REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 01082/2011

In the matter between:

BLUE SQUARE ADVISORY SERVICES (PTY) LTD Applicant

and

MADINGOANE POGISO First Respondent

SEPENG WINSTON Second Respondent

JUDGMENT

PETER AJ

[1] The issue in this application is whether or not the first and second respondents were lawfully removed as directors of the applicant company by a valid members' resolution at a general meeting of members convened on 26 November 2009 in terms of the provisions of section 220 of the Companies Act, 61 of 1973 ("the 1973 Act").

[2] On 22 November 2005 one Johannes Hendrik Louw, whom I shall hereinafter refer to as "Louw", the first respondent and the applicant company, represented by Louw, executed a written document entitled "Heads of Agreement". This document served to record the intentions and agreements of the three parties thereto. Recorded therein was an envisaged transaction between Louw, the first respondent and the applicant, that the first respondent would acquire shares and claims in the applicant to the extent of 50%. The transaction was subject to Louw successfully buying back 50% of the shares and claims from one Naicker. The transaction date was to be effective 1

November 2005. Transaction documents mentioned therein were to include *inter alia* a new shareholders' agreement, a purchase and sale agreement, contracts of employment for the executives, and rules and procedures for the staff of the applicant. An independent party was to conduct the valuation of the business of the applicant at 1 November 2005 and the first respondent was entitled to conduct a detailed due diligence on the business of the applicant. The first respondent was appointed an employee of the applicant company. It was envisaged that a more formal contract of employment would be drafted in due course but that in the interim the heads of agreement was to govern the working relationship between the applicant and its executives.

[3] At the time of the conclusion of the agreement, the register of members of the applicant company reflected that 50% of the issued shares therein were owned by the "Johan en Mercia Louw Familie Trust (IT4819/99)" ("the family trust"). The other 50% was held by Naicker. Both the family trust and Naicker appear to have acquired their respective shares from the first registered member and subscriber to the memorandum, one Linda Hall. Letters of Authority were issued by the Master of the High Court on 30 October 2002 in terms of the provisions of section 6(1) of the Trust Property Control Act, 1988. The Letters of Authority certified that Louw, Mercia Pritch Louw to whom I shall hereinafter refer to as "Mrs Louw", and one Karen Coetzer, as the nominee of Quadro Executive Estate Planning (Pty) Limited, were authorised to act as trustees of the family trust.

[4] On 14 February 2006 Louw and the applicant company and the trustees of the family trust entered into a written agreement in terms whereof the trustees purchased from Naicker, Naicker's 50% of the issued shares in the applicant for the sum of R150 000,00. On 16 February 2006 the first respondent was appointed a director of the applicant. Thereafter and in April 2007, the second respondent was employed by the applicant and appointed a director of the applicant in August 2007.

[5] The principal commercial rationale for the involvement of the first respondent, and later the second respondent, in the affairs of the applicant was to give the applicant black economic empowerment ("BEE") status and to assist the applicant in securing contracts with municipal local authorities. The later involvement of the second respondent in the affairs of the applicant was with a view ultimately that the first and second respondents collectively would hold two-thirds of the equity in the applicant company and further enhance its BEE credentials.

[6] Thereafter the relationship between Louw and the first and second respondents deteriorated. Although this much is common cause, there are conflicting disputes, allegations and counter-allegations of surreptitious competition with the business of the company, maladministration and a struggle for control in which Louw purportedly procured the appointment of additional directors, the first and second respondents dismissed Louw and Louw suspended the first and second respondents. It is not necessary for present purposes to catalogue or detail the full extent of the disputes. Suffice it to say that what transpired in the applicant company echoes the Western Schism that divided Europe at the end of the 14th and the beginning of the 15th Centuries with rival papacies of Avignon and Rome furiously denouncing and excommunicating each other.

[7] Matters came to a head when on 22 October 2009 Mrs Louw purported to lodge with the applicant company a notice in terms of section 220(2) of the 1973 Act and to requisition a special general meeting of the company on 26 November 2009 for the purposes of removing the first and second respondents as directors of the company. On 26 November 2009 Louw purported to pass a resolution on behalf of the members of the company removing the first and second respondents as directors of the applicant. On that date, the members' register of the applicant reflected as the name of its only member "Johan en Mercia Louw Familie Trust (IT 4819/99)".

[8] Mr Moorcroft, who appeared for the applicant, borrowing the title of a song of the American musician Kris Kristofferson, submitted to me that I need not make a determination of "who's to bless and who's to blame". Notwithstanding the myriad of disputes, allegations and counter-allegations, I need concern myself only whether or not the resolution removing the first and second respondents was properly passed.

[9] The version of the applicant is that after the conclusion of the heads of agreement with the first respondent, there was much negotiation about the first respondent purchasing shares and negotiation about the second respondent later acquiring shares but no agreement in this regard. No purchase price has ever been paid by either the first or second respondents for the shares. When matters came to a head, Mrs Louw and Louw, acting on behalf of the registered member, properly convened a meeting in terms of section 220 of the 1973 Act and passed an effective resolution removing the first and second respondents as directors.

