REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 41/2014

In the matter between:

KAI-UWE DENKER	**APPLICANT**

And

AMEIB RHINO SANCTUARY (PTY) LTD	**1ST RESPONDENT**
REGISTRAR OF COMPANIES	**2ND RESPONDENT**
THE TRUSTEE OF THE MICHAEL VILJOEN TRUST	**3RD RESPONDENT**
MINISTER OF LANDS & RESETTLEMENT	**4TH RESPONDENT**
MICHAEL HERCULES VILJOEN	**5TH RESPONDENT**

Neutral citation: *Kai-Uwe Denker // Ameib Rhino Sanctuary (Pty) Ltd and 4 Others* (A 41/2014) [2016] NAHCMD 82 (11 March 2016)

Coram: UEITELE, J

Heard: 2 December 2015

Delivered on: 11 March 2016

Reasons released on 24 March 2016

Flynote: ***Company*** - Shares - Rectification of register - Application for rectification of the register in terms of s 122 of the Companies Act, 2004 - The power given to the court under the section is a discretionary one - The discretion to be exercised by the court, only if court is satisfied of the justice of the case.

Sale of land - Foreign national holding 50% in a company registered in Namibia - Company in which a Namibian national does not hold controlling interest acquiring commercial agricultural land - No consent sought from Minister - The acquisition of the commercial agricultural land is thus in contravention of s58 of the Agricultural (Commercial) Land Reform Act, 1995 - The Minister responsible for Land Reform must accordingly deal with the commercial agricultural land so acquired as contemplated in s 60 of Agricultural (Commercial) Land Reform Act, 1995.

Summary: The applicant brought an application seeking the court to make an order declaring that the transfer of one share in Ameib Rhino Sanctuary Trust (Pty) Ltd from applicant to the Michael Viljoen Trust was unlawful and therefore invalid. Applicant furthermore, seeks an order directing Ameib Rhino Sanctuary Trust (Pty) Ltd to, pursuant to s 122 of the Companies Act, 2004, rectify the register of members by deleting the entry indicating the transfer of the one share (in Ameib) to the Michael Viljoen Trust.

The 5th respondent and the trustees of the Michael Viljoen Trust opposed the application and launched a counter application, in which counter application they seek an order directing that the land owned by Ameib Rhino Sanctuary Trust (Pty) Ltd be dealt with in accordance with s 60 of the Agricultural (Commercial) Land Reform Act, 1995. In the alternative they seek an order placing Ameib under provisional liquidation in the hands of the Master of the High Court.

Held that, it is unconscionable and unjust that Denker must take money from somebody and thereafter attempt to wrestle control of the company from that person. In the circumstances court was not persuaded that justice and equity require that an order for rectification of the register should be made.

ORDER

1 The applicant's application for rectification is dismissed;

2. The applicant must pay the third and fifth respondents' costs (in respect of both the application and the counter application) the costs to include the costs of one instructing and two instructed counsel.

3. The fourth respondent (i.e. The Minister responsible for Land Reform) must deal with the following property namely:

(1) **CERTAIN** PORTION A OF THE FARM AMEIB NO. 60,

SITUATED IN REGISTRATION DIVISION "H"
ERONGO REGION

MAEASURING 14309 (ONE FOUR THREE NIL NINE) HECTARES

HELD BY DEED OF TRANSFER NO. T 4286/2012

(2) **CERTAIN** PORTION B OF THE FARM AMEIB NO. 60,

SITUATED IN REGISTRATION DIVISION "H"
ERONGO REGION

MAEASURING 0001, 3994 (ONE COMMA THREE NINE NINE FOUR) HECTARES

HELD BY DEED OF TRANSFER NO. T 4286/2012

as contemplated in s 60 of the Agricultural (Commercial) Land Reform Act , 1995.

JUDGMENT

UEITELE, J

Introduction

[1] The dispute in this matter relates to the shareholding in a company which is the owner of agricultural (as is defined in the Agricultural (Commercial) Land Reform Act, 1995[1] being Portions A and B of the Farm Ameib No. 60 situated in the Erongo Region (I will, in this judgment, refer to this farm as 'farm Ameib'). The applicant is Mr. Kai-Uwe Denker who is one of the shareholders and a director in the company. I will, in this judgment, refer to the applicant as Denker. On 6th March 2014 Denker commenced proceedings in this court by way of a notice of motion, against Ameib Rhino Sanctuary Trust (Pty) Ltd (I will, in this judgment, refer to this company as Ameib) as first respondent and four other respondents. The relief which Denker seeks from this court is an order which declares that the transfer of one share in Ameib from Denker to the Michael Viljoen Trust, was unlawful and therefore invalid. He furthermore seeks an order directing Ameib to, pursuant to s 122 of the Companies Act, 2004[2], rectify the register of members by deleting the entry indicating the transfer of the one share (in Ameib) to the Michael Viljoen Trust.

[2] The fifth respondent is a certain Michael Viljoen, (who, I will, in this judgement, refer to as Viljoen) he and the trustees for the time being of the Michael Viljoen Trust (the third respondent) opposed the application and launched a counter application in which counter application they seek an order directing that the land owned by Ameib be dealt with in accordance with s 60 of the Agricultural (Commercial) Land Reform Act, 1995. In the alternative they seek an order placing Ameib under provisional liquidation in the hands of the Master of the High Court.

