Act, 1995, Act 6 of 1995 presented a hurdle to be overcome. Of particular relevance in the context of the case is section 58(9) of the Act which reads as follows:

> ‘(2) If at any time after the commencement of this Act, the controlling interest in any company or close corporation, which is the owner of agricultural land passes to any foreign national, it shall be deemed for the purposes of subsection (1)(a), that such company or close corporation acquired the agricultural land in question on the date on which the controlling interest so passed.’

[7] Section 58(1)(a) in turn prohibits a foreign national from acquiring agricultural land in Namibia, without the prior written consent of the Minister of Lands, Resettlement and Rehabilitation. The term “controlling interest” in a company means more than 50 per cent of the issued share capital of the company, more than half of the voting rights in respect of the issued shares of the company or the power directly or indirectly to appoint or remove the majority of the directors of the company without the concurrence of any other person.

[8] The applicant sought and obtained the services of the first respondent. She was known to him in a professional capacity as a bookkeeper for his assets and investments in Namibia. It is clear also from the answering affidavit deposed to by the first respondent that at various times the advice of practicing lawyers was sought and obtained. A series of transactions were discussed and considered. At some stage for instance the idea was mooted that the applicant will donate 51 of the shareholding in any company which acquired the farm to the first and eight respondents. This prompted the first respondent to address an e-mail to the applicant, in which she remarked that such a transaction will be on “on paper only”. The idea was jettisoned on the basis that a sale of the shares, as opposed to a donation will lend legitimacy to the transactions.

[9] In the end a number of agreements were concluded with the aim to bring the acquisition of the farm within the framework of the Act, these were the following:

9.1 The seventh respondent donated the farm to a close corporation styled Weissdorn Farming CC.

9.2 Weissdorn CC was then converted into a private company styled Weissdorn Farming (Pty) Ltd, the fourth respondent. The seventh respondent was the sole shareholder and director of the company.

9.3 A company styled Olea Investments (Pty) Ltd, the third respondent, was then acquired. The applicant took up 49 per cent of the issued shares. The remaining 51 per cent was taken up by the first and eight respondents.

9.4 The third respondent then acquired the entire shareholding in the fourth respondent, held by the seventh respondent for the purchase price of N$ 5,500.000.00.

9.5 A loan agreement was concluded between the applicant, on the one hand, and the first and eight respondents on the other hand, in terms whereof the applicant lent and advanced the sums of N$ 1,820,000 and N$1,750,000.00 to the first and eight respondents for a period of twelve years. The loans were interest free and the shares held by the fist and eight respondent were offered and accepted as collateral security. The amounts mentioned was to enable the first and eight respondents to purchase the shareholding they required. I pause to mention at this late stage perhaps that the shares held by the eight respondent passed to the second respondent at some stage, subsequent to the first respondent and the eight respondent being divorced.

9.6 A further agreement concluded between the applicant and the first and eight respondents related to the management of the farm. The relevant terms were in inter alia.

9.6.1 The first and eight respondent were responsible to manage the farm, subject to the overall power of the applicant.

9.6.2 The applicant in his sole discretion could sell the farm at a price determined by him to a purchaser of his choice. Upon a sale of the farm the first and eight respondents will be entitled to twenty percent of the proceeds of the sale.

9.7 A lease agreement was concluded with the second respondent who leased the farm.

[10] It is the case for the applicant that the series of transactions I mentioned amounted to simulated transactions.

[11] The respondents argue strenuously that the applicant is wrong. They contend that the transactions were *bona fide* and concluded at arm's length. The centrepiece of this argument as it appears from the affidavit filed by the first respondent is that the

applicant ultimately, came to accept as a fact that he will always be a minority shareholder with the consequences that flow from the fact. This is not supported by the evidence. The applicant was not content to be confined to his role as a minority shareholder. He wanted to and achieved the ultimate control over the farm. To that end he was aided and abetted by the first, second and at times the eighth respondents.

[12] Two fundamental questions require determination. They are:

(1) Are the transactions simulated transactions. If not then *cadit quaestio*;

(2) If the transaction are found to be simulated transactions, what should follow in the wake thereof?