The factual disputes

[10] Mr Limberis, who appeared for the respondents, submitted to me that this application should be dismissed by reason of material disputes of fact. In this regard, the respondents allege three oral agreements. The first oral agreement is one alleged to have been concluded at about the time of the heads of agreement between the first respondent, the company represented by Louw and the family trust ("the November 2005 agreement"). It was allegedly agreed that, if Louw was unable to acquire Naicker's shares or if the first respondent or his nominee did not obtain ownership of the shares for any reason, the first respondent would remain a director and employee of the applicant company and he would be paid, in addition to his salary, one half of the net profits made by the company on all contracts procured after 1 November 2005.

[11] The second oral agreement alleged by the respondents was by agreement entered into after 14 February 2006, the date of the written agreement of sale of Naicker's shares ("the February 2006 agreement"). In terms of the February 2006 agreement, the respondents allege that the first respondent agreed with Louw, acting on behalf of the family trust, that the first respondent would hold 50,1% of the shares in the company for which the first respondent was required to pay R150 000,00 to the family trust, being the fair market value of the shares as at 1 November 2005. At the time of this agreement, the respondents allege that Louw suggested that the first respondent form a trust to hold the shares. The first respondent agreed to consider the formation of his own trust but alleged that it was agreed that in the interim the family trust was to hold the shares as his nominee until such time as he instructed the family trust to transfer the shares to him or his nominee. The first respondent alleges that it was clearly understood and agreed that he would be entitled to the dividends and voting rights which attached to the shares, or put differently, these rights were to be exercised by the family trust at his instruction until otherwise agreed.

[12] The third oral agreement is alleged to have been concluded during or about April 2007 ("the April 2007 agreement"). The respondents allege that at that time they were negotiating with a view to transfer one-third of the shares in the company to the second respondent, half of the second respondent's shares to come from the first respondent and the other half from the family trust or to create a new structure in which the shares would so be held. The respondents allege that it was agreed between the applicant, represented by both Louw and the first respondent, the first respondent and the second respondent that until the shares were transferred to the first and second respondents, the company would pay the first and second respondents one third each of the net profits made by the company on contracts, in addition to their salaries and that they would both be employed by the company and be directors of the company for so long as the contracts continued to be performed.

[13] In essence therefore, the oral agreements alleged by the respondents attack the resolution on two bases. The first is directed at underlying ownership and voting rights. This challenge is that notwithstanding any registration in the members' register, the first respondent beneficially owned 50.1% of the shares and the voting rights attaching thereto had to be exercised by the family trust in accordance with his instructions. The voting that Louw purported to do on behalf of the family trust was in breach of the February 2006 agreement and the resolution was thus invalid. The second basis of attack is that there was an agreement of security of tenure of the respondent's directors; the passing of the resolution was in violation thereof and unlawful and the resolution thus invalid.

The applicant's challenge to the factual disputes

[14] The applicant challenged the efficacy of the February 2006 agreement on the basis that any purchase of shares had to be in writing. The applicant denied the existence or conclusion of the oral agreements.

[15] In regard to the requirement of writing, the applicant alleged that the heads of agreement document required any subsequent purchase and shareholders' agreement to be in writing. Mr Moorcroft relied on the case of *Goldblatt v Freemantle* 1920 AD 123. At pages 128 to 129 of the report, the following is said by Innes CJ:

> "*Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.20 etc.). At the same time it is always open for the parties to agree that a contract shall be a written one (see Voet 5.1.73. V. Leeuwen 4.2; sec. 2, Deckers's note), and in that case there will be no binding obligation*

until the terms have been reduced to writing and signed. The question is in each case one of construction."

[16] I am unable to agree with Mr Moorcroft's submission. This is so principally for two reasons. First, as a matter of construction, it appears to me that the heads of agreement were executed to serve the purpose of recording what was to be a binding agreement until later superceded. The heads of agreement did no more than record that the parties envisaged that a more formal agreement, one in writing, would in due course be executed. The document properly construed does not prescribe that the parties agreed that the future agreement relating to the purchase of the shares had to be in writing in order to be valid. Secondly, even if the agreement could so be construed as prescribing a necessary formality, the formality provision itself could be altered by agreement between the parties. As Mr Limberis, rightly pointed out in the context of the law relating to non-variation clauses which prescribe the formalities of writing and signature, the formality provision itself will be capable of variation unless entrenched, *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren & Andere* 1964 (4) SA 760 (A).

[17] The next attack by Mr Moorcroft on the alleged oral agreement, was that I should find factually that there was no basis for such an agreement and reject the allegations of the respondents in this regard as being far fetched or clearly untenable. The basis of this attack was that it was common cause that on 26 November 2009 the first and second respondents appeared at the meeting with a somewhat lengthy letter drafted by their attorney in which a number of challenges to the validity of the meeting and proposed resolution were made. Nowhere in the letter were the oral agreements recorded. However the affidavits disclosed a claim for preference points made in the bid of which Louw was the author. In the bid a claim for points was made on the basis of a representation that 50.1% of the applicant was owned by an historically disadvantaged individual, thereby making reference to the first respondent. The same document records the first respondent as owning 50.1% of the applicant's business with a note that the applicant was in the process of

improving the BEE/HDI status to at least 60%. I do not intend to express any view on the strengths or merits of the factual dispute other than to say that this is not a factual dispute which is properly determined on affidavit in motion proceedings.