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1 Act No. 6 of 1995.

2 Act No. 28 of 2004.

[3] At the time when Denker launched this application he and the Michael Viljoen Trust were the only shareholders of the company (Ameib), on an equal basis (i.e. on a 50/50 basis). The company also only had two directors namely Denker and Viljoen.

[4] From the pleadings filed of record, the background to the dispute between the main actors who are, Denker and Viljoen, may be summarized as follows: During the year 2010 Ms. Lyndsey Viljoen (I will, in this judgement, refer to her as Lyndsey) who is one of the trustees of the Michael Viljoen Trust and who is also the wife of Viljoen was introduced to Denker by a common friend of theirs a certain Ms. Katherina Henker. On 23 February 2010 Lyndsey addressed an email to Denker in which email she informed the latter that Henker had informed Viljoen about the possibility of land which may be sold and which would enable Denker to enlarge his conservancy. She further informed Denker that Viljoen is interested and he would like to obtain more information about the sale of the "land." It may be appropriate to pause here and state that although Denker is a farmer he has in the pleadings described himself as a conservationist with a dream to create a 'wild life reserve' of about 200 000 hectares in and around the Erongo Mountains, to that extent he and a certain Mr. Tim Koehne (a German national) founded the Erongo Mountain Rhino Sanctuary Trust. One of the aims and objectives of the Erongo Mountain Rhino Sanctuary Trust is to introduce and protect the endangered Black Rhinoceros in the envisaged wild life reserve.

[5] On 11 April 2010 Denker addressed an email to Viljoen in which he informed Viljoen of a farm, farm Etemba, which was in the market for sale, in that email Denker further informed Viljoen that he (Denker) is busy trying to buy 40 000 hectares to complete the project of establishing a wildlife reserve and enquired whether he (Viljoen) was interested in getting involved in one or other way. He concluded by stating that they could discuss the whole concept when Viljoen comes to Namibia during June 2010.

[6] During June 2010, Viljoen and his wife (Lyndsey) visited Namibia and they stayed at the Denkers' farm for three days. The parties (i.e. Denker and Viljoen) are not quite agreed as to what was discussed during that visit. Viljoen alleges that during that visit he conveyed to Denker that he was keen to acquire "a leisure property" where he

could put up a little place for himself. Viljoen furthermore alleges that it was during that visit that Denker explained to him that legislation exist which places restrictions on a foreign national to acquire agricultural land in Namibia and that it was competent for a foreign national to acquire 50% interest in agricultural land. Viljoen further alleges that during that visit Denker intimated to him that there was a way around the restriction placed on foreign nationals owning more than 50% interest in commercial agriculture land, Denker allegedly provided the example of Bergsig a farm which neighbours farm Ameib, which was allegedly bought and paid for 100 % by a foreign national who was a hunting client of Denker. Viljoen furthermore alleges that Denker explained to him that the farm Ameib was one of the farms envisaged to form part of the wild life reserve/conservancy and that he Denker unsuccessfully tried to buy that farm on previous occasion.

[7] Denker admits that he met Viljoen for the first time during June 2010 when Viljoen and his wife (Lyndsey) visited them at his farm. He furthermore admits that during that visit Viljoen indicated that he was thinking of buying a farm in Namibia, but disputes that Viljoen stated that he wanted to put up a little place for himself at the farm he intended to buy. Denker's version is that Viljoen was aware of the restrictions in respect of foreign nationals owning agricultural land in Namibia and that Viljoen enquired from him (i.e. Denker) whether there were ways to circumvent the restrictions on foreign nationals owning commercial agricultural land. Denker further alleges that he advised Viljoen to seek legal advice in that respect, but concedes that he mentioned three examples of where foreign nationals were involved in the purchase and ownership of agricultural land. One such example was the Farm Bergsig in which Denker and another foreign national Dr Tim Koehne each own 50% interest through a close corporation named "Plaas 167 Omaruru CC".

[8] Despite the conflicts in the versions of Denker and Viljoen as to what was said or not said during Viljoen's visit of June 2010, what is indisputable is that on 4 July 2010, Denker and Viljoen spoke over the telephone and during that conservation Denker informed Viljoen that farm Ameib will be sold in execution on 8 July 2010. Viljoen arrived at farm Ameib on the evening of 7 July 2010 that is the evening before the

auction. Denker on the other hand arrived at farm Ameib on the morning of 08 July 2010, 30 minutes before the auction was to commence. Denker and Viljoen met at the airstrip on Farm Ameib and discussed how the two of them will purchase farm Ameib. During the brief discussion Denker and Viljoen agreed that each of them will contribute 50% towards the purchase of the farm. They agreed that they will bid for the farm up to a maximum amount of N$ 12 million for the farm. Each party would contribute 6 Million towards the purchase and transfer cost.

[9] On 8 July 2010 farm Ameib was auctioned and Denker bid for the farm and the hammer fell on him at a price of N$ 10, 3 million exclusive of the commission and transfer costs. On the same date Viljoen paid the commission in the amount of N$ 460 000 and the deposit in the amount of N$ 1 030 000. After Viljoen paid the deposit and the commission Denker and Viljoen signed the deed of sales in their personal names or on behalf of a nominee.

