



REPORTABLE

CASE NO: SA 75/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

LOUIS FOURIE

First Appellant

THOMAS ARNOLD EHBRECHT

Second Appellant

and

DIETER MUELLER

First Respondent

JEAN-PIERRE RAMBERT

Second Respondent

SECRET SPRINGS LTD

Third Respondent

SHINYA INVESTMENTS (PTY) LTD

Fourth Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 8 March 2024

Delivered: 14 June 2024

Summary: The second respondent, a foreign national, sought to acquire commercial agricultural land in Namibia. The appellants, owners of the Zebra River Farm in Namibia, intended to sell the farm. They mandated the first respondent to find a purchaser, and he facilitated contact between the parties for this purpose.

Upon the sale of the farm, the first respondent was not paid the estate agent's commission. Aggrieved, he approached the High Court to assert his claim for the payment of the commission. The High Court ruled in favour of the first respondent, granting him the claimed commission, along with interest and costs.

On appeal, the appellants argued that the High Court erred in its finding that the first respondent was entitled to the commission. They contended that the first respondent was not the primary cause of the sale and that intervening events prior to the sale's conclusion effectively cancelled the first respondent's mandate.

In considering the matter, the Supreme Court examined the contractual scheme of the sale and whether it was structured to circumvent s 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995 which prohibits foreign nationals from acquiring a controlling share or full ownership of agricultural land without the consent of the Minister of Agriculture, Water and Land Reform. The sale ultimately resulted in a Namibian-registered trust owning the farm, with the second respondent, a foreign national, being the founder, sole beneficiary, and controlling trustee of the trust.

Held that, the intention of the second respondent as evinced by the record in the proceedings in the High Court and confirmed by counsel on appeal was that Rambert, a foreign national, intended to gain full ownership of the farm.

Held that, based on the facts before this Court the entire scheme amounted to a subterfuge to unlawfully circumvent the prohibition in s 58 of the Act. The acquisition of the farm was accordingly in direct conflict with s 58 of the Act and is illegal and void as a consequence.

Held that, in light of this Court's finding that the transactions amounted to a scheme in *fraudem legis*, it follows that the scheme was illegal and not enforceable and the first respondent is not entitled to estate agent's commission from this illegal scheme. This is based on the ordinary principle that commission is only payable when a valid sale had been concluded, unless there is evidence that suggests a different agreement had been reached. Commission was only payable once a valid transaction had been effected. Since no valid transaction occurred here, the High Court's decision to award the first respondent a commission stood to be set aside.

With regards to costs, it was held that the appellants engaged in a deliberate scheme to circumvent s 58 of the Act. This amounted to acting in fraud of the Act, amounting to dishonesty and improper conduct, warranting the severe censure of this Court. Their fraudulent conduct should thus deprive them of costs both in this Court and in the High Court.

The appeal succeeds with no order as to costs made.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ and SMUTS JA concurring):

Introduction

[1] This matter came before us as an appeal against a judgment of the High Court regarding the question of whether the first respondent, an estate agent, was the effective cause of the sale of a certain immovable property and was thereby entitled to a commission, as was determined by the court a quo. However, as will become apparent in this judgment, our examination of the case revealed additional issues for determination beyond the initial scope of the appeal.

The parties

[2] Mr Louis Fourie and Mr Thomas Ehbrecht, the first and second appellants (second and third defendants a quo) were members of Shinya Investments CC, the fourth respondent and first defendant a quo. In this judgment they are referred to as Fourie and Ehbrecht, respectively, and jointly as the appellants.

[3] The first respondent (plaintiff a quo), is Mr Dieter Mueller, an estate agent employed at Daphne Swanepoel Properties, in Swakopmund, Namibia. He is referred to as Mueller or the first respondent, interchangeably.

[4] Lastly, the second respondent (fourth defendant a quo) is Mr Jean-Pierre Rambert, a Mauritian national and director of Secret Springs Ltd (fifth defendant a quo) at the time preceding the proceedings instituted in the High Court. He is referred to as Rambert.

[5] The only parties who participated in the appeal are the appellants, Fourie and Ehbrecht, and the first respondent, Mueller.

Background

[6] The facts leading to the action proceedings in the court below are thus: During November 2014, Mueller received a mandate from Ehbrecht – which Mueller accepted – to find a purchaser for a farm, described as Consolidated Zebra River Farm, No. 211 in the Hardap Region, Namibia, held under Deed of Transfer No. T

4432/2009 (the farm). The farm was registered in a close corporation, namely Shinya Investments CC, of which Ehbrecht and Fourie held 49 per cent and 51 per cent member's interest respectively.

[7] Mueller, through his employer Daphne Swanepoel of Daphne Swanepoel Properties, was made aware of a foreign national, Rambert, who sought to purchase a farm in Namibia. Thus began correspondence between Mueller, Fourie and Ehbrecht, as well as Mr Frederik Plijnaar (Plijnaar), who was Rambert's representative in the sale negotiations and Mr Alvin Juwaheer (Juwaheer), Rambert's Mauritius-based lawyer.

