

HISTORIC SHARE BLOCK SCHEMES: IF IT QUACKS LIKE A DUCK ...

The Trustees for the Time Being of the Hunter Family Trust v Duin-en-See (Pty) Ltd and Others (5035/2017) [2022] ZAWCHC 141 (26 July 2022)

This judgment is of interest as it illustrates the provisions in the Share Blocks Control Act that allow for recognition of a share block scheme that was in place before the Act became operational. With recognition as such a scheme, comes the protection that is offered to shareholders by the Act. The judgment further confirms that shareholders who transfer their shares in a company owning immovable property and operating a share block scheme, are transferring shareholder rights and not an interest in the immovable property of the company.

The Judgment can be viewed [here](#).

FACTS

Duin-en-See (Pty) Ltd (DeS) was incorporated during 1958 by its shareholders, at the time 5 natural persons, as a vehicle to acquire and hold certain immovable property for the benefit of the original shareholders. By virtue of their respective shareholdings, they would each be entitled to the benefit in and exclusive use of a defined area on the land ('land parcel'). Collectively the parcels made up the whole of the land owned by DeS.

All the shares in DeS were allotted to the respective original shareholders. The current shareholders were the successors in title to of this allotment.

Contemporaneously with the incorporation of DeS, (it is alleged that) the original shareholders entered into an agreement in respect of the use of their shares. It provided, amongst other things, that to each shareholding a specific land parcel would be allocated, over which each original shareholder and his/her successors in title would enjoy certain use rights. These use rights included: (i) the right to the exclusive use, possession and occupation of the allocated parcel; (ii) the right to let out the allocated parcel and to collect the rental for the personal gain of that shareholder; (iii) the right to erect dwellings on the allocated parcel; (iv) the right to bequeath/dispose his/her shareholding and the usage rights associated therewith; (v) the right to divide his or her shareholding and the parcel allocated to that shareholding to the extent permitted by the company's memorandum and articles of association ('the 1958 agreement'). The company and the original shareholders implemented the agreement ever since.

From time to time between 1958 to the present, certain of the original shareholders disposed of and divided their shareholdings and related original allocated parcels. At the time of these proceedings there were 12 shareholders, of which the Hunter Family Trust (the HF Trust) was one.

During **1961**, Scholtz (an original shareholder) divided his original shareholding in half and also divided the original parcel into two parts. He then sold the one half of his shares to Ms Hunter. The share sale agreement included reference to the use rights in respect of the portion of the parcel allocated to Scholtz initially, and the sale and transfer occurred with the knowledge and consent of DeS and the other shareholders. In **1995**, again with the knowledge and approval of all the shareholders of DeS and of DeS itself, Hunter transferred her shares (and rights under the usage agreement) to the HF Trust.

Since 1995, the HF Trust had effected improvements to the parcel associated with the Trust's shareholding (as had Hunter and Scholtz before it), including the erection of dwelling houses and other structures.

The immovable property owned by DeS was incorporated into what is now the Bitou Municipality. During 2012, DeS procured the subdivision of the land into separate erven, with the shareholders' consent, which consent was subject thereto that: (i) the subdivision would not prejudice the shareholders' rights and interests attached to their shares; and (ii) that the subdivided erven would be created around the existing dwellings erected on the allocated parcels, thereby preserving shareholders' rights to the dwellings erected upon the respective allocated parcels; and (iii) that the company would be entitled to deal with and dispose of the erven created by the subdivision other than those created around the existing dwellings on the allocated parcels.

When it appeared that DeS was contemplating disposing of one such Erf (being the parcel allocated to the HF Trust and on which the Trust had erected a home), the Trust approached the Court for an order declaring that a share block scheme existed and that DeS was in fact a share block company and was therefore prohibited from depriving them of the right to occupy, use and benefit from the erf.

DeS raised two exceptions to the claims. In the main, it denied that the HF Trust showed that the scheme was a share block scheme.

HELD

First ground of exception: Can it be said that the arrangement (if proved in a court) in fact constituted a 'share block scheme' as defined in section 1 of the Act?