[10] After the parties signed the deed of sale Viljoen was advised by a legal practitioner that the appropriate “vehicle” to own the farm was a private company. In accordance with the advice received Denker and Viljoen purchased a shelf company, at the time the shelf company’s name was Bonsai Investments Eighty Three (Pty) Ltd. At that time the shelf company only had a certain Ms. Van Zyl as the sole director and shareholder. Fourteen days after Viljoen and Denker signed the deed of sale Viljoen transferred the balance of the amount of his portion (which was 50%) of the purchase price to the legal practitioners responsible for transferring the farm into the name of the purchaser.

[11] After the balance of the purchase price was secured, the shares in the shelf company which Denker and Viljoen bought had to be transferred to them. Viljoen alleges that it was at that stage that he, for the first time, received advice from the legal practitioners tasked with the responsibility of transferring the farm into the name of the company, that a foreign national may not own more than 49% interest in a company or closed corporation which is the owner of commercial agricultural land. On the strength of that advise he instructed Ms. Van Zyl to transfer 1 share of the 50 % shares which he

held in Ameib to Denker. Ms. Van Zyl accordingly transfer 51 % shares she held in Ameib to Denker and 49 % to Cobbett Trust.

[12] The transfer of the agricultural land (farm Ameib) to Ameib was delayed for a period of approximately two years. The delay was caused by the fact that, one of the shareholders of the company which owned farm Ameib contested the legality of the sale of farm Ameib in execution. From August 2010 the shareholding in Ameib thus reflected that Denker was a 51% shareholder and the Cobbett Trust a 49% shareholder in that company until January 2012. During January 2012 Viljoen held discussions with a certain Steyn, concerning the Cobbett Trust's shareholding in Ameib. During the discussion Steyn informed (although he says that he gave the advice on the wrong assumption that the discussion dealt with shares in a company which is the registered owner of agricultural land) Viljoen that, as a foreign national he may not acquire controlling interest in a company which owns commercial agricultural land, implying that it was correct for a foreign national to hold 50% shares in a company which owns agricultural land, because 50% is not controlling interest.

[13] Following the advice which Viljoen received from Steyn he instructed Van Zyl to transfer the 49% shares which the Cobbett Trust had in and to Ameib in to his personal name, and he also instructed her to prepare the necessary documents to cause the transfer of one share from Denker to him. On 25th January 2012 (Denker disputes that this date is correct he alleges that he signed the documents on 18 January 2012) Denker signed the documents authorizing the transfer of the one share from him to Viljoen, meaning that as from 25 January 2012 the shareholding in Ameib was 50% share in the name of Denker and 50% in the name Viljoen. On 22 August 2012 farm Ameib was registered in the name of Ameib. On that day (i.e. on 22 August 2012) Viljoen once again instructed Van Zyl to, retrospectively to 25 January 2012, transfer the 50% share which he had in Ameib to the Michael Viljoen Trust. On 24 October 2012 Denker signed the documents to transfer the one share from him to the Michael Viljoen Trust. The company (Ameib) records thus reflect that on 25 January 2012 Denker transferred one share to the Michael Viljoen Trust and of 49% shares from the Cobbett Trust to the Michael Viljoen Trust.

[14] Towards the end of the year 2012 the relationship between Viljoen and Denker started to get ‘sour’ and completely broke down during the year 2013. Because of the break down in the relationship between Denker and Viljoen, Denker approached his legal practitioners for advice. He was advised that when the company (Ameib) acquired farm Ameib the acquisition was in contravention of the Agricultural (Commercial) Land Reform Act, 1995 and may thus be illegal. Denker as result instituted these proceedings.

Basis of Applicant’s application

[15] As I have indicated above the applicant is seeking an order directing the rectification of Ameib’s share register so that that register reflects Denker as a 51% shareholder in Ameib and the Michael Viljoen Trust as a 49% shareholder. The applicant launched his application on the strength of s122 of the Companies Act, 2004. The grounds on which he basis his application are that:

(a) The transfer of the shares to the Michael Vijoen Trust was not compliant with the Companies Act, 2004 and the Stamp Duties Act, 1993 and is as such invalid;

(b) He agreed to transfer his one share to the Michael Viljoen Trust because of a misrepresentation by Michael Viljoen.

(c) The purported transfer of shares from Ms. van Zyl to the Cobbett Trust is invalid the transfer of my one share to the Michael Viljoen Trust during October 2012 is further also invalid as a transfer to a trust which is not a legal person is invalid.

The Companies Act, 2004

[16] Section 122 of the Companies Act, 2004 provides as follows:

‘122 **Rectification of register of members**

(1) If-

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.

(2) The application referred to in subsection (1) must be made in accordance with the rules of Court or in any other manner which the Court may direct, and the Court may either refuse it or may order rectification of the register concerned and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his or her name entered in or omitted from the register concerned, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register.'