[18] Accordingly it is necessary to consider the lawfulness of the resolution in the light of the version of the respondents.

The statutory framework

[19] In order to determine whether or not the agreements, alleged by the respondents, render the resolution to remove the respondents as directors invalid or ineffective, regard must first be had to the provisions of section 220 of the 1973 Act, the relevant parts of which read as follows:

> *"220 (1) (a) A company may, notwithstanding anything in its memorandum or articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office.*
> . . .
> *(2) Special notice shall be lodged with the company of any proposed resolution to remove a director under this section or to appoint any person in the stead of a director so removed at the meeting at which he is removed, and, on receipt of notice of such a proposed resolution, the company shall forthwith deliver a copy thereof to the director concerned who shall, whether or not he is a member of the company, be entitled to be heard on the proposed resolution at the meeting.*

[20] There are thus two important features to be noted from the provisions of section 220. First that the power granted by a company to remove a director overrides anything in its memorandum or articles and overrides any agreement between it and any director. Secondly, the power is exercised by resolution of which special notice is required to be lodged and given.

[21] Relevant to the passing of a resolution at a meeting in terms of the provisions of section 220 of the 1973 Act are other provisions of the 1973 Act, to which regard must be had. These are sections 181, 184, 186, 188, 189, 190,

193 and 197. The relevant provisions of these sections (with emphasis added) are set out below:

> "181(1) The directors of a company shall, notwithstanding anything in its articles, on the requisition of-
> (a) one hundred members of the company or of members holding at the date of the lodging of the requisition not less than one-twentieth of such of the capital of the company as at the date of the lodgement carries the right of voting at general meetings of the company . . .
>
> . . . issue a notice to members convening a general meeting of the company. . .
>
> 184 In the case of a company having only one member, such member present in person or by proxy shall be deemed to constitute a meeting.
>
> 186(1) (a) Unless the articles of a company provide for a longer period of notice, the annual general meeting or a general meeting called for the purpose of passing a special resolution may be called by not less than twenty-one clear days' notice in writing and any other general meeting may be called by not less than fourteen clear days' notice in writing.
>
> . . .
>
> (3) No resolution of which special notice is required to be given in terms of any provision of this Act shall have effect unless notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved . . .
>
> 188(1) A company or other body corporate may, by resolution of its directors or other governing body, authorize any person to act as its representative at any meeting of any company of which it is a member or at any meeting of any class of members of that company.
>
> . . .
>
> (3) A person authorized as aforesaid shall be entitled to exercise on behalf of the company or other body corporate which he represents, the same powers as that company or body corporate could have exercised if it were an individual shareholder, debenture-holder or creditor of the company in relation to which such person has been authorized to act.
>
> 189(1) Any member of a company entitled to attend and vote at a meeting of the company, or where the articles of a company limited by guarantee so provide, any member of such company, shall be entitled

> to appoint another person (whether a member or not) as his proxy to attend, speak, and vote in his stead at any meeting of the company
>
> . . .
>
> 190 Unless the articles of a company provide for a greater number of members entitled to vote to constitute a quorum at meetings of a company, the quorum for such meetings shall be-
>
> . . .
>
> (b) in the case of a private company, not being a private company having one member, two members entitled to vote, present in person or by proxy or, if a member is a body corporate, represented; and
>
> (c) in the case of a wholly-owned subsidiary company, the representative of the holding company.
>
> 193(1) Subject to the provisions of sections 194 and 195 and to the exceptions stated in section 196, every member of a company having a share capital shall have a right to vote at meetings of that company in respect of each share held by him.
>
> 197(1) Any person present and entitled to vote, on a show of hands, as a member or as a proxy or as a representative of a body corporate at any meeting of the company shall on a show of hands have only one vote, irrespective of the number of shares he holds or represents.
>
> (2) On a poll at any meeting of a company, any member (including a body corporate) or his proxy shall be entitled to exercise all his voting rights as determined in accordance with the provisions of this Act, but shall not be obliged to use all his votes or cast all the votes he uses in the same way."

[22] From the above provisions it is clear that members of the company are critical role players. The directors of a company are required to convene a general meeting of the company upon a requisition of members of the company, section 181(1)(a). A quorum at the meeting is determined by the presence of a member either present in person or by proxy, sections 184 and 190. Where a company or body corporate is a member of a company, it may by resolution authorise a person to act as its representative, section 188(1). Such representative exercises the power of the company or body corporate member as if such company or body corporate were an individual, section 188(3). Members may appoint a proxy, section 189. Subject to exceptions not

relevant in the present case, members of a company have the right to vote at meetings in respect of each share held by such members, section 193. These exceptions relate to preference shares, section 194, different classes of shares, carrying different voting rights, section 195 and provisions relating to voting rights of shares in existence at the commencement of the 1973 Act, section 196. Voting rights are exercised by members either personally present or present through a proxy or a company's representative of a body corporate, section 197. Special notice of 28 days must be given to members for a resolution in terms of section 220, section 186(3) and section 220(2).

