THE COMPANIES ACT 71 OF 2008 DOES NOT OUST THE COMMON-LAW DERIVATIVE ACTION FOR CLOSE CORPORATIONS

Naidoo v The Dube Tradeport Corporation [2022] ZASCA 14

1 Introduction

The Companies Act 71 of 2008 (2008 Act) abolished the common-law derivative action for companies; section 165 of the 2008 Act replaced it with the statutory derivative action (Griggs "The Statutory Derivative Action: Lessons That May Be Learnt From the Past!" 2002 *University of Western Sydney Law Review* par 1.2; Coetzee "A Comparative Analysis of the Derivative Litigation Proceedings Under the Companies Act 61 of 1973 and the Companies Act 71 of 2008" 2010 *Acta Juridica* 298). The question that remained was what impact this would have on common-law rights for close corporations that had been incorporated before the commencement of the 2008 Act but which have not converted to companies under that Act. The Supreme Court of Appeal (SCA) judgment in *Naidoo v The Dube Tradeport Corporation* ([2022] ZASCA 1) provides much-needed clarity on the status of the common-law derivative action for close corporations. The case also provides guidance on how a court will assess whether knowledge of information can be imputed to a third party in their dealings with a close corporation.

2 Facts

This case was an appeal from the KwaZulu-Natal Division of the High Court, Durban (High Court), which had upheld the exception of the first respondent, the Dube Tradeport Corporation (Dube Tradeport), to the appellants' particulars of claim (par 1). In the action, the first appellant, Mr Sagadava Naidoo (Sagadava) and the second appellant, Odora Trading CC (Odora), a close corporation, sued the first defendant, Mr Sivaraj Naidoo (Sivaraj) and Dube Tradeport to set aside the sale of certain farms that had belonged to Odora and had been sold to Dube Tradeport under the controlling mind of Sivaraj (par 1).

Sivaraj was the sole registered member of Odora, and therefore held the entire member's interest in the close corporation. However, in the particulars of claim it was alleged that Sagadava was in fact the beneficial owner of the member's interest in Odora, and that Sivaraj held the member's interest on behalf of Sagadava as his nominee (par 2). This claim was made pursuant

to certain previous oral agreements between Sagadava and Sivaraj. It was alleged that Sivaraj had no right to sell the property to Dube Tradeport without Sagadava's consent. It was on this ground that Sagadava had instituted a derivative action on behalf of Odora, and a personal action in his own name to set aside the sale of the properties (par 2).

These properties were the sole assets of Odora and were sold pursuant to a written purchase agreement between Odora and Dube Tradeport (par 3). Odora had purchased the properties in December 2001. On 20 January 2001, Sagadava and Sivaraj had concluded an oral agreement in terms of which certain assets in Sagadava's possession would be divided between the two brothers on a 50/50 basis (2001 agreement). The ultimate agreement was that the assets would be registered in the personal names of Sagadava and Sivaraj. However, the latter repudiated the 2001 agreement and refused to sign any record of it. In response, Sagadava refused to accept Sivaraj's repudiation and elected to hold him to the agreement (par 4).

In the alternative to the 2001 agreement, it was pleaded that Sagadava and Sivaraj had concluded an agreement in 1998, in terms of which Sivaraj would hold certain assets on behalf of Sagadava as his nominee (1998 agreement). When Odora purchased the properties in 2001, they became part of the 1998 agreement. On 13 January 2014, Sagadava instituted an action in the High Court against Sivaraj, seeking transfer and delivery to him of his (Sagadava's) member's interest in Odora. Sivaraj defended the action, also claiming to act on behalf of Odora (par 4–5).

An exception to the particulars of claim was filed by Dube Tradeport, predicated on the contention that, since Sagadava was not a member of Odora, he could not bring an action on its behalf, and that, in any event, section 54 of the Close Corporations Act 69 of 1984 (Close Corporations Act) protected Dube Tradeport. Section 54 of the Close Corporations Act provides that a member of a close corporation is an agent of the close corporation in dealings with a third party, and has the power to bind the close corporation, except where a third party knows or ought to know of the member's lack of authority to transact on behalf of the close corporation (par 7).