[17] It has been held that the court's jurisdiction under section 122 is unlimited it having discretion in the circumstances of each case.[3] In the matter of *Bauermeister v Bauermeister, CC, (Pty) Ltd and Another*[4] Nicholas J said the following:

'The power given to the Court under the section [i.e. s 122] is a discretionary one: [The] section … provides that the Court may either refuse the application or may order rectification of the register.(See *Thole v Trans-Drakensberg Bank Ltd (In Judicial Management*) 1967 (2) SA 214 (D) at 217G.)

[3]See Meskin P M (editor): *Henochsberg on the Companies Act* 4th edition at p 179 and the authorities there cited.

[4] 1981 (1) SA 274 (W).

> "When the Court entertains the application it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition".'

[18] In matter of *Trevor v Whitworth*[5] Lord Macnaghten is reported as saying that the power to rectify the register:

> '... is a judicial power, as it has been called, and it is to be exercised by the Court, to use the language of s 35, 'if satisfied of the justice of the case'. Those are not mere idle words. They mean, I think, what they say. Although they have sometimes been overlooked, Lord CAIRNS, I may observe, relied upon them in Sichell's case Law Rep 3 Ch 119 as showing that the Court is bound to go into all the circumstances of the case and to consider what equity the applicant has to call for its interposition.

[19] In the matter of *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd*[6]) the court held that following factors may influence the court not to exercise its discretion to order the rectification of a register; defences based upon waiver, estoppel or the *exceptio doli* ; that applicant was debarred from relief by delay; that the remedy being a discretionary one, the court should refuse to exercise its discretion in applicant's favour, both because of the complexities of the case and because there was no equity in applicant's favour which called for the granting of this summary relief.

[20] An application in terms of section 122 is concerned with title to be on the register and not necessarily with ownership of shares: for the right to be on the register may be independent of ownership.[7] Under this section the court may order the removal from the register of a company the name of a person to whom shares have been illegally issued, for in such a case the name of the person has been entered onto the register "without

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[5] (1887) 12 App Case 409 Quoted by Nicholas J in the *Bauermeister* case *supra*.

[6] 1973 (4) SA 1 (C).

[7] *Ibid* and also see *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd* 1973 (4) SA 1 (C) and *Waja v Orr* 1929 TPD 865 at 871-872.

sufficient cause".[8] In the *Bauermeister case*[9] the court cited with approval the following from paragraph 146 of 7 Halsbury[10]:

> 'A person who is put on the register in respect of shares unlawfully issued at a discount may obtain the removal of his name from the register if he has not assented and applies to the Court promptly, but not after he has assented, even though he is ignorant of the legal effect of the transaction; the Court will, however, in a proper case, grant relief where his mistake is one of fact and not of law.'

Discussion

The alleged misrepresentations by Michael Viljoen

[21] Denker in his affidavit, in support of this application, alleges that on 18 January 2012 he travelled from his farm to Windhoek at the request of Viljoen. He further alleges that a meeting Viljoen informed him (Denker) that because he (Viljoen) had made contributions to the company on an equal basis he thought it would only be fair if the shareholding in Ameib was changed to give him (Viljoen) 50% in Ameib. Denker alleges that he queried the request by Viljoen but Viljoen assured him that he (Viljoen) consulted a lawyer and he was advised that a foreign national could hold 50% equity in a company which owns agricultural land as defined in the Agricultural (Commercial) Land Reform Act, 1995. Denker asserts that based on the representation as to the legality of such a position (i.e. a foreign national owning 50% equity in a company which owns agricultural land) he agreed to Viljoen's proposal.

[22] The version of Viljoen is that he met Denker for the first time during June 2010. On the occasion when they met for the first time Viljoen conveyed to Denker that he (Viljoen) was keen to acquire *"a leisure property, where I could put up a little place for myself".* Denker explained to him that legislation existed which placed restrictions on

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8 *Bauermeister v Bauermeister, CC, (Pty) Ltd and Another* 1981 (1) SA 274 (W).

9 *Ibid.*

10 *Halsbury Laws of England* 4th ed vol 7 art 146.

foreign nationals acquiring commercial agricultural land in Namibia but Denker indicated to him that "as a foreigner" it was competent for Viljoen to hold "50%" interest in commercial agricultural land. After that meeting they agreed to, together, purchase agricultural land to add to Denker's envisaged 'wild life reserve' and to cooperate and participate in Denker's conservation activities.

[23] On 4 July 2010 Denker informed Viljoen that farm Ameib will be sold in execution on 8 July 2010. On the morning of the auction (i.e. on 8 July 2010) Denker and Viljoen briefly discussed how they will purchase Ameib. They agreed that they would be 50/50 partners and that each will raise N$6 million to cover the purchase price and the costs to transfer Ameib into their names. On the date of the auction Viljoen paid the 10% deposit amounting to N$ 1 030 000 and the auctioneer's commission in the amount of N$ 460 000.

[24] On 13 July 2010, in response to an email by Marlé Wessels[11] to both Viljoen and Denker, Viljoen addressed an email in the following terms to Wessels:

> '1 We have to register a company as soon as possible for the farm to be registered in and the new company will be the nominee. I would like my 50% shares in the company to be owned by the Cobbet Trust for which I attach a copy of the Trust Deed. I cannot sign on behalf of the Trust…
>
> 2 …
>
> 3 Please send me guarantee requirements as soon as possible and a breakdown of transfer costs. I am responsible for 50% in total and the balance of the guarantee will be arranged Mr. Pieter van Soloms who is Mr Denker's bank manager in Omaruru….'