[23] In relation to members of the company, sections 103, 104 and 109 of the 1973 Act provide as follows:

> "103 (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members.
> (2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.
> (3) A company shall, subject to the provisions of its articles, enter in the register as a member, *nomine officii*, of the company, the name of any person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being wound up which is a member of the company, and any person whose name has been so entered in the register shall for the purposes of this Act be deemed to be a member of the company.
> (4) Subject to the provisions of section 213 (1) (b), the bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either for all purposes or for such purposes as may be specified in the articles.
>
> 104 A company shall not be bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share.
>
> 109 The register of members of a company shall be *prima facie* evidence of any matters directed or authorised to be entered therein by this Act."

[24] Before considering the legal efficacy of the agreements alleged by the respondents, it is necessary to make some observations about trusts.

Trusts

[25] The 5th edition of *Honoré's South African Law of Trusts*, 2002, ("*Honoré*"), describes a trust as "a legal institution in which a person, the trustee subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose". This description has been quoted with approval most recently in *Lupacchini and Another NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA), as a description of a trust as a "legal relationship of a special kind".

[26] The statutory definition of a trust in terms of the Trust Property Control Act, 57 of 1988 is as follows:

> "'trust' means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-
> (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
> (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
>
> but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965)"

[27] The English textbook Hanbury and Martin, *Modern Equity*, 18 ed 2009 p 49 describes a trust as follows:

> "A trust is a relationship recognised by equity which arises when property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other persons called cestuis que trust or beneficiaries."

[28] This description is given after it is noted that many attempts have been made to define a trust but none of them have been wholly successful. The author notes that it is more useful to describe than to define a trust and then to distinguish it from related concepts.

[29] Typically a trust has a creator. Where the trust is created during the lifetime of the creator it is referred to as an *inter vivos trust*. The creator of the trust is variously referred to as the donor, founder or settlor. A testamentary trust may be created by will through a testator. In *Honoré*, the institution of trust is compared with other legal institutions such as contracts, agency, partnership and others. A trust is thus a matrix of multilateral rights and obligations involving a person who creates the trust, at least one person who accepts the obligations as trustee, generally including a person who is a beneficiary and the public roles of the Master and the High Court. At its heart, whether described as an institution, an arrangement or a relationship, a trust is a legal relationship governing the ownership or control of assets and their enjoyment.

[30] A trust is not a person and does not have legal personality. In *Commissioner for Inland Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A) at 370E-I the following is said by Joubert JA:

> "Is a trust a legal *persona*? According to the Anglo-American law of trusts a trust has no legal personality. P W Duff Personality in Roman Private Law Cambridge University Press (1938) at 206:
>
> 'Maitland showed [*Collected Papers vol 3* (1911) 321-404)] that by vesting property in trustees, rather than in corporations or associations, English lawyers evaded many questions that have caused difficulty abroad.'
>
> See R W Ryan in his unpublished Cambridge doctoral thesis entitled 'The Reception of the Trust in the Civil Law' (1959) at 11: 'A trust is certainly not a legal person'. The position is the same in our law of trusts. See *Commissioner*

for Inland Revenue v MacNeillie's Estate 1961 (3) SA 833 (A) at 840G-H: 'Neither our authorities nor our Courts have recognised it as a persona or entity. It is trite law that the assets and liabilities in a trust vest in the trustee.' Consult also *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 859E-H:

'In its strictly technical sense the trust is a legal institution *sui generis* . . . .The trustee is the owner of the trust property for purposes of administration of the trust but *qua* trustee he has no beneficial interest therein.'

It is clear therefore that a trust is not an incorporated company. Nor is a trust a body of persons unincorporate whose common funds are the collective property of all its members. There is also no basis for a submission that because the statutory definition of 'person' in s 1 of the 1962 Act was extended to include a deceased estate, it should by analogy be further extended to include a trust. The conclusion is inescapable that a trust is not a 'person' within the meaning of that word in the 1962 Act".

[31] Often in commercial usage, reference is made to a trust as if it were a legal person and in a sense other than a matrix of legal relationships. Perhaps it is that people making such commercial usage are unaware of the legal nature of a trust and unaware that a trust is not a legal person like a company which exists by reason of a legal fiction. Be that as it may, courts have not been astute to find such reference meaningless but rather give such reference a meaning in its context. Thus where a testator made a bequest of the residue of his estate to two named trusts which were family trusts which he had created shortly before the execution of his will, it was held to be a valid bequest to the trustees in their capacities as such of the trusts therein mentioned, *Kohlberg v Burnett NO & Others* 1986 (3) SA 12 (A). Similarly where in a suretyship a trust was described as the principal debtor, this was interpreted to be a description of the trustees of the trust in their capacities as such and the suretyship was valid in that it complied with the provisions of section 6 of the General Laws Amendment Act 50 of 1956; extrinsic evidence was permissible to identify the trustees, *BOE Bank Ltd (formerly NBS Boland Bank Ltd) v Trustee, Knox Property Trust* [1999] 1 All SA 425 (D).