- Section 4 of the Share Blocks Control Act ('the SBC Act') provides that "a company shall be presumed to operate a share block scheme if any share of the company confers a right to or an interest in the use of ... any part of immovable property". A 'share block scheme' is further defined in the SBC Act to mean 'any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property'.
- The use in the definition of the expressions 'any scheme' and 'in any manner whatsoever' expresses an intention by the legislature to cast the net widely for the purposes of the Act, the object of which is reflected in its long title, being '(t)o control the operation of share block schemes; and to provide for matters connected therewith'.
- The fact that the shareholders' relevant rights or interests in the use of the immovable property were not explicitly provided for in the definition of the relevant class of shares in the company's memorandum of incorporation, as argued by DeS, does not take it outside the application of the Act. The SBC Act was brought into being to regulate a state of affairs that had obtained since at least the 1950s whereby, prior to the inception of sectional title ownership of immovable property, persons sought to obtain something akin to separate ownership of parts of buildings. To achieve that object, it was necessary to devise a means of getting around the common law doctrine that holds that a building erected on land cannot be owned separately from the ownership of the land (*superficies solo cedit*). A commonly adopted means of doing so was to use a company as the property owner, with the shares issued in it conferring exclusive use and benefit rights for the holders thereof in respect of identified sections of the property.
- Previously, shareholders' attendant rights and interests *vis-à-vis* the company were frequently recorded in the company's articles of association. But that was not the only manner in which they were provided for. Indeed, it was in recognition of that fact that the legislature determined in section 7(2) of the SBC Act that a uniform method be adopted. It did so by providing that '(t)he articles of a share block company shall provide that a member shall be entitled to the use of a specified part of the immovable property in respect of which the company operates the share block scheme, on the terms and conditions contained in a use agreement entered into between the company and such member'. Recognition by the legislature that some companies

that were operating share block schemes at the commencement of the Act, on 1 January 1981, might require to amend their articles of association to comply with the introduction of a uniform method, is evident in section 2 of the SBC Act, which in material part provides that the Registrar of Companies may “on application ... by a company which at the commencement of this Act operates a share block scheme, exempt such company from any provision of this Act for such period and on such conditions as the Registrar may deem fit. “

- In the current matter, the HF Trust alleged that the relevant rights and interests and their integral connection to the original blocks of shares, were provided for in the 1958 agreement between the original shareholders themselves, and to which the company became privy. The juristic effect of such an agreement is indistinguishable from a company’s articles of association.
- The 1953 agreement that the HF Trust pleaded would, if proved at the trial, constitute a manner by which the holding of the respective blocks of shares conferred a right to or an interest in the use of identified parts or parcels of the company’s immovable property.
- For these reasons the exception on the first ground fell to be dismissed. The allegations, if proved at a trial, would indicate that DeS was a share block company.

The second ground of exception: that the transfer to Mrs Hunter and then to the HF Trust, of shares and rights under the 1958 agreement, had to be in writing to be valid

- It was argued by DeS that under section 1(1) of the General Law Amendment Act 68 of 1957 (‘the GLA Act’), *in force at the time of the transfer of shares to Mrs Hunt*, no contract of sale or cession in respect of land or any interest in land would be of any force or effect unless it was reduced to writing and signed by the parties thereto or by their agents acting on their written authority.
- Section 2(1) of the Alienation of Land Act 68 of 1981 (‘ALA’), which has been applicable since October 1982, is to essentially the same effect as the provision in the aforementioned GLA Act.
- It was clear from the papers that the contract that the HF Trust relied on was one between themselves (shareholders) and the company – a so-called ‘shareholders’ agreement’. The action was instituted for the enforcement of the rights that they alleged attached to the shares the HF Trust held in the company. The antecedent transactions in 1961 (cession to Mrs Hunt) and 1995 (cession to the HF Trust) that culminated in the Trust’s acquisition of the shares were not contracts in respect of the sale of land or for the cession of rights in land. They were sale of share agreements.
- Accordingly, HF Trust did not persuade the Court that the alleged 1961 agreement in terms of which the HF Trust acquired and held the shares was subject to the formalities prescribed in either the GLA Act or the ALA.

The transfer after the SBC Act came into operation: the 1995 transaction

- The 1995 transaction, in terms of which 25 shares then held by Mrs Hunter were acquired by the HF Trust, was, however, not effected in a manner compliant with the Act which requires the agreement to be in writing. The situation was addressed by section 18(2) of the SBC Act which provides that a contract for the acquisition of a share which does not comply with the provisions of section 16 or 17 of the SBC Act, shall not be effected by such defect if the purchaser had discharged his obligations in terms of the contract and the seller had transferred the relevant share to the purchaser.
- The aforementioned provisions of section 18(2) of the SBC Act were equivalent to those in section 28(2) of the ALA, which provides that any alienation which does not comply with the provisions of section 2(1), shall in

all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question had been transferred to the alienee.

- Thus, even if the alleged 1995 transaction was subject to the ALA, as contended by the first defendant, it would not be bereft of force and effect once the parties to it had fully implemented their contract, as alleged in the amended particulars of claim.
- The provisions of section 28 of the ALA and section 18(2) of the SBC Act are consistent with the common law. An executory oral agreement in respect of the alienation of land is unenforceable by virtue of its non-compliance with the prescribed formalities, but such an agreement does nonetheless give rise to natural obligations, which, if discharged, give rise to legally cognisable results. The same considerations would apply in respect of the performance of an alienation of land or any right or interest therein that was subject to the GLA Act.

CONCLUSION

In the result, DeS' exceptions dismissed.