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[11] Marlé Wessels was the conveyancer employed by Erasmus & Associates. On 11 July 2010 she addressed an email in the following terms to both Denker and Viljoen:

'I confirm that we are attending to the transfer of Ameib Ranch to yourselves.

Kindly provide us with the name and full particulars of the nominee, if applicable.

Kindly further provide us with copies of your identity documents, marriage certificates and marriage contracts as well as with copies of the identity documents of your spouses.'

[25] During July 2010 (approximately on the 26 July 2010) Wessel informed both Denker and Viljoen that the law in Namibia does not permit a foreign national to own more than 49% interest in commercial agricultural land. He alleges that that was the first time he was so informed and he in good faith agreed that one percent of his shares in Ameib be transferred to Denker. He furthermore alleges that it is also on that basis that he signed an affidavit in terms of s 61 of the Agricultural (Commercial) Land Reform Act, 1995 stating that he holds 49 percent share in Ameib. On 24 January 2012 Viljoen again Windhoek and on that occasion met a certain Simon Hercules Steyn who was the managing director of L& B Commercial Services (Pty) Ltd, a corporate and tax adviser. Steyn advised him that it was legal for him to own 50 % interest in commercial agricultural land in Namibia. After he received that advised that is when he contacted Van Zyl and instructed her to prepare the necessary documents transfer the one share from Denker to him.

[26] On 25 January 2012 Viljoen called Denker and they agreed to meet at Smiley's. Turn the Tide Coffee Shop at 09h00. When they so met, at around 09h00, Viljoen informed Denker of the advice which he received from Steyn and handed to Denker the documents, prepared by van Zyl, to transfer the one share from Denker to Viljoen. Viljoen further alleges that after handing over the documents to Denker he advised the latter to obtain his own independent legal advice and requested that he (Denker) signs the documents only after he was comfortable that it was in order to sign the documents. After the meeting at Smiley's coffee shop Denker left with the documents. During the afternoon of 25 January 2012 Denker's wife called Viljoen and requested a meeting at Stellenbosch Restaurant in Windhoek, where they met at around 17h00 and at that meeting Denker informed Viljoen that he (Denker) had signed the documents and handed over the documents to Viljoen.

[27] I am of the view that, on the facts which are before me and which are not in dispute, I am in the position to decide whether or not Viljoen made an innocent misrepresentation to Denker which misrepresentation induced Denker to transfer the one share to Viljoen. In the matter of *Wright v Pandell*[12] Herbstein J said:

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[12] 1949 (2) SA 279 (C).

'A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it.' (*Behn v Burness* (8 L.T. 207).)

Wessels (vol. 1, sec. 1,015) puts it as follows:

'An innocent representation may be either a stipulation on the strength of which the contract is entered into and therefore a condition precedent to the contract, or it may be a statement made by the one party as an inducement to the other party to enter into the contract and but for which the latter party would not have contracted.'

[28] The facts which I mentioned in the preceding paragraph are the following. Denker has dream to create a 200 000 hectare 'wild reserve' reserve around the Erongo Mountains. The farm Ameib forms the southern boundary of the envisaged 'wild reserve'. During early July 2010 Denker learned that farm Ameib will be sold in execution on 8 July 2010. When he learned that the farm will be sold in execution, Denker contacted the managing director of Gondwana (a private company which owns and operate a number of lodges in Namibia), a certain Mr Manfred Goldbeck. Goldbeck informed Denker that Gondwana is not interested in the farm. And that the estimated value of the farm was N$ 12 million. Denker was aware that he would not raise the N$ 12 million, which may be required to purchase the farm. He was aware that Viljoen had approximately N$ 4 Million available he thus contacted Viljoen and another South African by the name of Espach. Denker and Viljoen agreed to meet on the day of the auction at the farm. In the meantime Denker had made arrangements with his bank manager and the bank manager assured him that he would be able to advance to Denker N$ 6 million to enable him to purchase the farm Ameib. On the day of the auction he and Denker agreed that each would raise N$ 6 million to purchase the farm.

[29] It is clear that before or at the time when Denker and Viljoen agreed to purchase the farm Ameib Viljoen made no representation of some matter or circumstances relating to the purchase of the farm or the shareholding in the farm. If there is anything clear it is the fact that it was in the contemplation of Denker that they will be equal partners with Viljoen in the purchase of the farm. I say so because on Denker's own version he anticipated the farm to be sold for N$ 12 million and he had raised 50 % of

that amount namely N$ 6 million and he expected Viljoen to raise and contribute the other N$ 6 million. I accordingly dismiss Denker's assertion that he was induced by a misrepresentation by Denker for him to transfer his one share to Viljoen or to the Michael Viljoen Trust.