[32] It is also possible to refer to a trust in a sense that refers neither to the matrix of legal relationships nor the trustees in their capacity as such, but

rather the trust estate as an accumulation of assets and liabilities. Thus a trust, in the sense of a trust estate has been held to be "a debtor in the usual sense of the word" for the purposes of section 2 of the Insolvency Act of 1936 and thus capable of being sequestrated, *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly and Another NNO* 1984 (1) SA 160 (W). In the context of an accumulation of assets and liabilities, although not a legal person, a trust estate has been described as a separate entity, *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at 83G-84H. In this sense, the assets, held or controlled in trust and the liabilities, incurred by the trustees, satisfaction of which may be had by recourse to the trust assets, are a separate entity just like a deceased estate or the joint estate of people married in community of property performing juristic acts with regard to such estate in terms of the provisions of section 15 of the Matrimonial Property Act, 88 of 1984.

[33] The observations made thus far in respect of trusts are in respect of trusts and trustees in the narrow sense. There is a wider sense in the use of the word "trustee" as it describes someone who is bound to hold or administer on behalf of another or for some impersonal object and not for his or her own benefit, *Honoré* pp3-4. In England the notion of a constructive trust, one which arises by operation of law, is employed to impose obligations through the application of equitable doctrines in factual situations which give rise to remedies in the South African Roman Dutch legal system through the application of principles of contract, delict and unjust enrichment, *Honoré* pp131-136.

The efficacy of the alleged agreements

[34] In the February 2006 agreement, the first respondent asserts ownership of 50.1% of the shares of the company. It is possible to own shares without being registered as the member. This is possible where shares are purchased and acquired and as a matter of property, ownership is transferred by way of cession without registration in the members' register. Ownership

may pass on conclusion of the cession without delivery of share certificates or transfer forms, *Botha v Fick* 1995 (2) SA 750 (A). The register of members is *prima facie* proof of ownership of the shares, section 109 of the 1973 Act. The court is entitled to go behind the register to ascertain the identity of the true owner. Thus where a registered member sold his shares and became insolvent after ownership had passed to the purchaser but before registration had taken place in the name of the purchaser, the court could go behind the register and make a determination that notwithstanding registration in the name of the insolvent seller, the shares were not assets in the insolvent seller's estate, *McGregor's Trustees v Silberbauer* (1891-1892) 9 SC 36. Similarly upon the death of one of two registered members both of whom held shares as trustees, without any personal beneficial interest therein, for an overseas bank, the court could go behind the register to declare that no part of the shares registered in their names belonged to the deceased estate. No stamp duty was payable in respect thereof to the master, *Randfontein Estates Ltd v The Master* 1909 TS 978.

[35] The concept of a nominee as an agent to hold shares in his name and be the registered member on behalf of a nominator or principal, has been recognised as a convenient and accepted practice. The principal whose name does not appear on the register is usually described as "the beneficial owner" which is not juristically speaking within the South African legal system, *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 453. This is so because the concept of a "beneficial owner" is a concept of equitable ownership as distinct from legal ownership applicable in English trust law but inappropriate to characterise the personal rights of a beneficiary in a trust or a principal in a principal agent relationship in South African law. This is a common practice and well understood commercially although the employment of trust terminology is done perhaps in the wide sense. The courts have gone behind the register to recognise the beneficial owner's interest to enforce the rights of the beneficial owner *visa a vis* the nominee and to compel the nominee to deliver to the beneficial owner the share certificates together with the necessary transfer documents, *Standard*

Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others 1983 (1) SA 276 (A). Where shares have been sold and ceded by a registered member, the court could go behind the register to identify the purchaser as the true owner of the shares and rectify the register to reflect the purchaser as the registered member in circumstances where the seller refused to sign the necessary transfer forms to facilitate registration in the purchaser's name, *Botha v Fick* (referred to above). In an appropriate case it is open for a court to go behind the register to identify a beneficial owner for the purposes of determining who controls that company, as a matter of fact, notwithstanding a nominee registered as the owner where such factual control is relevant as in admiralty proceedings, *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (A) at 1106H-I. Where a registered member had sold his shares but registration has not yet taken place in the register in the purchaser's name, it is permissible for the court to go behind the register to ascertain the true nature of the seller member's interest in order to determine whether or not it is just and equitable to wind up a company at the instance of the member who is no longer the owner of the shares in respect of which he is registered as the member, *Kalil v Decotex (Pty) Ltd and* Another 1988 (1) SA 943 (A).

[36] In none of the reported cases has it ever been held permissible for the court to go behind the members' register in order to confer membership status on a beneficial owner, in the absence of an application for rectification of the register. In fact in *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (T), Southwood J declined to go behind the register, at the instance of an alleged true owner of shares whose ownership had not been registered in the register of members, in order to give the true owner the status of member which was a necessary prerequisite to an application for relief from oppression in terms of section 252 of the 1973 Act.