[13] In seeking to determine the true intention of the parties it is necessary to consider the facts and circumstances in their totality. The applicable legal principle is that the parties may arrange their affairs to remain outside the provisions of the Act, but if the purpose is to the disguise the true nature of the transaction, effect will be given to what the real intention of the parties was despite the existence of an agreement or nature of arrangement designed to portray something different. *Strauss vs Labuschane* [1]
As was stated in *Commissioner of Customs* and *Excise vs Renales*, *Brothers and Huason*[2]

'… the parties do not intend in it, inter partes, to have the legal effect which the terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties'.

[14] A determination of the real intention of the parties requires a determination of fact. As was stated in Strauss (supra) at para 47.

'47. Determining whether the contractual sections in the case is a disguised or simulated transaction will require a consideration of whether the parties actually intended that the agreement they concluded in the would have the legal effect as adopted; or whether; in fact they intended their agreement to have a different consequence which they could not express because it would be in conflict with the provisions of the Land Reform Act.

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[1] *Strauss vs Labuschane* 2012 (2) NR 460 SC
[2] *Commissioner of Customs* and *Excise vs Renales*, *Brothers and Huason* 1941 AD. 369

48. In determining, as a matter of fact, whether a particular contractual agreement is simulated or not, the Courts have considered whether the arrangement has an “air of unreality” or “accords with reality “or “contains anomalies” or “are startling”’.

[15] In applying the principles to the facts of the case before me, what emerges from the agreements regarding the shareholding is a picture of a company in which the minority shareholder is a foreigner, the applicant. The majority shareholders are Namibia citizens. In order to acquire the majority shareholding it became necessary to conclude a agreement of loan concluded between the applicant and the first and eight respondents. The agreement reflects that the sums borrowed were lent and advanced as paid in cash yet there is no suggestion that any money changed hands. This was the scheme of arrangement which was portrayed to the outside world.

[16] Inter partes, an entirely different picture emerges. The minority shareholder has the final say as to how the farm should be managed. The applicant, is able to unilaterally decide whether or not sell the farm, to whom it is to be sold and at what price. In regard to those matters the majority shareholders retain no power or contract. What is clear is that, inter partes, the applicant is entitled to make decisions regarding the management and disposal of the farm as if he owned the farm in his own name. That is not how things work in reality when the farm is owned by a corporate entity with a board of directors. Such decisions will in the ordinary course be made by the appointed board and not left to the whims of an individual who is not accountable to anybody for the decisions he made.

[17] A comparison between the agreements relating to the shareholding on the agreement or reflected in the agreement of the parties, produces conclusions which cannot reconciled are anomalous and give rise to startling results.

[18] I am accordingly satisfied that the agreements as drafted are simulated transactions which do not reflect the true intention of the parties to them. I find that the true intention always was that the applicant will effectively be the sole owner of the farm to deal with it as he pleased. The consequence of such a finding is that the agreements

drafted are void *ab initio*. As a further consequence I find that in the process section 59 of the Act was contravened.

[19] What is to follow is to wake of these findings are the procedures mentioned in Section 60 of the Act. These were considered by the Supreme Court in the case of *Denker v Aimeb Rhino Sanctuary (Pty) Ltd and Others*[3]. I will have regard to and follow the approached adopted in paragraphs 66 – 69 of that judgment which read as follows:

'[66] Section 60 contains elaborate provisions as regards the process to be followed when the miner, instead of expropriating the land, choose to order a forced sale. In the first place, it requires of the minister to, in his notice afford the foreign national the opportunity to provide within 90 days of the notice 'an agreement of sale or disposal otherwise of the land concerned to a person who is not by law disqualified from acquiring it.' Only if that fails is the minister empowered to order the sale of the land. Mortgage-holders and others with encumbrances and other real rights over the land must all be given notice of the minister's notice. Due process has therefore been weaved into the procedure to be followed for a forced sale.

67. On the contrary, where expropriation is the alternative chosen by the miner, part IV of the Land Reform Act applies which, similarly but to different outcomes, contains detailed provisions, including the rights of the affected person and third parties with interest in the land.