The non-compliance with the Companies Act, 2004 and the Stamp Duties Act, 1993

[30] On the pleadings that are before me, it is clear that when the company was bought as a shelf company it was known as Bonsai Investments Eighty Three (Pty) Ltd and that 0it only had one shareholder and one director namely a certain Ms van Zyl. In his affidavit, in support of his application for the rectification of the register, Denker seems to suggest that a meeting of the directors of the company was held on 1 July 2010. I say so because he attaches a resolution dated 01 July 2010 marked as Annexure "D" (which amongst other things reads that 'at a meeting of the directors held at Windhoek on 01 July 2010) without explaining whether there was or there was no such meeting on that date at which meeting it was resolved to transfer the shares from Van Zyl to Denker and to the Cobbet Trust. The share certificates Numbers 2 and 3 respectively (which were later cancelled) indicate that as at 1 July 2010 Denker and the Cobbett Trust were 51 % and 49 % the shareholders respectively in Bonsai Investments Eighty Three (Pty) Ltd.

[31] The above information cannot be correct, I say so because by 1 July 2010 Denker and Viljoen had not discussed the formation or purchase of a company together. On 11 July 2010 Wessels wrote to both Denker and Viljoen enquiring about the details of the nominee in whose name farm Ameib must be transferred. Viljoen replied two days later that they have to register a company as soon as possible. This means that the 1st of July 2010 is not the true date on which Denker and the Cobbett Trust acquired the shares in Bonsai Investments Eighty Three (Pty) Ltd.

[32] I indicated above, that on 25 January 2012 Viljoen instructed Ameib's public officer, a certain Ms. Van Zyl, to transfer 50 of the 51 share which Denker had in Ameib to Denker and one share to Viljoen and the 49 shares which the Cobbett Trust had to

Viljoen. A “Transfer of Shares, Stock, Debentures or Options” dated 25 January 2012 in terms of which Denker transferred the 50 shares for no consideration to himself is attached as Annexure “N” to his supporting affidavit. This document is signed by him alone (as transferor and transferee and is stamped with a N$ 2 revenue stamp. The share certificate, Certificate No. 4, signifying Denker as the registered proprietor of 50 ordinary shares in Ameib is annexed to Denker’s supporting affidavit as Annexure “O”. This certificate is signed both by Denker and Viljoen.

[33] The “Transfer of Shares, Stock, Debentures or Options” dated 25 January 2012 in terms of which Denker transferred the one share for no consideration to Viljoen is attached as Annexure “L” to his supporting affidavit. This document is signed by both Denker (as transferor) and Viljoen (as transferee) and bears no revenue stamp. The “Transfer of Shares, Stock, Debentures or Options” dated 25 January 2012 in terms of which the Cobbett Trust transferred the 49 shares for no consideration to Viljoen is attached as Annexure “P” to Denker’s supporting affidavit. This document is signed by Viljoen alone (as transferor and transferee) and bears no revenue stamp I have also indicated above that Denker denies that he signed these documents on 25 January 2012, he alleges that he signed these documents on 18 January 2012.

[34] Denker furthermore alleges that on 24 October 2012 he at the request of Viljoen attended at the offices of the company secretary where he was presented with a directors’ resolution (dated 22 August 2012) which revoked the resolution dated 25 January 2012 and authorised the transfer of one share from him (Denker) to the Michael Viljoen Trust and fourty nine shares from the Cobbett Trust to the Michael Vijoen Trust with effect from 25 January 2012. Denker denies that he signed the resolution on 22 August 2012.

[35] Denker thus stated in his supporting affidavit that in terms of section 23 (read with section 10(6)) of the Stamp Duties Act, 1993 (“the Stamp Duties Act”) an instrument of transfer must be dated with the true dates of the signatures of the transferor and transferee and the stamps must be defaced by an authorised person recording the true date of the defacement before the company may register the transfer. He continues to

contend that because the instruments of transfer did not comply with both the requirements of section 140 of the Companies Act, 2004 and section 23 read with section 10(6) of the Stamp Duties Act, 1993 it was not competent to act on the said instruments and change its register of members.

[36] The contentions by Denker overlook the fact that Denker was a party to the non-compliance with the statutory provisions which he now want to invoke. If he had not agreed to the backdating of the transfer documents the share register would not have reflected him as 50% shareholder and the Michael Viljoen Trust as 50% shareholder in Ameib. If Denker signed the documents on 18 January 2012 as he alleges then he has failed to explain as to when he realised that the date of his signature is incorrect. If he, on the date that he signed the transfer documents, realised that the date of signature is incorrect why did it take him more than two years to dispute the correctness of the date of signature. Secondly if the transfer of the one share from Denker to the Michael Viljoen Trust is invalid because the transfer documents do not reflect the actual date on which the shares were transferred then the transfer of the shares from van Zyl to Denker and to the Cobbett Trust is on the same grounds invalid and Denker can therefore not lay claim to the 51 shares.

[37] Mr Denker alleges, in his supporting affidavit, that the transfer documents, dated 25 January 2012, of the one share from him to Viljoen do not bear a revenue stamp. He thus contends that the company was not legally entitled to register the transfer for want of compliance with section 140 of the Companies Act, 28 0f 2004 as read with section 23 (read with section 10(6) of the Stamp Duties Act, 1993. Mr Frank who appeared for Denker submitted that no one has the right to be on a register of members of a company, as the transferee of shares unless the transferor has delivered a proper share transfer instrument duly stamped in respect of those shares. He further submitted that without compliance with the applicable legislation no one is entitled to be registered in the share register as a member of such company. The question that needs to be answered is, in my view, whether the failure to stamp the documents renders the transfer of the shares a nullity.