[37] In matters such as the status of its member *vis a vis* the company, it has long been the policy of the law that the company should concern itself only with the registered owner of the shares, *Standard Bank of South Africa*

Ltd and Another v Ocean Commodities Inc and Others 1983 (1) SA 276 (A) at 289A-B. This policy is embodied in the provisions of section 104 of the 1973 Act. In *Pender v Lushington* (1877) 6 Ch 70, the articles of association of the company provided that every member was to have one vote for every complete number of ten shares held with a voting limit that no shareholder shall be entitled to more than 100 votes. A beneficial shareholder interested in more than 1000 shares, with the object of increasing its voting powers, arranged for its shares to be held through nominees so as to be able to cast 649 votes. The company rejected the votes and in proceedings by a member to restrain the rejection of votes, Jessel MR held the following at 77-78:

> "It appears to me that it is plain from the reading of these articles alone that the articles meant to refer to a registered member, but I think it is made, if possible, plainer – though I doubt whether it could be made plainer when you come to consider that it would not be possible to work the company in any other way, for how else could the company hold meetings or demand a poll, or have the votes taken by scrutineers? – but if possible it is made plainer by the 19th article, which says: "The executors and administrators of a deceased member shall be the only persons recognised by the company as having any title to his share," and also provides that "the company shall not be affected by notice of any trust." And the 30th section of the *Companies Act*, 1862 says: "No notice of any trust express, implied, or constructive, shall be entered on the register, or be receivable by the Registrar in the case of companies registered under this Act and registered in *England* or *Ireland*." It comes, therefore to this, that the register of shareholders, on which there can be no notice of trust, furnishing the only means of ascertaining whether you have a lawful meeting or a lawful demand for a poll, or of enabling the scrutiny as to strike out votes.
>
> The result appears to be manifest, that the company has no right whatever to enter into the question of the beneficial ownership of the shares. Any such suggestion is quite inadmissible, and therefore it is clear that the chairman had no right to enquire who was the beneficial owner of the shares, and the votes in question ought to have been admitted as good votes independent of any enquiry as to whether the parties tendering them were or were not, and to what extent, trustees for other persons beneficially entitles to the shares."

[38] In *Société Générale de Paris and Another v The Tramways Union Company, Ltd, and Others* (1884-1885) 14 QB 424 (CA) Lindley, LJ said the following at pages 451-452:

"But if shares in companies registered under the Companies Act, 1862, are spoken of as choses in action, care must be taken not to overlook the fact that their transferee has a legal, and not merely an equitable, right to become a shareholder. If a shareholder in a company governed by the Companies Act, 1862, does not transfer his shares, but agrees to transfer them or to hold them upon trust for another, either absolutely or by way of security, there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it. As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains the shareholder still. He is the person entitled to exercise the rights of a shareholder, - for example to vote as such, to receive dividends as such and to transfer the shares."

[39] In *Inland Revenue Commissioners v J. Bibby & Sons, Ltd* 1945 1 All ER 667 (HL), Lord Macmillan held the following at 671:

"As was said by Jessel, M.R., in *Pulbrook v, Richmond Consolidated Mining Company (2), [(1878), 9 Ch D 610]* at p. 615:

'The company cannot look behind the register as to the beneficial interest but must take the register as conclusive and cannot enquire . . . into the trusts affecting the shares.'

So far as the company is concerned the relation between such of its shareholders as happen to be trustees and their beneficiaries is *res inter alios*. It may be that a trustee shareholder may, as between himself and his *cestuis que trust*, be under a duty to exercise his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way (*cf. Puddephatt v Leith* (3) [[1916] 1CH 200]). But with such restrictions the company has nothing to do. It must accept and act upon the shareholder's vote notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere."

[40] The February 2006 agreement alleges in effect that the first respondent was the beneficial holder of 50,1% of the registered shares of the applicant company. As such, the votes cast in respect of such shareholding were required to be in accordance with the first respondent's instructions. Even if that were so, agreements between a registered shareholder and a beneficial shareholder in respect of the voting rights of the company are *res inter alios acta*. The first respondent cannot, *vis a vis* the applicant company, aver that a resolution was improperly passed on account of the fact that behind

the register he was either a beneficial owner of the shares or held the rights to direct the manner in which shares ought to be voted and the vote was not in accordance with his instructions. Accordingly the factual dispute in relation to the existence of the February 2006 agreement is not a material dispute relating to the efficacy of the resolution. It does not assist the respondents.

[41] The November 2005 and April 2007 agreements are relied upon and must be examined. Insofar as the applicant company might have been a party to the agreements, the provisions of section 220 operate to override any restraint on the removal of the respondents as directors. There are two differences between the two agreements. First the second respondent was not a party to the November 2005 agreement. Secondly the family trust is not alleged to have been a party to the April 2007 agreement. The provisions of section 220 override the April 2007 agreement which is only between the company and the directors. Nevertheless, in relation to such agreements it has been held that as between the director and the member concerned, the agreement is capable of enforcement. Thus in *Stewart v Schwab* 1956 (4) SA 791 (T) and *Amoils v Fuel Transport (Pty) Ltd* 1978 (4) SA 343 (W), the directors concerned were able to obtain interdicts interdicting and restraining the members from voting in favour of a resolution in contravention of their obligations under and in terms of the agreement to the directors concerned. However the difficulty presented in this case is that this issue is not raised in the context of an application for an interdict to interdict a threatened harm. The contractual breach of the voting member is raised as a ground, after the fact, that the vote ought to be rejected *vis a vis* the company. It appears to me that an interdict is an appropriate remedy precisely not only because specific performance of an agreement is sought but further that if a vote is taken in breach of the agreement, the harm would be irreparable in that a valid resolution would be passed. That this is so is evident from authorities referred to above. Any agreement as between a member and a director that the member would not exercise his or her voting rights to remove a director is *res inter alios acta* and has nothing to do with the company.