[8] In the initial correspondence with Rambert and his representative, Daphne Swanepoel informed them about the legal requirements for a foreign national seeking to purchase commercial agricultural land in Namibia. She pointed out that according to s 58(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act), the acquisition of full ownership of agricultural land or a controlling interest in a company or close corporation which is an owner of agricultural land by such national is prohibited, except with the prior written consent of the Minister of Agriculture, Water and Land Reform (the Minister).

[9] Mueller proceeded to arrange for a meeting between the parties and on 10 January 2015 Mueller, Rambert, Plijnaar and Juhaweer visited the farm where they

met the first appellant, Fourie. At the time Fourie was also the manager of the lodge operated on the farm, namely Zebra River Lodge.

[10] During negotiations at the farm, it was agreed that Daphne Swanepoel Properties (DSP) would be entitled to an estate agent's commission should the sale between the parties be concluded. Although DSP initially sought a commission of eight per cent of the purchase price plus 15 per cent VAT, it was finally agreed that the commission would be reduced to N\$600 000 after Rambert committed to employing Mueller's services for envisaged construction and maintenance projects on the farm.

[11] As is invariably the case with arrangements or agreements involving ownership or purchase of interest in land, something went awry. Matters became acrimonious between Mueller and Fourie when it came to Mueller's attention that he was being excluded from negotiations between the parties. Nevertheless, negotiations continued and by 15 February 2015 a deed of sale was signed between Shinya Investments CC and Secret Springs Ltd – a company registered in Mauritius of which Rambert was a director – for the purchase of the farm for the amount of N\$10 million, inclusive of the estate agent's fee of N\$600 000 plus VAT.

[12] The sale agreement was subject to the condition precedent of Rambert obtaining the necessary ministerial consent within four months of signature of the

agreement. To facilitate the sale, Koep & Partners, a Namibian law firm, was instructed to, inter alia, apply for the required consent on behalf of Rambert.

[13] The process to obtain the required ministerial consent did not yield the desired results and the sale agreement lapsed because the condition precedent was not met within the stipulated time period. The parties were however still interested in finalising the sale. In an effort to expedite the process, Fourie proposed a structured sale as part of an offer to sell, which offer was valid until 15 July 2015. The proposed structure was set out in an email by Fourie to the involved parties, including Mueller, on 12 July 2015, the relevant portions of which are replicated below:

- '1) The Buyers take up 49% interest in Shinya Investments CC with immediate effect and Thomas will sign all needed documents to transfer such interest into the name of the Buyers. For this payment of N\$5 million is made into the Bank Account of Shinya Investments CC. This needs to take place within 14 days (or latest 31 July). It is a minority share and the selling price under N\$10 million, so no need for the Competition Commission or any other Government body to approve this sale.
- 2) . . .
- 3) The Buyers form a Namibian Trust, Secret Springs Trust.
- 4) The Buyers appoint three trustworthy **NAMIBIAN** Trustees to 'manage' the Trust for the best interest of the beneficiaries. This is unfortunately what the Law requires (Andre Swanepoel, please confirm?) (Emphasis and use of inverted commas are as in the original).

- 5) Secret Springs Limited becomes 100% Beneficiary of Secret Springs Trust.
- 6) You transfer 100% Interest in Shinya Investments CC (or if you so wish, transfer the Land into your new Namibian Company and make the Trust 100% Shareholder of the new Company) into the name of Secret Springs Trust of which Secret Springs Limited is 100% beneficiary. Upon transfer you pay the balance N\$4.99 Million into our account. This will bring the total selling price to N\$11.1 million which is what you were willing to pay had you bought 100% in the first place.
- 7) You continue with the process (waiver application) to own the majority share, but even if you fail for now, times will change and this current situation will blow over and once you have proven yourselves worthy investors the Government will look at you through different eyes. Unfortunate we as sellers cannot wait for this to happen.
- 8) Due to serious time constraints on our part, our offer is valid until midnight (Namibian time) on Wednesday, 15 July 2015.'

[14] A minor digression is justified to point out that 'Thomas' referred to in subpara 1 above is Ehbrecht. Fourie proposed the structured sale because he believed that the ministerial consent would not be forthcoming, as he stated in another email to the parties on the same date:

'Another 4 months and it will still come to the same conclusion as there is no way on God's earth they will get permission to buy 90% except the way that has been suggested by our lawyer Andre Swanepoel. I have dealt with this type of situation in the past and to give you an example, Peggy Dulany (Margareth Rockerfeller) owns Fish River Lodge, 45000 ha of land along the Fish River Canyon, in a similar Trust (Canyon Nature Trust) and as the name suggests, you only need Trustees you can **TRUST** then you actually own 100% of the land. She is the daughter of an American

billionaire, David Rockefeller, so if it worked for her, why not [Rambert]? I was instrumental in the entire process of buying the land and setting up the Trust and have a lot of experience with this.' (The emphasis is Fourie's).