[38] In considering the question that I raised above the enquiry is whether the legislature intended that the failure to stamp a document will render the document valid or invalid. The Legislature's intention must 'be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.'[13] In the matter of *Swart v Smuts*[14] Corbett AJA (as he then was) said the following:

> 'In general an act which is performed contrary to a statutory provision is regarded as a nullity, but this is not a fixed or inflexible rule. Thorough consideration of the wording of the statute and of its purpose and meaning can lead to the conclusion that the Legislature had no intention of nullity.' [This is a loose translation from the Afrikaans version of the judgment.]

[39] In *JEM Motors Ltd v Boutle and Another*[15] Milne J said the following:

> '. . . what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at.'

[40] In the matter of *DTA of Namibia and Another v Swapo Party of Namibia and Others*[16] this court approved the guidelines set out by Herbstein J[17] when he said:

> 'In *Sutter v Scheepers* (1932 AD 165 at pp. 173, 174), Wessels JA suggested certain tests, not as comprehensive but as useful guides to enable a Court to arrive at that real intention. I would summarise them as follows:

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[13] *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H; and *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A).

[14] 1971 (1) SA 819 (A), at 829E – F; also see *Kanguatjivi and Others v Shivoro Business and Estate Consultancy and Others* 2013 (1) NR 271 (HC).

[15] 1961 (2) SA 320 (N) J at 328A – B.

[16] 2005 NR 1 (HC) at 11C.

[17] In the matter of *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) at 451.

(1) The word shall when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.

(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.

(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases.'

[40] I now proceed to apply the approach and guidelines as set out in the various cases which I have referred to above, to this matter. Section 10 (6) of the Stamp Duties Act, 1993 reads as follows:

> ‘(6) Any person required or empowered by this Act to deface an adhesive stamp shall deface it by writing or impressing in ink on or across the stamp his or her name or initials together with the true date of defacement in such manner as effectually and permanently to render it incapable of being used for stamping any other instrument.’

The use of the word 'shall' in s 10(6) is an indication that the provision is peremptory rather than directory. The fact that it is couched in positive terms and that no sanction is provided for non-compliance tend to show that the provision is directory. There is no provision visiting nullity upon, a failure to ‘deface’ a stamp with the true date of defacement. This, again, is an indication that the provision is directory. Sections 9, 12 and13 of the Stamp Duty Act, 1993 read as follows:

‘**9 Late stamping of instruments and penalties for default**

(1) If any instrument requiring to be stamped under this Act has not before the expiry of the relevant period prescribed in section 8(1) or (2) been stamped for the full amount of duty payable, such instrument shall, subject to the provisions of subsection (4) of this section, be stamped in the presence of an authorized revenue officer for the amount of duty unpaid, and there shall be paid, in addition to the duty-

(a) a validating penalty equal to-

(i) twice the unpaid duty if the instrument is stamped for the unpaid duty within six months after the date of execution of the instrument or the date on which it was first received in Namibia, as the case may be; or

(ii) three times the unpaid duty if the instrument is stamped for the unpaid duty later than six months after the said date:

Provided that such validating penalty shall not be less than R1 or more than R2 000; and

(b) such further penalty as the Permanent Secretary may impose but not exceeding R4 000: Provided that such further penalty shall not be payable if such instrument is voluntarily presented to an authorized revenue officer for stamping or the Permanent Secretary is satisfied that any failure to comply with the provisions of section 8 was due to inadvertence.

12 Invalidity of instruments not duly stamped

Save as is otherwise provided in any law, no instrument which is required to be stamped under this Act shall be made available for any purpose whatsoever, unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law, except-

(a) in criminal proceedings; or

(b) in any proceedings by or on behalf of the State for the recovery of any duty on the instrument or of any penalty alleged to have been incurred under this Act in respect of such instrument:

Provided that the court before which any such instrument is so produced, given or made available may permit or direct that, subject to the payment of any penalty incurred in respect of such instrument under section 9(1), the instrument be stamped in accordance with the provisions of this Act and upon the instrument being duly stamped may admit it to be produced or given in evidence or made available.

13 Person making use of instrument not duly stamped to be liable for unpaid duty and penalty thereon

(1) Any person who for any purpose in connection with a business conducted by him or her keeps or retains, or who in any manner other than a manner contemplated in section 12 makes use of, an instrument which is required to be stamped under this Act but has not been duly stamped, shall be liable for the unpaid duty in respect of such instrument and any unpaid penalty incurred in respect of such instrument under section 9(1).

(2) The provisions of subsection (1) shall not be construed as relieving any person who under any other provision of this Act is liable for the duty or any penalty in respect of any instrument, from his or her liability to pay any unpaid amount of such duty or penalty, as the case may be.'

[41] I am of the view that the existence of sections 12 and 13 is an indication that the legislature did not intend that if a document is not stamped such failure leads would lead to a nullity of the document. I am of the further view that the court when faced with a document which is not stamped may order that the document be stamped in accordance with the Stamp Duty Act, 1993.