3 Proceedings in the High Court

The High Court found that the common-law derivative action is available in respect of close corporations. However, the court concluded that since Sagadava was not a registered member of Odora, he was not entitled, in terms of that law, to institute an action on its behalf or in its name (par 8). According to the court, neither section 49 nor section 50 of the Close Corporations Act granted Sagadava the right to institute an action in the name of Odora. In any event, concluded the High Court, as Sagadava had relied on the common-law derivative action to advance the suit of Odora, he could not rely on section 50.

The High Court also considered section 54 of the Close Corporations Act. The court held that the provisions of the Close Corporations Act precluded the action by both Sagadava and Odora against Dube Tradeport, as the

latter had transacted with Sivaraj, the sole member of Odora, and who, as its agent, had the power to bind it. The court held that Dube Tradeport was protected against the negative effects of the *ultra vires* doctrine and the doctrine of constructive notice (par 9). The court accordingly held that the appellants' pleaded case did not set out a cause of action against Dube Tradeport, and it upheld the exception with costs (par 10).

4 Issue

The SCA had to consider three issues. The first was the *locus standi* of both Sagadava and Odora, which depended on Sagadava's claim that he was the "beneficial owner" of the member's interest in Odora. The second issue was whether the common-law derivative action, upon which Sagadava relied, is available in respect of close corporations, and if so, whether Sagadava was entitled to bring such action on behalf of Odora. The third was whether section 54 of the Close Corporations Act protected Dube Tradeport. Both the second and third issues arose only if the first issue was answered in the affirmative (par 14).

5 Judgment

On the first issue, Makgoka JA concluded (Mocumie, Mothle, Mabindla-Boqwana JJA and Weiner AJA concurring) that this being an exception stage, the factual averments by Sagadava must be accepted as correct, unless they were manifestly false and untenable, which was not apparent from the pleadings (par 35). Makgoka JA held that, for the purposes of the exception, Sagadava's *locus standi* had been established. With regard to the common-law derivative action for close corporations, the court considered the effect of abolishing the common-law derivative action by section 165(1) of the 2008 Act, and concluded that this did not affect close corporations that had not converted to companies. Thus, the common-law derivative action was still available to such close corporations. With regard to section 54 of the Close Corporations Act, the SCA found that Dube Tradeport had known of the dispute between Sagadava and Sivaraj concerning the membership of Odora and the properties. The court held that there was sufficient indication, at least at the exception stage, that the imputed knowledge should be attributed to Dube Tradeport in terms of section 54(2), and as a result, Dube Tradeport did not enjoy the protection of section 54 of the Close Corporations Act (par 34). Accordingly, the SCA set aside the order of the High Court, and upheld the appeal with costs (par 37).

6 Discussion

6 1 The origin and nature of the common-law derivative action

Judges have long been reluctant to interfere with the internal affairs of a company and similar associations; they have usually abdicated their

jurisdiction in favour of the obvious alternative authority – the majority of the members (shareholders). The long-standing view has been that it is not the business of a court to manage the affairs of a company – that is a task for shareholders and directors (*Shuttleworth v Cox Bros & Co* [1927] 2 K.B 9 23; see also Sykes "The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims Under the Companies Act 2006" 2010 *Civil Justice Quarterly* 205 209). This was the view adopted in *Sammel v President Brand Gold Mining Co Ltd* (1969 (3) SA 629 (A)), where the court held that the concept of corporate democracy connotes that where there is disagreement among the members, or between the members and directors, the will of the majority members must ultimately prevail (see *Sammel v President Brand Gold Mining Co Ltd supra* 678; see also *Karoo Valley Farms Bpk v Klein Karoo Kooperasie Bpk* 1998 (4) SA 226 (C) 235; Gibson *South African Mercantile and Company Law* 8ed (2005) 368–369). The general rule is that the courts are reluctant to interfere with the internal management of a company (*Carlen v Drury* (1812) 1 V 7 B 154; 35 ER 61 62; *Yende v Orlando Coal Distributors (Pty) Ltd* 1961 (3) SA 314 (W) 316; *Maynard v Office Appliances (SA) (Pty) Ltd* 1927 WLD 290; *Levin v Felt and Tweeds Ltd* 1951 (2) SA 401 (A) 414–415). This rule stems from the principle in *Salomon v Salomon & Co Ltd* ([1897] AC 22 (HL)) that an incorporated company must be treated like any other independent person. It is the bearer of its own rights and liabilities.