[15] Facing financial pressures from the bank, Fourie aimed to finalise the sale by no later than 31 August 2015, advising in the same email that failure to conclude the sale by then would result in the farm being sold at auction.

[16] On 16 July 2015 Fourie informed the parties by email that the offer as recorded in his email of 12 July 2015 had lapsed. The parties however continued to negotiate the sale of the farm.

[17] An auction for the sale of the farm (or the members' interest in Shinya Investments CC) was subsequently scheduled for 8 October 2015. On the same date, an offer to purchase was concluded between Marck Investments One (Pty) Ltd and Rambert as the offeror, and Shinya Investments CC as the offeree. The agreed purchase price was set at N\$12 million (of which N\$1 million had already been paid into the trust account of Koep & Partners). Rambert would pay N\$6 million for Ehbrecht's 49 per cent member's interest in Shinya Investments CC, with the balance to be paid upon transfer of Ehbrecht's member's interest to Rambert.

[18] The offer to purchase further stipulated that upon payment of the full purchase price, Rambert and Fourie would convert Shinya Investments CC into a private company. Following the conversion, Rambert or his nominee would acquire all the

shares in the new company in terms of a sale of shares agreement to be signed by the parties.

[19] On 2 November 2015, a deed of sale between Rambert and Fourie was concluded in terms whereof Fourie sold his 49 per cent member's interest to Rambert for N\$6 million. (The Deed of Sale does not reference an estate agent or include any provision for the payment of an estate agent's commission).

[20] By the end of 2016 and following multiple alterations in the structure of the registered ownership of the farm (which will be outlined below), the controlling interest in the farm was registered in Marck One Investment (Pty) Ltd with the Secret Springs Trust as sole shareholder.

[21] Upon learning about the change in ownership of the farm and being aggrieved by not receiving the estate agent's commission it felt entitled to, DSP opted to pursue legal action against Fourie and Ehbrecht. DSP ceded its claim for the commission to Mueller who instituted proceedings in the High Court.

Proceedings in the High Court

[22] Mueller's claim was for payment by the appellants, jointly, for an estate agent's commission in the sum of 8 per cent of the purchase price of the property/member's interest with 15 per cent VAT, as well as interest thereon and costs.

[23] Fourie and Ehbrecht defended the claim and refuted Mueller's allegations that they had instructed him, either verbally or otherwise, to secure a buyer for the farm. They also asserted that Fourie had merely expressed to Mueller that he would *consider* an offer to purchase the farm.

[24] The matter proceeded to trial on 27 September 2019, and continued on 11 March 2021 after the appellants' application for absolution was dismissed by the court a quo. During the trial, Mueller gave evidence and called Plijnaar (Rambert's representative), Daphne Swanepoel (his employer) and Rambert as witnesses. Fourie and Ehbrecht testified on behalf of the defendants.

[25] During the trial, Mueller's mandate was not disputed. In argument, counsel for the appellants conceded that the first respondent was indeed mandated to find a purchaser for the farm on behalf of the sellers. However, it was argued that an 'intervening cause', specifically the expiration of the initial agreement, led to the termination of the mandate.

[26] The High Court found in favour of Mueller and granted judgment as prayed for. In its judgment, the court applied the principles set out in *Key Properties (Pty) Ltd v Lamprecht & another*¹ in determining whether or not DSP was the effective cause of the sale of the farm. It found in the affirmative stating the following:

[38] In this matter it can safely be concluded that most of the effort to realise the first sale was done by the Plaintiff and Daphne Swanepoel and this ultimately led to

¹ *Key Properties (Pty) Ltd v Lamprecht & another* 1996 NR 197 (HC).

the telephone call by the representative of the 4th defendant to 2nd defendant just before the auction. The Auctioneer in this matter merely attended to the signing of the agreement between the parties who were already known to each other thanks to the introduction by Daphne Swanepoel Properties. It is as stated by Judge Parker in *Stefan Loftie-Eaton t/a SLE Properties v Andrew Fordred NO and Another*, Case no I634/2011 delivered on 2012 June 20:

“What is significant in my view, is that Senior did come into the scene after Simone had done all the donkey work, to use a pedestrian language, just to pick up the fruits that have dropped to the ground, through Simone’s effective work; . . .”

[39] It is my considered view that the introduction was still “overridingly operative” at the time the counter offer was made and when the sale was concluded and thus the effective cause of the sale which took place on 8 October 2015.’

[27] Regarding the legality of the sale contracted between the relevant parties, the court remarked thereon as follows:

‘The court raised its concern regarding the legality of the 2nd and 3rd agreements and asked the parties to address it on this issue. Counsel for the defendants submitted that the agreements do not constitute a contravention of the Agricultural (Commercial) Land Reform Act 6 of 1995. I make no finding in this regard but I am of the view that this is a matter which should be brought to the attention of the Ministry of Lands and Resettlement and a copy of this judgment will be forwarded to the office of the said Minister.’