[42] In an application for an interdict, the company is not sought to give effect to the agreement; the enforcement of the agreement is sought as between the member and the director. In the present case, the first respondent seeks to hold the company bound to the agreement with Louw and the family trust. Mr Limberis submitted that the ground upon which the company could be held bound to the contract was that the agreement was with the entire registered membership of the company. As such, when the vote was taken to pass the resolution, the "company in general meeting" was thus a party to the agreement and its breach. For that reason Mr Limberis submitted to me that I ought to hold the company bound.

[43] I have two difficulties with this argument. The first is that the argument is constructed at making the company a party to the agreement by extending the members *qua* members to the company in general meeting. The problem the respondents have in this regard is that the result of such extension is to find that the company is a party to the agreement. The company was in any event a party to both the November 2005 and April 2007 agreements. The express wording of section 220 overrides any agreement to which the company is a party and permits the company to remove the director notwithstanding any agreement between it and the director. The second difficulty I have is that equating the majority members with the company in general meeting is in fact an argument that *Stewart v Schwab* was wrongly decided and that even an agreement between the members and the director is overridden by the provisions of section 220. This argument, that the words "the company" in section 220 means the company in general meeting which is the majority of shareholders assembled in general meeting, was raised by counsel in *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 513E-G. This argument was not determined as, on the facts of that case, it was held that there was no agreement not to remove the directors concerned.

[44] Accordingly both the November 2005 and April 2007 agreements are similarly a factual disputes which are not material in that they cannot assist the respondents. That however is not the end of the matter. The applicant's

papers must nevertheless show that a resolution was validly passed at the meeting which was properly held.

The members who passed the resolution

[45] In order for the company to pass a valid resolution in terms of section 220 of the 1973 Act, it must be carried by a majority of votes of the members, either present in person or by proxy or, in the case of a body corporate represented in terms of section 188. In the present case the question arises who was the member that passed the resolution. In this enquiry the provisions of sections 103 and 104 of the 1973 Act, must be read in the light of the relevant provisions of sections, 32, 52, 54, 60 and 65 of the 1973 Act. The relevant parts of which (with emphasis added) read as follows:

> "32 Any seven or more persons or, where the company to be formed is a private company, any two or more persons associated for any lawful purpose or, where the company to be formed is to be a private company with a single member, any one person for any lawful purpose, may form a company having a share capital or a company limited by guarantee and secure its incorporation by complying with the requirements of this Act in respect of the registration of the memorandum and articles.
>
> 52 . . .
> (2) If the company is to have a share capital, the memorandum shall state-
> (a) (i) the amount of the share capital with which it is proposed to be registered and the division thereof into shares of a fixed amount; or
> (ii) the number of shares if the company is to have shares of no par value;
> (b) the number of shares which each subscriber undertakes to take up, stated in words opposite his name: Provided that no subscriber may take less than one share.
> . . .
> 54 (1) The memorandum shall be and be completed in the form prescribed.
> (2) The memorandum of a public company shall be signed by not less than seven subscribers and of a private company by one or more subscribers, stating their full names, occupations and residential, business and postal addresses, and each subscriber shall sign the memorandum in the presence of at least one witness who shall attest the signature and state his residential, business and postal address.

> 60 (1) The articles shall be and be completed in the form prescribed.
> (2) The articles shall be signed by each subscriber of the memorandum stating his full name, occupation and residential, business and postal address, in the presence of at least one witness who shall attest the signature and state his residential, business and postal address.
>
> 65 (1) From the date of incorporation stated in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate with the name stated in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession, but with such liability (if any) on the part of the members to contribute to the assets of the company in the event of its being wound up as provided by this Act.
> (2) The memorandum and articles shall bind the company and the members thereof to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."

[46] Thus company may be formed by one or more persons, section 32. Those persons are the subscribers to the memorandum who are required to sign the memorandum, section 54(2) and articles of association, section 60(1). The shares taken up by each subscriber are recorded next to the name of each subscriber in the memorandum, section 52(2)(b). Upon incorporation the persons who were the subscribers form the body corporate with juristic personality, together with such other persons who become members of the company, section 65. The persons who were the subscribers to the memorandum are deemed to be the first members of the company and are required to be entered forthwith in the register of members, section 103(1). Every other person who agrees to become a member of a company and whose name is entered in its register of members, becomes a member of the company, section 103(2).