The origin of what is now known in English law as the rule in *Foss v Harbottle* ((1843) 2 Hare 461, 491; 67 ER 189) (*Foss v Harbottle*) can be traced to some early nineteenth-century decisions on the law of partnership. In *Foss v Harbottle* (see also Beuthin and Luiz *Beuthin's Basic Company Law* 3ed (2003) 153–156; see generally Cassim (ed) *Contemporary Company Law* (2011) 678–300). Sir James Wigram VC stated that, in respect of wrongs done to a company, "the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative" (Wedderburn "The Rule in *Foss v Harbottle*" 1957 *Cambridge Law Journal* 194 and 1958 *Cambridge Law Journal* 93: these articles are primarily concerned with the modern rule and the exceptions to it, but also provide an introduction to the history of the rule).

The exception to the rule in *Foss v Harbottle* (*supra*) is available where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. According to Wedderburn, the exceptions to the rule in *Foss v Harbottle* (*supra*) are not exceptions at all (Wedderburn "Shareholders' Rights and the Rule in Foss v Harbottle" 1957 *Cambridge Law Journal* 203). They are situations in which there is no chance of confirmation by the majority, and are therefore situations where the rule in *Foss v Harbottle* does not apply (par 11).

Exceptions to the rule in *Foss v Harbottle* (*supra*) have been established even though there has not always been agreement upon their exact nature. The exceptions to the rule listed by Jenkins LJ in *Edwards v Halliwell* ([1950] 2 All ER 1064) are where:

1. *Ultra vires or illegal acts have been committed*: The act of the company is *ultra vires* where the act complained of is wholly *ultra vires* to the

company or association. *Ultra vires* means "beyond the scope of (its) powers" (Hiemstra and Gonin (eds) *Trilingual Legal Dictionary* 3ed (2003) 300). In cases where the act or acts in question are *ultra vires* or illegal, the majority shareholders cannot ratify the act and specifically in the case of illegal acts, such will be prohibited under law. In such a case of an *ultra vires* or illegal act performed by the majority, a shareholder has a right of action, for an interdict or injunction to restrain the act in question. This action may be brought on his own behalf, or in his representative capacity acting on behalf of other shareholders (Wedderburn *Cambridge Law Journal* 203).