[28] The court a quo was correct to have flagged the transaction and to have directed the parties to address it on the legality of the scheme. However, it erred in not making a finding thereon after it had received counsel’s submissions on the legal

question. In any event, the court's remarks in the above paragraph demonstrate that the legality of the contractual scheme was indeed a live issue in the court below.

Grounds of appeal

[29] The appellants contended that the court erred in concluding that DSP or the first respondent was the primary cause of the sale after the original sale agreement lapsed, in disregarding clause 3.4 of the deed of sale, which specified that if the conditions precedent were not met within 120 days of signing, the agreement would terminate and neither party would retain any rights or obligations as outlined in the Deed of Sale.

[30] Additionally, they asserted that the court overlooked two intervening events that effectively terminated DSP's or the first respondent's mandate: the expiration of the initial deed of sale and the appellants' decision to schedule an auction, which led to the final sale agreement on 8 October 2015.

[31] The appellants also contended that the court erred in finding that there was no proof of the mandate's cancellation; that the auctioneer had an exclusive mandate for the auction; and that the Minister's consent was refused when in fact, no consent was obtained and the agreement lapsed.

[32] It was argued in the alternative that if this Court confirms the High Court's ruling that the estate agent was indeed the effective cause for the sale, then the appellants would contend that the court erred in its determination of the rate of

commission. The court awarded the first respondent commission at the rate of 8 per cent of the purchase price without evidence of an agreed rate between the parties, simply accepting Daphne Swanepoel's testimony that 8 per cent is the standard rate. Moreover, they argued that the decision to impose the estate agent's commission solely on the appellants and not also on the purchaser, was also incorrect.

[33] The first respondent opposed the appeal and supported the judgment and order a quo.

The contractual scheme

[34] Prior to the hearing of the appeal, this Court directed the parties as well as other dramatis personae to file written heads of argument on the legality of the contractual scheme which led to the effective change of ownership of the agricultural land without the Minister's consent. The question posed by the Court was the following:

'Whether the contractual scheme which led to the effective change of ownership of the agricultural land in question is valid and enforceable and whether or not, it is in conflict with Act 6 of 1995, as amended.'

[35] The contractual scheme may be summarised as follows:

Transfer of member's interest from Ehbrecht to Rambert in Shinya Investments

CC

- (i) On 2 November 2015 a deed of sale was executed between Rambert and Ehbrecht, whereby Rambert acquired Ehbrecht's 49 per cent member's interest in Shinya Investments CC (the entity in the name of which the farm was registered). The change in member's interest was formally documented with an amended founding statement issued on 18 November 2015.

Conversion of Shinya Investments CC to a private company

- (ii) On 4 February 2016, Fourie and Rambert – as members of Shinya Investments CC – resolved to apply for the conversion of Shinya Investments CC from a close corporation to a private company with limited liability in terms of s 27(9) of the Close Corporations Act 26 of 1988. Consequently, the entity was registered as Shinya Investments (Pty) Ltd on 14 June 2016, with Rambert and Fourie holding 49 and 51 ordinary shares, respectively.

The Secret Springs Trust

- (iii) On 14 December 2015 the Secret Springs Trust was registered with the Master of the High Court, founded by Rambert. As founder, Rambert, in terms of the Deed of Trust, may at his sole discretion amend the Deed; appoint or remove trustees; nominate new beneficiaries of the Trust and amend Annexure "A" to the Deed, which lists the powers of the trustees.

- (iv) Rambert is mandated to be present for trustee meetings to reach a quorum, and decisions are made by unanimous vote. In the event of a tie in votes, the Chairperson – identified as Rambert in clause 2.2.4 of the Deed – shall have the casting vote.
- (v) The trust has broad powers to acquire assets, establish entities, and form other trusts globally.
- (vi) In terms of the Trust Deed, the first trustees of the Trust were Rambert, Fourie and Hugo Meyer van den Berg (Van den Berg), a legal practitioner at Koep & Partners who facilitated the sale between the parties. Clause 3.3 of the deed records Rambert as the sole beneficiary of the Trust.
- (vii) The composition of the trustees subsequently changed, with the substitution of Fourie for one Jeanette Margaretha Lubbe.
- (viii) Secret Springs Trust became the sole shareholder of Marck Investments One (Pty) Ltd (Marck Investments) with Rambert and Van den Berg serving as directors.
- (ix) On 8 September 2016, Shinya Investments (Pty) Ltd issued share certificates indicating that Marck Investments acquired 51 and 49

ordinary shares in the company, previously held by Fourie and Rambert.

This transfer was recorded in the Register of Members Share Transfers.