[47] Accordingly a member must be a person whose name is entered in the company's register. The family trust is named in the register as the member holding the entire share capital of the company. Mrs Louw requisitioned the general meeting, on behalf of the family trust, purporting to act in terms of a resolution of the trustees dated 12 November 2002 which empowered each of

the trustees to act individually to perform various specified activities and generally all other dealings authorised in terms of the trust deed. Whether this resolution of trustees is permissible in terms of the trust deed or a violation of the principle that trustees should act jointly, *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA), *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA), *Parker's* case, referred to above, is not something I am able to determine as the trust deed is not before me and I assume that the conduct of Mrs Louw was authorised by all the trustees. Both Mrs Louw and Louw were present at the meeting of 26 November 2009. Louw purported to represent the family trust through the instrument of a proxy in the form of a resolution signed by all three trustees of the family trust.

[48] Nevertheless for the resolution of the applicant company to be valid it had to be passed by or on behalf of a member. Whether or not that was done is determined with recourse to the register of members. The difficulty the applicant faces is that the name in the register is the family trust which is neither a person nor a body corporate or unincorporated, *Friedman's* case. The trust is a legal relationship, *Lupacchini's* case. The register does not disclose the name of a person. If by the name of the family trust one reads in a legal relationship or a trust estate there is no reference to a person, rather meaningless words. A trust is a legal relationship incapable of owning anything. The trust estate, in the sense of an accumulation of assets and liabilities, similarly cannot be the member as it too is not a person. If by the name of the family trust one is to read therein the trustees of the family trust in their capacities as such, as was done in *Kohlberg's* case and *BOE Bank* referred to above, there is at least a reference to persons.

[49] The applicant's difficulties are not resolved by this reading of the expression. There is no compliance with the provisions of section 103(2) which requires the name of the member to be registered. Registration by reference to office requires an enquiry involving evidence of identity extrinsic to the register. The applicant's difficulties are further compounded by the

provision of article 5.4 of the articles of the company which corresponds to articles 47 of Table A and 48 of Table B of Schedule 1 of the 1973 Act. This article provides that where a share is jointly held any one of the joint holders may vote as if he were solely entitled to the voting right. Where however more than one of the joint holders are present wither in person or by proxy, the vote of the joint holder whose name is entered on the statutory register first is to be recorded as the only eligible vote. An enquiry that identifies three trustees who are to be considered joint holders of the shares does not assist in determining whose name is registered first.

[50] To embark on such an enquiry, to identify the who are the trustees, requires recourse to the trust deed and the letters of authority of the master. These are matters with which the company is neither required nor permitted to concern itself, section 104. It is the register that is supposed to identify and disclose the names of the members. The name of the member ought to be reflected on the register. Where this is not so it is permissible for the court to go behind the register in proceedings to rectify the register. There were no such proceedings before me. No doubt were there such proceedings it might then have necessary to determine the factual dispute relating to the existence of the February 2006 agreement.

[51] The applicant and the trustees are the author's of their own misfortune. For whatever reason they chose to keep the names of the trustees off the register and then exercise, when it suited them, the rights accorded to members as if their names were reflected on the register. It is the trustees who were the owners of the shares. To the extent that the shares are trust assets one or more of the trustees names ought to have been reflected on the register in order to exercise the voting rights attaching to the status of a member.

The 2008 Act

[52] Shortly after this matter was argued, the 1973 Act was for the most part repealed by section 224 of the Companies Act 71 of 2008 ("the 2008

Act") which came into effect on 1 May 2011 by proclamation in the *Government Gazette* 34236 of 26 April 2011. Notably section 71(1) of the 2008 Act, the equivalent of section 220 of the 1973 Act, operates to override any agreement between the shareholder and the director. Thus the relief in *Schwab* and *Amoils* would seem to be no longer competent. Significantly the 2008 Act does not use the term "member" of a company except in relation to a non profit company. A "shareholder" is the holder of a share issued by a company and who is entered as such in certificated or uncertificated securities register. A person for the purposes of the 2008 Act is defined to include a juristic person. A juristic person in turn is defined to include a trust. There is no equivalent of section 104 of the 1973 Act. Whether the 2008 Act permits the registration of a trust as a shareholder, or includes trusts for the purposes of going behind the register for the purposes of determining control and the existence of a relationship giving rise to related and inter-related parties, for the purposes of corporate governance is happily a question upon which I need not embark; this is possibly a task for another court in the future.

Conclusion

[53] When the 2008 Act came into effect on 1 May 2011 it did so without retroactive effect. Accordingly the 2008 Act has no effect on the validity resolution or the meeting of 26 November 2009.

[54] The resolution was thus passed by Louw whose name was not reflected on the register as a member. Louw acted in terms of a proxy on behalf of the trust which is not a person and thus not a member. To the extent that Louw acted on behalf of all three trustees (of which he was one), since none of their names were reflected in the register, he could not be said to have on behalf of any member.

[55] The resolution was not the resolution of a member and was thus invalid and ineffective as an instrument to remove the respondents under section 220 of the 1973 Act.

[56] I make the following order: the application is dismissed with costs.

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J R PETER
ACTING JUDGE
SOUTH GAUTENG HIGH COURT, JOHANNESBURG

APPEARANCES

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E A Limberis SC, for the respondent instructed by Fluxmans Inc, Johannesburg