[42] A further question that I have to answer here is whether fairness and justice favour Denker thus requiring of me to interpose and order a rectification the register. On the face of it, it seems to me that Denker was the architect of the transaction to purchase farm Ameib with Viljoen, he succeeded in that design and is now trying, by relying on a technicality, to take control of the company because of the difficulties which

have subsequently arisen between him and his co-director, Viljoen. I am of the view that it is unconscionable and unjust that Denker must take money from somebody and thereafter attempt to wrestle control of the company from that person. In the circumstances I am not persuaded that justice and equity require that an order for rectification of the register should be made in his matter.

Can a Trust hold shares in a private company.

[43] In support of his case for rectification Denker, in his supporting affidavit alleges that:

> '…shares in a company like the first respondent cannot be transferred to a trust and… the purported transfer from Ms van Zyl to the Cobbett Trust is invalid…the transfer of my one share to the Michael Viljoen Trust during October 2012 is further also invalid as a transfer to a trust which is not a legal person is invalid… whereas shares can be registered in the names of the trustees appointed under their deeds or their nominees, they cannot be registered in the name of a trust which is not a legal persona.'

[44] Mr Frank who appeared for Denker developed this argument further and submitted that simply refer in the share register to a trust is not a valid inscription as a trust cannot be a member of a company and only individual persons or legal persons can be members. It thus further follows that the Michael Viljoen Trust cannot be a shareholder of the company and the share register reflecting it as a 50% member will have to be rectified in due course by whoever the shareholders are of those shares so as to come on record. The company can simply not be required when dealing with shareholders to deal with a private and nebulous entity that is not a legal person in respect of such obligations towards its members. At the moment Ameib, and the court is left in the dark as to who the member(s) other than Denker is (are) of Ameib.

[45] In the matter of *Geldenhuys and Neethling v Beuthin*[18] Innes CJ observed:

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[18] 1918 AD 426 at 441.

> ‘Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.’

And in the matter of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[19] the Constitutional Court observed that:

> ‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.’

In view of the conclusion I have arrived at that it is not fair and equitable to order a rectification of the register I find the question whether a trust is or is not entitled to hold shares in a private company academic and accordingly decline to deal with it.

The counter application

[46] The effect of refusing to exercise my discretion and order a rectification of Ameib’s register is that as on 25 January 2012 Denker held 50 shares, representing 50% interest, in Ameib and the Michael Viljoen Trust held 50 shares, also representing 50% interest in Ameib. It cannot be disputed that farm Ameib was transferred to Ameib on 22 August 2012. It can also not be disputed that the Michael Viljoen Trust is a trust registered in the Republic of South Africa and is therefore a foreign national. On 22 August 2012 when farm Ameib was transferred to Ameib, Denker did not hold the controlling interest in that company. It accordingly follows that Ameib (or Denker and Michael Viljoen Trust) acquired farm Ameib in contravention of s58 of the Agricultural (Commercial) Land Reform Act, 1995. That Act does, in section 60, provide for the scenario where commercial agricultural land is acquired in contravention of that Act. I am thus of the view that the counter application must succeed.

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[19] 2000 (2) SA 1 (CC) 2000 (1) para 21.

Costs

[47] So far as the costs are concerned, the third and fifth respondents have successfully opposed the applicant's application and were also successful in their counter application. I therefore see no good reason and none has been cited to me why the general rule that costs follow the course should not apply. I am of the further view that the matter is of such complexity to justify the employment of two counsel. The third and fifth respondents implored me to order the fourth respondent to pay their costs of the counter application. The fourth respondent although initially opposed the application it later changed its mind and indicated that it will abide by the court's decision. I think, therefore, that the fairest order would be that, in respect of the fourth respondent each party must pay its own costs.

Order

[48] I accordingly make the following order:

1 The applicant's application for rectification is dismissed;

2. The applicant must pay the third and fifth respondents' costs (in respect of both the application and the counter application) the costs to include the costs of one instructing and two instructed Counsel.

3. The fourth respondent (i.e. The Minister responsible for Land Reform) must deal with the following property namely:

(1) **CERTAIN** PORTION A OF THE FARM AMEIB NO. 60,

SITUATED IN REGISTRATION DIVISION "H"
ERONGO REGION

MAEASURING 14309 (ONE FOUR THREE NIL NINE) HECTARES

HELD BY DEED OF TRANSFER NO. T 4286/2012

(2) **CERTAIN** PORTION B OF THE FARM AMEIB NO. 60,

SITUATED IN REGISTRATION DIVISION “H”
ERONGO REGION

MAEASURING 0001, 3994 (ONE COMMA THREE NINE NINE FOUR) HECTARES

HELD BY DEED OF TRANSFER NO. T 4286/2012

as contemplated in s 60 of the Agricultural (Commercial) Land Reform Act , 1995

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SFI Ueitele
Judge

APPEARANCES:

FOR APPLICANT:	Mr. T. Frank, SC (with him Ms. N Bassingthwaighte) Instructed by ENS Africa l Namibia LorentzAngula Inc.
FOR 3rd and 5th RESPONDENTS:	Mr. R Heathcote SC (with him Mr. Schickerling) Instructed by Francois Erasmus & Partners
FOR 4th RESPONDENT:	Mr Akweenda Instructed by Government Attorney