- (x) Marck Investments thus became the sole shareholder of Shinya Investments (Pty) Ltd, the registered owner of the farm.

[36] The outlined contractual scheme effectively culminated in the Secret Springs Trust, through its sole shareholding in Marck Investments, becoming the controlling entity in the company. As such, all the company's assets, including the Zebra River Farm, were ultimately controlled by the Secret Springs Trust, of which Rambert is the founder, sole beneficiary and effectively the controlling trustee of the Trust.

Submissions on appeal

[37] Of immediate relevance to this judgment are the parties' submissions pertaining to the legality of the contractual scheme which resulted in the effective change of ownership of the Farm Zebra River. This is so because this point of law alone may well dispose of the appeal.

Submissions on behalf of the appellants

[38] The written heads of argument prepared on behalf of the appellants were rather terse and essentially boiled down to the contention that the 'controlling interest at all relevant times was held by Namibian nationals and not foreign nationals, with the foreign national only being the beneficiary of the trust at the end'.

[39] It was however conceded during oral argument that in considering the judgments of this Court in *Strauss & another v Labuschagne*² and *Ellis & others NNO v Naobeb*³ it would appear that the contractual scheme was not valid and enforceable in the circumstances, and in the event of this Court finding that this was the position, then it was accepted that the matter be remitted to the Minister for the latter to consider exercising the powers conferred on him by s 60 of the Act.

[40] In answer to questions posed by the Court on the overall effect of the arrangement on ownership of the farm, counsel conceded that following the subsequent transfer of shares, Rambert, a foreign national, was granted complete beneficial ownership of the farm as the sole beneficiary of the Secret Springs Trust.

[41] When the Court enquired on the implications for the parties if the transactions were to be declared void *ab initio*, counsel reiterated that the Court was entitled to refer the matter to the Minister.

Submissions on behalf of the first respondent

[42] Counsel for the first respondent urged the Court to recognise the mandate agreement as a distinct and independent contract, separate from the other agreements that led to the change in ownership of the farm. The payment of commission was tied specifically to the task of locating a purchaser, with payment

² *Strauss & another v Labuschagne* 2012 (2) NR 460 (SC) (*Strauss*).

³ *Ellis & others NNO v Naobeb* 2015 (2) NR 325 (HC). Counsel for the appellants did not appear to have noticed at the time of the filing of the heads of argument that the High Court judgment in this matter was reversed on appeal.

due upon the successful transfer and registration of the 49 per cent member's interest, irrespective of other related transactions. It was contended that this arrangement, focusing solely on the transfer of the 49 per cent member's interest, remained valid and enforceable without requiring ministerial approval.

[43] To buttress this point, counsel referred to clause 2.4.3 of the offer to purchase agreement which reads: 'The agent's entitlement to commission is not dependent on the transaction proceeding in terms of clause 2.3 above'. (Clause 2.3 of the agreement deals with the conversion of the close corporation to a private company). The first respondent, not being privy to subsequent changes in ownership, was said to be entitled to commission based solely on this specific transaction.

[44] If the Court were to find other parts of the contractual framework – such as the transfer of the remaining 51 per cent shares – to be invalid, it was argued that the mandate agreement could still stand independently, ensuring the first respondent's right to commission.

[45] During oral argument, counsel reaffirmed that the first respondent's commission was due upon the transfer of the 49 per cent member's interest, regardless of the legality of the subsequent transactions. It was argued that it was not for this Court to determine the legality of the contractual scheme as such legality was neither fully ventilated in the court a quo nor raised by the appellants on appeal. When pressed on the potential illegality of the overall scheme, counsel cited *Marot &*

*others v Cotterell*⁴, arguing that the validity of the share register remained even if the underlying contract may be illegal.

[46] Furthermore, counsel contended that the Act was silent on trusts, as s 58 of the Act prohibiting foreigners from holding a controlling interest in Namibian agricultural land through companies or close corporations did not explicitly extend this restriction to trusts where the trustees, if Namibian, hold the trust capital, even if the beneficiary is a foreign national. Counsel contended that in such an instance the structural scheme is lawful and does not contravene s 58 of the Act.

Disposition

[47] The determination of this appeal hinges on whether the contractual arrangement for effectively transferring ownership of the farm was deliberately structured to circumvent the Act's provisions concerning the acquisition of agricultural land by a foreign national.

[48] The legislative purpose of the Agricultural (Commercial) Land Reform Act 6 of 1995, is to enable the State to acquire agricultural land for land reform, ensuring that such land is allocated to Namibian citizens, particularly those who do not own or have enough agricultural land and those disadvantaged by past discriminatory practices. To this end, the Act, inter alia, regulates the acquisition of agricultural land by foreign nationals.

⁴ *Marot & others v Cotterell* 2014 (2) NR 340 (SC).

[49] The restriction on the acquisition of agricultural land by foreign nationals is contained in s 58 of the Act, which provides as follows:

'58. (1) Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the date of commencement of this Part, without the prior written consent of the Minister, be competent-

(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or

(b) . . .