68. In interpreting s 60, one has to have regard to the safeguards punctiliously weaved into s 60 and to the effect produced by s 58(1)(a). Section 58(1)(a) makes clear that it is 'not competent' for a company in which a foreign national holds a controlling interest to acquire agricultural land in Namibia. In other words, if such a transaction passes throughout the deeds registry, it is pro-non-scripto. It is not capable of conferring rights and obligations as the law presumes it not to have occurred. What the purpose will be of art 18 representation to the minister as contended by Mr Töttemeyer is therefore not clear to me; and in any event, is not supported by the scheme of s 60, which has its own in-built audi provisions, depending on what route the minister chooses to follow. If the suggestion (in other words to make it lawful) otherwise than as contemplated in s 60(2), I cannot agree. That the minister has no alternative other than to either expropriate the land or to order a forced sale is, under the scheme of s 60, an ineluctable legal consequence.

[3] *Denker v Aimeb Rhino Sanctuary (Pty) Ltd and Others* 2017 (4) NR 1173 SC)

69. The legislature clearly appreciated the consequences of non-adherence with s 58(1)(a): if the transaction is deemed not to have occurred, the land in question remains in legal limbo. It cannot revert to the previous owner because he or she was duly paid and has no claim in law to the land. Since the State under the Land Reform Act has the right of first refusal, it is given the option to buy the land. If it chooses to, it must comply with the provisions of part IV of the land Reform Act. The scheme of s 60 recognises though that the state may either not be interested in buying the land concerned, or it may not have the resources to buy the land. In the latter event, and to meet the interests of those who put up the funds to purchase the land-a forced sale is contemplated.'

[20] It is apparent form the papers that in the process of acquiring the farm, the provisions of Section 17 of the Act was contravened. I do not consider it necessary to deal with aspect of the case due to the findings I made regarding the illegality of the acquisition of the farm in the first place. It was argued on behalf of the respondent that, if I were to grant the orders in prayers, 1 and 2 of the Notice of Motion, I will in the process lend legitimacy to what is prohibited by the Act. The purchase of the farm is a hard fact, which cannot be wished away. The argument by the respondents is selective and ignores the fact that in effect the acquisition of the farm is unlawful and in contravention of the Act and is declared to be so.

[21] As far as costs are concerned the applicant seeks a costs order in his favour. I am not inclined to accede to that request. I remain unpersuaded that the applicant is an "innocent bystander". He was either if I may refer to terminology used in criminal law, an accomplice or accessory.

[22] What remains is to consider what orders I should make I appears to me to be appropriate to make the orders being sought in prayer 1 to 5. I will also grant prayer 6 but with the following amendments.

(a) The deletion of the reference to section 17 of the Act and.

(b) The deletion of sub-paragraphs 6.1 and 6.2. It is sufficient in my view that the matter be dealt with in terms of Section 60 in accordance with its own provisions, without the need for the orders which I will delete.

[23] I make the following orders:

(1) Declaring that the transfer of shares in the third respondent to the first and second respondents is a simulated transaction and that, accordingly, the share register of the third respondent be rectified to reflect the applicant as the only shareholder of third respondent.

(2) That the first and second respondents be removed as directors of the third and fourth respondents.

(3) Declaring the purported lease agreement concluded with the second respondent in respect of Farm Eensgezind No. 97, District of Okahandja, a nullity.

(4) An order evicting the first and second respondents from Farm Eensgezind No. 97, District of Okahandja.

(5) That:

5.1 a loan agreement purportedly concluded between the applicant and the first and second respondents as per annexures GW 8 and GW 9 to this application; and

5.2 a management agreement in respect of the third and fourth respondents as per annexures GW 10 and GW 11 to this application; is set aside.

(6) Declaring the acquisition of Farm Eensgezind No. 97, District of Okahandja an illegal and simulated transaction in contravention of the provisions of section 58 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 and that the fifth

respondent be directed to act in accordance with the provisions of section 60 of the Agricultural (Commercial) Land Reform Act, 6 of 1995.

(7) There is no order as to costs

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K MILLER

Acting Judge

APPEARANCES:

APPLICANTS:	R Tötemeyer with CE van der Westhuizen Etzold- Duvenhage
1st – 4th RESPONDENTS:	T Barnard Theunissen, Louw & Partners
5TH RESPONDENT	Office of the Government Attorney