2. *The company fails to achieve a special resolution*: The company fails to achieve a special resolution where the matter is one that could validly be agreed to or sanctioned not by a simple majority of the members but only by some special majority. The rule is ousted in this situation. In *Edwards v Halliwell* (*supra*), Jenkins LJ held that anything that, according to the articles, should be done by a special majority fell outside the rule in *Foss v Harbottle* (*Edwards v Halliwell supra* n 6 1067). If this was not the case, a company, where its directors had breached its own regulations by acting without a special resolution, could assert that it alone was the proper plaintiff in any further action. The effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which was required by the articles to be done by special resolution (Wedderburn 1957 *Cambridge Law Journal* 194).
3. *A member's rights are infringed*: A member's rights are infringed where the personal and individual rights of membership of the plaintiff have been invaded (*Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1988) 6 ACLC 1160). In *Edwards v Halliwell* (*supra*), the court said that each member had a personal right to prevent irregular alterations. In *Pender v Lushington* ((1877) 6 ChD 70), the court stated that the right of a shareholder to vote according to the articles was enforced. This is true whether a shareholder votes with the majority or minority; a shareholder is entitled to have their vote recorded and thus also has an individual right to sue (*Edwards v Halliwell supra* 1064, 1066). The cases go further and have recognised not only a member's contractual rights under the articles of association (*Borland's Trustee v Steel Bros, Ltd* (1901) 1 Ch 279; *Bigswood v Henderson's Transvaal Estates, Ltd* (1908) 1 Ch 743), and the right to enforce shareholder rights (*Beattie v Beattie* [1938] Ch 708 721–722), but also personal rights: a) to transfer shares and to vote (*Pender v Lushington* (1877) 6 ChD 70; *Moffat v Farquhar* (1877) 7 ChD 591; *Marks v Financial News* (1919) 35 TLR 681); b) to protect preferential rights and class interests, such as the right to have shares offered to them; c) to enforce a declared dividend to be distributed according to the articles (*Moodie v Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 (HL); *Burdett v Standard Exploration Co* (1899) 16 TLR 112); and d) to prevent directors from holding positions in breach of the articles. Similarly, a shareholder has a personal right to prevent alterations of the articles that would constitute a fraud on the minority (*Greenhalgh v Arderne*

Cinemas supra [1945] 2 All ER 719; *Brown v British Abrasive Wheel* (1919) 1 Ch 290).

4. *A fraud on the minority has been committed*: The majority of members perpetrate a fraud on the minority (*Cook v Deeks* (1916) 1 AC 554 (PC)). The two elements in the concept of fraud on a minority were established in the leading decision of *Burland v Earle* ((1902) AC (PC) 83). In this case, the respondents (as shareholders) sued to compel the directors to declare a dividend, and to obtain an account from B (a director) of a profit made by him out of the purchase and resale to the company of certain materials. The Privy Council rejected both claims. The question that the court considered was the right of minority shareholders to sue when the alleged wrongdoers were in control of the company. Lord Davey, in *Burland v Earle* (*supra*), maintained that an exception would be made to the principle that the company is a proper plaintiff where "the persons against whom the relief is sought themselves hold and control the majority of shares in the company and will not permit an action to be brought in the name of the company" (*Burland v Earle supra* 93). This element became known as wrongdoer control.
5. *The wrongdoer is in control*: The question that often arises is what exactly is meant by control. The test for control was stated in the case of *Pavlides v Jansen* ((1956) Ch 565). According to the court, the test requires that the wrongdoers own at least 51 per cent of the shares in the company. This test has been criticised for being too narrow, because in some instances a shareholder could have *de facto* control of the company without holding a majority of shares in that company (Ngalwana "Majority Rule and Minority Protection in South African Company Law: A Reddish Herring" 1996 113 *South African Law Journal* 527–528). A more flexible approach was adopted in earlier cases. In *Russel v Wakefield Waterworks* ((1875) LR 20 Eq 474), the court stated that the rule in *Foss v Harbottle* (*supra*) is not a universal rule but a rule that is subject to exceptions, and these exceptions are dependent on the necessity of the case and of the court doing justice (*Russel v Wakefield Waterworks supra* 480).

The common-law exceptions to the rule in *Foss v Harbottle* (*supra*) have been consistently applied in South African law, and it is accepted that they form part of our law (see *Lewis Group Ltd v Woollam* [2017] 1 All SA 192 (WCC); 2017 (2) SA 547 (C) par 30, where reference is made to *Wimbledon Lodge (Pty) Ltd v Gore NO* 2003 (5) SA 315 (SCA); [2003] 2 All SA 179 (SCA); *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA); *Letseng Diamonds Ltd v JCI Ltd* 2009 (4) SA 58 (SCA); *Cassim v Voyager Property Management* 2011 (6) SA 544 (SCA); *Communicare v Khan* 2013 (4) SA 482 (SCA); *Gihwala v Grancy Property Ltd* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)).