(2) If at any time after the commencement of this Part 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.'

[50] A controlling interest, as referred to in s 58(2) is defined in the Act as follows:

“controlling interest”, in relation to –

(a) a company, means-

(i) more than 50 per cent of the issued share capital of the company;

(ii) more than half of the voting rights in respect of the issued shares of the company; or

- (iii) the power, either directly or indirectly, to appoint or remove the majority of the directors of the company without the concurrence of any other person; or
- (b) a close corporation, means more than 50 per cent of the interest in the close corporation.'

[51] It is apparent from the provisions above that the acquisition of agricultural land by foreign nationals without prior consent of the Minister is prohibited. It is common cause that ministerial consent had not been obtained in the transaction now under consideration. Thus, the pivotal issue is whether the contractual arrangement was crafted to skirt the requirements of s 58 and to misrepresent the parties' actual intent in concluding the transactions.

[52] This Court, in its recent ruling in *Bergh & others v Wohlfart & others*⁵ dealing with the provisions of s 58 of the Act, reaffirmed the criteria for identifying a simulated transaction as established by Watermeyer JA in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd*:⁶

'A disguised transaction in the sense in which the words are used above is something different. In essence, it is a dishonest transaction: dishonest, inasmuch as the parties to it do not really intend it to have, inter partes, the legal effect which its 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. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to

⁵ *Bergh & others v Wohlfart & others* (SA 54-2021) [2024] NASC (3 April 2024).

⁶ *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 SA 369 (AD) at 395 – 396.

the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a transaction is said to be in *fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.'

[53] Counsel for the first respondent rightly observed that the Act does not specifically refer to trusts. The pivotal inquiry, nevertheless, is to determine the real intention behind the parties' decision to structure the ownership as they did and whether or not the scheme so elaborately crafted falls foul of the prohibition contained in s 58 of the Act.

[54] Rambert's intention, as evinced by the record of the proceedings in the High Court and confirmed by counsel for the appellants on appeal was to gain full ownership of the farm. This intention is clearly articulated by Rambert himself (through an interpreter) in the following extract from the transcribed record during his examination-in-chief:

'INTERPRETER: Your Honour, what [Rambert] is saying, he is saying he does not know if you want to know how he, how he purchased the property. He said he purchased the property from the (intervention).

COURT: No, I just want him to say whatever is not correct in that statement this is his opportunity to correct it.

INTERPRETER: Yes, Your Honour.
So I instructed Mr Mueller who introduced me to Mr. Fourie, this is correct. But I do not know for, I bought it through, I bought it

[from] Mr Thomas okay, *I bought the whole thing* through my lawyer through the bank (indistinct). How do you call it? --- Through auction.

MR SWANEPOEL: Mr. Rambert you stated that you purchased 49% or acquired 49% of Shinya. --- Yes.

Did you also acquire the other 51% and how did you acquire it?

INTERPRETER: Okay. He said that he got the other 51% through the company that is called Shinya.'

[55] The testimony further continued as follows:

'MR SWANEPOEL: Your Namibian company, Mark Investments, I just want to confirm with you that your, you have a trust, is that correct, called Secret Springs Trust?

INTERPRETER: Yes.

MR SWANEPOEL: It is a Namibian Trust?

INTERPRETER: It is a Namibian Trust, yes.

MR SWANEPOEL: And you have stated, and this Namibian Trust, does this Namibian Trust own 41% of Mark Investments?

INTERPRETER: 51.

...

MR SWANEPOEL: And then page 136 and there you see Secrets Springs Limited. Is that your off shore company? Is that correct?

INTERPRETER: Yes.

MR SWANEPOEL: Is it correct that, that company owns 49% of Marks Investments?

INTERPRETER: Yes.'

[56] During cross-examination Rambert testified as follows regarding his ownership of the farm:

'MR BOEASAK: . . . Okay, Mr Rambert you bought the farm and you have explained how, My Learned Colleague took you through the documents [on] how *you acquired 100%* of [the] farm, is it Farm Zebra, right?

INTERPRETER: Yes.

. . .

MR BOESAK: So what was the idea for you to come to Namibia?

INTERPRETER: It is because *I wanted to buy a farm here in Namibia. I came to see the farm that I could buy here in Namibia.*'

[57] It was always Rambert's intention to obtain full ownership of the farm. The proverbial wrench in the gears of Rambert's plan to acquire the farm was the Minister's delay in deciding whether or not to grant the requisite consent as the appellants were desirous of completing the sale without delay.

[58] Fourie, guided by legal advice and past experiences, suggested a plan which would enable the parties to proverbially kill two birds with one stone: facilitating the

effective transfer of ownership interest and circumventing the prohibition contained in s 58 of the Act.

[59] The final structure in the stratagem, the Secret Sprigs Trust, positioned Rambert as the controlling trustee and the sole beneficiary, essentially granting him effective ownership and the controlling interest as defined by s 1(a)(iii) of the Act. Rambert controlled the trust, which is the sole shareholder of Marck Investments. As the sole beneficiary of the trust, he is the ultimate beneficial owner of the shares in Marck Investments.

[60] The trust deed's terms suggest that the two Namibian trustees serve in mere nominal roles, seemingly superfluous appendages to the trust's structure and powerless. In his position as the controlling trustee, Rambert has the power to indirectly appoint and remove directors of Marck Investments and thus holding the controlling interest in the company as envisaged in s 1(a)(iii).

[61] In *Strauss*⁷, this Court distinguished between evading and avoiding a statutory requirement, which is a distinction critical to this case:

'Although there is no doubt that people may arrange their affairs to avoid statutory prohibitions, the arrangement of their affairs must not result in a simulated transaction. As Innes CJ reasoned in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 548:

⁷ Para 44.

“(P)arties may genuinely arrange their transactions so as to remain outside its provisions. Such a procedure is, in the nature of things, perfectly legitimate. There is nothing in the authorities, as I understand them, to forbid it. Nor can it be rendered illegitimate by the mere fact that the parties intend to avoid the operation of the law, and that the selected course is as convenient in its result as another which would have brought them within it. An attempted evasion, however, may proceed along other lines. The transaction contemplated may in truth be within the provisions of the statute, but the parties may call it by a name or cloak it in a guise, calculated to escape those provisions. Such a transaction would be in *fraudem legis*; the Court would strip off its form and disclose its real nature, and the law would operate.”

[62] On the facts before this Court, the entire scheme amounts to a subterfuge to unlawfully circumvent the prohibition in s 58 of the Act. The acquisition of the farm was accordingly in direct conflict with s 58 of the Act and is illegal and void as a consequence.

[63] Once s 58 has been breached, the legislature has provided for a statutory remedy in s 60 of the Act, which outlines the procedures when agricultural land is acquired by a foreign national or nominee owner in violation of the Act. If such a violation occurs, the Minister may order the sale of the land, unless the State decides to acquire it. The procedure to be followed in a transaction that violates s 58(1)(a) and the consequences thereof were summarised in *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others*⁸ as follows:

⁸ *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others* 2017 (4) NR 1173 (SC) para 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.'

[64] Once a court has found that a transaction involving ownership of agricultural land was entered into in violation of s 58 of the Act, the court is duty bound to bring such a transgression to the attention of the Minister for the Minister to exercise the powers conferred on him or her by s 60 of the Act. This is the approach this Court should adopt. The focus should next turn on the question of whether, despite the finding that the contractual scheme leading to the effective change of ownership of the agricultural land in question was illegal, the first respondent is still entitled to the payment of a commission.

Is there scope for the payment of a commission?

[65] Counsel for the first respondent's argument that it was not for this Court to consider the legality of the contractual scheme because it was neither decided in the court a quo nor raised by the appellants is untenable. Where a point of law is apparent from the papers – as is the case in this matter – a court is not only entitled,

but is in fact also obliged to raise the point of law, of its own volition, and require the parties to deal therewith.⁹

[66] Counsel for the first respondent's contention that the 'legal' or 'valid portion' of the scheme can be severed in some manner to justify the first respondent's claim for commission is likewise untenable. The transactions amounting to the sale of the farm to Rambert are to be considered in their entirety. In light of this Court's finding that the transactions amounted to a scheme in *fraudem legis*, it follows that the first respondent is not entitled to estate agent's commission from this illegal scheme.

[67] This finding is based on the ordinary principle that commission is only payable when a valid sale has been concluded, unless there is evidence that suggests a different agreement had been reached.¹⁰ Commission is thus only payable once a valid transaction has been effected. Since no valid transaction occurred here, the High Court's decision to award the first respondent a commission stands to be set aside.

Condonation

[68] It remains finally to decide the applications for condonation filed by the parties for the failure to comply with the rules of court. The High Court delivered its order on 3 August 2021 followed by its reasons for the order on 13 August 2021. In terms of rule 7(1) of the Rules of this Court, the notice of appeal had to be filed within 21 days of

⁹ *CUSA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC) para 68.

¹⁰ *Strauss* para 60.

the delivery of the order, i e by 2 September 2021. The notice of appeal was belatedly filed on 13 September 2021. The explanation for this non-compliance is that the appellants' legal practitioner mistakenly believed that the notice of appeal had to be filed within 21 days of the delivery of the reasons for the judgment.

[69] The record too was belatedly filed on 16 November 2021, which was more than the three months prescribed by the rules. A bond of security was filed together with the record. However, a new bond of security was filed on 9 December 2021 as the parties could initially not agree on the amount to be furnished.