Section 165 of the 2008 Act abolished the rule in *Foss v Harbottle* that a person other than the company can bring legal proceedings on behalf of the company; it replaces the rule with statutory provisions that are contained in section 165 of the 2008 Act. This approach is similar to the provisions in

Canadian company law that revoked the common-law derivative action with the introduction of the statutory derivative action (Griggs 2002 *University of Western Sydney Law Review* par 1.2; Coetzee 2010 *Acta Juridica* 298).

6 2 Sections 49 and 50 of the Close Corporations Act

Dube Tradeport argued that because the common-law derivative action was abolished in section 165(1) of the 2008 Act and replaced with a statutory derivative action, there was no common-law derivative action applicable to close corporations (par 12). Dube Tradeport contended further that the appellants were prevented from bringing the action by sections 49 and 50 of the Close Corporations Act. According to Dube Tradeport, since Sagadava was not a member of Odora, he was excluded from pursuing any legal proceedings on behalf of Odora. It was also contended that it was incompetent for Odora to bring an action itself or to be assisted by a non-member like Sagadava (par 13).

Sections 49 and 50 of the Close Corporations Act are expressly limited to proceedings instituted by registered members of a close corporation designated in the founding statement. Section 49(1) of the Close Corporations Act provides:

> "Any member of a corporation who alleges that any particular act or omission of the corporation or one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section."

Section 50 gives a member the right to institute proceedings against fellow members on behalf of the corporation where, among other things, a member or a former member of a corporation is liable to the corporation for: a) a breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or b) negligence in terms of section 43 (par 12).

According to Makgoka JA, on a simple and sensible reading of the allegations, the essence is clear that it was not Odora itself that was suing, but Sagadava suing on its behalf, and in his own name. Thus, Sagadava was suing in two capacities, namely in his personal capacity as a victim of an alleged fraud perpetrated against him by Sivaraj, and in his representative capacity on behalf of Odora (par 16). According to the established principles of derivative action, Odora ought not to be cited as a plaintiff. However, the fact that it was cited does not detract from the fact that Sagadava purported to sue on behalf of Odora. This is expressly averred. Despite imperfections, the essence of Sagadava's *locus standi* was clear (par 16). Makgoka JA was of the view that an over-technical approach should be avoided because it destroyed the usefulness of the exception procedure, which is to weed out cases without legal merit. On the face of it, Sagadava's case could not be classified in the category of those "without legal merit" (par 16; see also *Telematrix (Pty) Ltd v Advertising Standards*

Authority SA [2005] ZASCA 73; 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) par 3).

Sagadava alleged that he was in fact the sole member, alternatively, a 50 per cent member of Odora, and that there was an oral agreement between him and Sivaraj that the latter would hold the membership of Odora on his behalf as his nominee. The High Court had not accepted Sagadava's claims to membership of Odora (par 17). According to Makgoka JA, however, the factual averments by Sagadava should have been accepted as correct, unless they were manifestly false (see *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) 754J–755B; *Voget v Kleynhans* 2003 (2) SA 148 (C) par 9; *Trinity Asset Management (Pty) Ltd v Investec Bank Limited* [2008] ZASCA 158; 2009 (4) SA 89 (SCA); [2009] 2 All SA 449 (SCA) par 55), which was, according to the judge, not apparent from the pleadings. The High Court should not have gone beyond the allegations. At the trial, the allegations might well turn out to be false, but, for the purposes of the exception, their truthfulness should have been accepted. Makgoka JA stated that the High Court's reasoning also suffered an internal contradiction (par 18). The High Court had said that even if it accepted that Sagadava was the sole, or a 50 per cent member of Odora, he was "a stranger to Odora", who could not institute an action on its behalf. It defies logic that as a member, even a sole member, Sagadava could, in the same breath, be "a stranger" to it. It follows that for the purposes of the exception, facts regarding Sagadava's membership of Odora, and therefore his *locus standi* to bring a derivative action on its behalf, had been established and should therefore have been accepted by the High Court (par 18).