[70] The appellants' legal practitioner continued under the mistaken belief regarding the timelines for filing the notice of appeal and the record until they were informed by the registrar of this Court, in a letter dated 17 May 2022, that due to the appellants' non-compliance with the applicable rules and their failure to seek condonation for the non-compliances, the appeal was deemed withdrawn. Just under a month later, on 10 June 2022, the appellants filed the application for condonation and reinstatement of the appeal. The delay in filing the application was attributed to instructed counsel being out of the country on a work-related trip at the time and only being available to prepare the application the following week.

[71] The first respondent opposed the application. In the answering affidavit it is averred, inter alia, that the first respondent's legal practitioner alerted the appellants'

legal practitioner by letter dated 17 September 2021 that the appeal was noted out of time.

[72] The appellants filed a conditional replying affidavit, raising a point in limine that, according to rule 5(2), the first respondent's answering affidavit should have been filed within ten days of the service of the condonation application. In response, the first respondent filed a condonation application for the late filing of the answering affidavit, explaining that his legal practitioner had been preoccupied with other matters related to the case and had overlooked the rule requiring the answering affidavit to be filed within ten days. The legal practitioner first became aware of this rule when it was mentioned in the replying affidavit delivered to him on 20 October 2022. The condonation application was subsequently filed on 2 November 2022.

[73] This Court is once again confronted with a deeply concerning trend of parties failing to comply with court rules due to legal practitioners not familiarising themselves with the rules. The first duty cast upon a practitioner taking instructions to appeal to this Court is to acquaint himself or herself with the rules of this Court.¹¹ The recurring neglect to read the rules has become intolerable.

[74] The explanation for the late filing of the notice to appeal and the record is most unsatisfactory. To add insult to injury, the delay in filing the notice to appeal was brought to the attention of the appellants' legal practitioner by the first respondent's

¹¹ *Martin v Shoprite Namibia (Pty) Ltd* (SA 14-2019) 2020 NASC 46 (4 December 2020).

legal practitioner, but inexplicably this did not lead to the immediate filing of a condonation application. And even when informed that the appeal was deemed withdrawn by the registrar, it took a further three weeks for the appellants to file a condonation and reinstatement application, notwithstanding the requirement that a litigant seeking condonation should launch such an application without delay.¹²

[75] Although the explanation for the delay is woefully inadequate, having considered the merits of the matter as discussed in this judgment which, in the circumstances, render the appeal successful, this is a matter where condonation and reinstatement of the appeal ought, albeit with great reluctance, to be granted despite an unsatisfactory explanation for non-compliance with the rules.

Costs

[76] The general rule regarding costs dictates that costs should follow the result. Whilst the appellants enjoy a measure of success because the judgment and order of the High Court are to be set aside and replaced with an order dismissing the first respondent's claim for commission, this would not be an instance to apply the general rule. Misconduct of parties in a matter can justify a court's departure from the general rule on costs where a court is satisfied that a party or parties acted improperly, dishonestly or in a discreditable manner.¹³

¹² *De Klerk v Penderis & others* 2023 (1) NR 177 (SC) para 21.

¹³ *Moolman & another v Jeandre Development CC* 2016 (2) NR 322 (SC) para 94.

[77] In this instance, the appellants engaged in a deliberate scheme to circumvent s 58 of the Act. This amounts to acting in fraud of the Act, amounting to dishonest and improper conduct, warranting the severe censure of this Court. Their fraudulent conduct should thus deprive them of costs both in this Court and in the High Court.

Order

[78] In the result, the following order is made:

- (a) The first and second appellants' condonation application is granted and the appeal is reinstated.
- (b) The first respondent's condonation application is granted.
- (c) The appeal succeeds and the judgment and order of the High Court are set aside and the following order is substituted therefor:
 - '(i) The plaintiff's claim against the first and second defendants is dismissed.
 - (ii) The transfer of shares from the second respondent to Jean-Pierre Rambert and all other transactions flowing therefrom resulting in the

change of ownership of Consolidated Zebra River Farm, No. 211, Hardap Region are declared *void ab initio*.

- (iii) No order as to costs is made.'
- (d) The registrar is directed to furnish the Minister of Agriculture, Water and Land Reform (the Minister) with a copy of this judgment.
- (e) The Minister is directed to exercise his powers in respect of the property described as Consolidated Zebra River Farm, No. 211 in the Hardap Region, Namibia, held under Deed of Transfer No. T 4432/2009 in accordance with the provisions of s 60 of the Agricultural (Commercial) Land Reform Act 6 of 1995 taking into account the findings made in this judgment on the contractual scheme leading to the effective change of ownership of the agricultural land in question.
- (f) No order as to costs in this Court is made.

DAMASEB DCJ

SMUTS JA

APPEARANCES

APPELLANTS:

A W Boesak

Instructed by Dr Weder, Kauta & Hoveka Inc.

FIRST RESPONDENT:

P J Swanepoel

of Philip Swanepoel Legal Practitioners