Prior to the 2008 Act coming into effect, a common-law derivative action was recognised for companies, and by extension, for close corporations (see *TWK Agriculture Ltd v NCT Forestry Co-Operative Ltd* 2006 (6) SA 20 (N)). In *TWK Agriculture Ltd v NCT Forestry Co-Operative Ltd* (*supra*), it was decided that the common-law principles of minority protection in companies are applicable to co-operatives, and that, accordingly, a common-law derivative action is available to a member of a co-operative. Sections 266 to 268 of the repealed Companies Act 61 of 1973 offered members the right to initiate legal proceedings, or to cause legal proceedings to be initiated on behalf of the company when, acting through its directors, the company failed to initiate such proceedings. In respect of close corporations, sections 49 and 50 of the Close Corporations Act provide members with similar rights. These statutory rights, according to Makgoka JA, have always been parallel, and complimentary to, the common-law rights of shareholders of companies and members of close corporations to pursue derivative actions on behalf of their respective corporate entities. They were never meant to oust those common-law rights (par 20).

The 2008 Act, however, abolished the common-law right of derivative action in section 165, and substituted it with a statutory right. This, according to Makgoka JA, has not affected the common-law rights in respect of close corporations that were incorporated prior to the commencement of the 2008 Act but which have not converted to companies pursuant to that Act (par 21). In terms of Schedule 3 Part A paragraph 3 of the 2008 Act, close

corporations will continue to exist indefinitely until they are deregistered or dissolved under the current Close Corporations Act, or converted to a company as envisaged in paragraph 1(1) of Schedule 2 of the Act. The current Close Corporations Act (with slight amendments) and the 2008 Act will exist concurrently, and close corporations will be required to comply with the provisions of both Acts (par 21).

Makgoka JA was of the view that it would be misplaced and incorrect for a comparison to be drawn by the respondent between sections 49 and 50 of the Close Corporations Act, and section 165 of the 2008 Act. Not only is the abolition of common-law derivative actions expressly stated in section 165(1) of the 2008 Act, but section 165(*d*) also provides for a third party right, which is not found in sections 49 and 50 of the Close Corporations Act (par 21). The situation remains therefore that the common-law rights of members of close corporations, including the rights of an unregistered owner of a member's interest to bring a derivative action, are still available (par 21). Sagadava did not purport to rely on section 49 or 50, but pursued his common-law rights as the actual and factual, albeit unregistered, member of Odora.

6 3 Section 54 of the Close Corporations Act and the doctrine of constructive notice

Section 54 of the Close Corporations Act provides:

> "(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.
> (2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power."

The purpose of this section is to protect third parties who have *bona fide* transacted with a member of a close corporation, against the negative effects of the *ultra vires* doctrine and the doctrine of constructive notice. It was submitted on behalf of Dube Tradeport that it was protected under this section as it transacted with a member of Odora (Sivaraj), who, on the basis of section 54, was an agent of Odora and had the authority to bind it. In addition, he was the sole registered member (par 24).

According to Makgoka JA, equal attention must be given to the caveat in subsection (2)(*b*) of section 54. Where the third party knows, or ought reasonably to know, that the member he or she is dealing with has no power to act for the close corporation, such third party does not enjoy the protection afforded by the section (par 25). In the present case, in their particulars of claim, the appellants alluded to the dispute between Sagadava and Sivaraj in respect of the membership of Odora and the ownership of the properties. They pointed out that Sagadava had, pursuant to that dispute, instituted an action for, among others, an order directing Sivaraj to transfer and deliver to

him, Odora's member's interest, which action was pending. The appellants went on, according to Makgoka JA, to make extensive allegations of fraud, unlawfulness and misrepresentations against Sivaraj in relation to Odora and, in particular, the sale of the properties to Dube Tradeport (par 25).

The appellants alleged that Dube Tradeport was aware of the dispute between Sagadava and Sivaraj, and the pending action in respect thereof; accordingly, it knew or ought to have known of Sagadava's claimed rights; and was therefore not a *bona fide* possessor who was unaware of Sagadava's prior claims (par 26). In essence, the appellants alleged that Sivaraj had no power to sell the properties on behalf of Odora because he was a 50 per cent member of Odora, or alternatively a mere nominee of Sagadava, and that Dube Tradeport knew it, or in the circumstances, ought to have known it (par 26).

Makgoka JA stated that Dube Tradeport was aware of the dispute between Sagadava and Sivaraj (as was evident from the escape clause written into the agreement of sale for the properties), and accordingly knew or ought to have known that Sivaraj may lack the necessary authority to conclude the sales agreement on behalf of Odora without the consent of Sagadava (par 26). Dube Tradeport could therefore not claim to be a *bona fide* possessor who was unaware of Sagadava's claims. Makgoka JA stated further that Dube Tradeport did not have to know the truthfulness of these claims, but it was sufficient that it subjectively foresaw the possibility of the truthfulness, and nonetheless proceeded with the impugned sale agreement (par 26). According to the court, Dube Tradeport's position is similar to a purchaser described thus in *Dhayanunth v Narain* 1983 (1) SA 565 (N) 565:

> "[A purchaser who] has been apprised, prior to purchasing the property, of the existence of some right in the property vested in a third party in such a way as to make it incumbent upon him to enquire, before purchasing the property, precisely what that right comprised. If he does not do so, he cannot be heard … to say that he did not know the precise nature of the third party's right. The imperfection of his knowledge is attributable to his own act in wilfully shutting his eyes and failing to see what was perfectly obvious." (par 31)

The High Court accepted that Dube Tradeport was aware of the dispute between Sagadava and Sivaraj over the membership of Odora and the properties when it concluded the impugned purchase agreement with Odora. The High Court accepted that the "escape clause" was inserted with this in mind. However, the High Court concluded that this was not enough for Dube Tradeport to lose the protection afforded in section 54 "because of the lack of knowledge of [Dube Tradeport] as to the truth of the membership ownership" (par 27).

Makgoka JA disagreed with the reasoning of the High Court. According to Makgoka JA, section 54 has two requirements pertaining to the knowledge of a third party of a member of a close corporation's lack of authority: actual or imputed knowledge (par 28). These requirements are in the alternative. The appellants relied on the latter. Whether a third party knew or ought to have known of the member's lack of power to act for the corporation is a factual question, the truthfulness of which can only be determined at the trial (par 28). Makgoka JA stated that as the High Court was not sitting in the trial

of the main action, it was not in a position to determine probabilities or cast doubt on the facts alleged in the particulars of claim. This was for the simple reason that it had only one version before it, namely that of the appellants. The High Court had to accept that version, unless it was patently false, which was not the case here (par 28).

According to Makgoka JA, Dube Tradeport had known of the dispute between Sagadava and Sivaraj concerning the membership of Odora and the properties, and it was sufficient, at least at the exception stage, that the imputed knowledge in terms of section 54(2) should be attributed to it. As a result, it did not enjoy the protection of section 54 of the Close Corporations Act (par 28–34).

7 Conclusion

The judgment in *Naidoo v The Dube Tradeport Corporation* indicated that before the promulgation of the 2008 Act, the common-law derivative action was recognised in relation to companies and extended to close corporations. For this reason, the statutory rights have always been parallel and complementary to the common-law rights of companies, shareholders and members of close corporations to pursue derivative actions on behalf of their respective companies and close corporations. The statutory rights and principles were never meant to totally disregard the common-law rights of close corporations. The SCA in *Naidoo v The Dube Tradeport Corporation* (*supra*) provides the certainty needed, as it indicates that the common-law rights in respect of close corporations incorporated before the commencement of the 2008 Act but not converted to companies under that Act have not been affected. This ensures that the common-law rights of members of close corporations, including an unregistered owner of a member's interest, to bring a derivative action remain intact.

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