IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no. 796/2017

In the matter between

WESTCOTT AND OTHERS

and

N'WANDLAMHARJI COMMUNAL PROPERTY ASSOCIATION AND ANOTHER

Date of judgment: 26 October 2018

JUDGMENT

Legodi JP

[1] The use, occupation and viewing of fauna and flora on a farm referred to in these proceedings as Charleston Farm consisting of two camps known to the applicants as South and North camps next to Kruger National Park, Skukuza, Mpumalanga had become the subject of a dispute before me.

[2] The farm in question was initially registered in the names of one Mr Frans Unger who happened to be the grandfather of the four applicants, being the children of the two daughters of the said Mr Unger. The first and second applicants are siblings from the one daughter of Mr Unger and the third and fourth applicants are siblings from the other daughter of Mr Unger.

[3] The farm has since 30 October 2013 by way of registration become the property of the first respondent, namely N'Wandlamharhi Communal Property Association. The farm was bought by the Government from the Charleston companies and thereafter registered in the names of the first respondent subsequent to a successful land claim. The farm is presently leased and used by Malamala Game Reserve Property Limited, an affiliate of Rattray Reserves.

[4] The applicants have approached this court on amended notice of motion asking for a final relief framed as follows:

1. *An order in favour of the first and second applicants in the following terms:*
   1.1. *Declaring that the first and second applicant hold the following rights over Portion 1 of Charleston 378 KU (1801,0691ha) Province of Mpumalanga held by Deed of Transfer T11454/2013- ("Charleston South") which rights are exercisable by each of them for the remainder of their lives:*

      1.1.1. *The right of access to egress from and of traversing Charleston South, whether on foot or in a vehicle or in or on any other form of transport, for the purpose of viewing fauna and flora, including the right to exercise such other rights in regard to Charlestson South as shall be implicit in or incidental to the viewing of fauna and flora ("the first and second applicants' traversing rights').*

1.1.2. *The right of sole and exclusive use and occupation of the camp known as "Trollip Camp" or "Charleston South Camp" situated on Charleston South at GPS co-ordinates at Latitude 24°54'40.63 "S and Longitude 31°33'22.44"E, comprising the buildings shown on the plan and aerial photographs attached to the founding affidavit marked LW4.2, 4.3 and 4.4.*

1.1.3. *The right to bring guests, who shall at all times be accompanied by one of the first and second applicants and not exceeding 16 (sixteen) in number, upon Charleston South in the normal course of the exercise of the above rights provided that no consideration shall be given to or received by the first and second applicants for the benefits enjoyed by such guests (the rights in paragraph 1.1.2 and 1.1.3 collectively "the first and second applicants' use and occupation rights").*

1.1.4. *The right to employ staff to attend at Charleston South Camp, such right being ancillary to the first and second applicants' traversing use and occupation right ("the first and second applicants' staff right').*

1.2. *Declaring that the first and second applicants enjoy a right of access to the eastern part of Charleston South over the "high level bridge" situated at GPS co-ordinates at Latitude 24°48'4.92"S and Longitude 31°32'43.32"E on the Farm Mala Mala 341, Registration Division K.U, Province of Mpumalanga Measuring 1873,8523 (One Thousand Eight Hundred and Seventy Three comma Eight Five Two Three) hectares Held by Heed of Transfer T11452/2013 ("the high level bridge rights').*

1.3. *Directing that the first and second respondents shall do all things necessary and provide the required co-operation to enable and permit:*

1.3.1. *the first and second applicants' traversing, use and occupation rights to be registered as personal servitudes in their favour in the Mpumalanga Deeds Registry over Charleston South, which shall include the granting of all such powers, the signature and lodgement of all such applications and the taking of all such other steps as may be necessary for the purpose of procuring the registration of the personal servitudes; and*

1.3.2. *if required, the written consent of the Minister for Agriculture to be obtained for the registration of the personal servitude, as contemplated in section 6A of the Subdivision of Land Act 70 of 1970, which shall include the granting of all such powers, the signature and lodgement of such application and the taking of all necessary steps;*

1.4. *In addition or in the alternative to 1.1 to 1.3 above:*

1.4.1. *declaring that after October 2013, an agreement was concluded between the first respondent and the first and second applicants in terms of which the first respondent agreed to the applicants' continued enjoyment of the traversing, use and occupation and staff rights, and the high level bridge rights which they had enjoyed until October 2013.*

1.5. *Declaring that the first and second respondents have unlawfully denied the first and second applicants their rights described in paragraphs 1.1 to 1.4 from 31 July 2016, and continue to do so.*

1.6. *Declaring that the second respondent unlawfully induced Charleston Farm (Pty) Ltd and the first respondent to breach their obligations to the first and second applicants and/or unlawfully interfered with the contractual relationship between the first and second*

applicants and Charleston Farm (Pty) Ltd, and between the first and second applicants and the first respondent.

1.7. *Granting an interdict preventing the second respondent from interfering with the first and second applicants' traversing, use and occupation and staff rights, and the high level bridge rights.*

1.8. *That the first and second respondents, jointly and severally, are liable to the first and second applicants for damages in the amount of no less than R10,530,000.00 (ten million five hundred and thirty thousand Rand) flowing from:*

1.8.1. *the first respondent's denial of the above rights, and the breach of the agreement referred to in paragraph 1.4;*

1.8.2. *the second respondent's denial of the above rights and the unlawful inducement referred to in paragraph 1.6.*

[5] The relief sought in respect of the "North Camp" is the same as relief sought in respect of the South Camp quoted in paragraph [4] above. Just to clarify further on the two same reliefs: In 1958 the original Charleston Farm was subdivided into Charleston South and North. The mother of the third and fourth applicants became a beneficiary to the viewing rights and other rights related thereto in respect of the Charleston South farm where the south camp was erected and the mother of the first and second applicants became a beneficiary to rights created in clause 11 of the shareholding agreements quoted in paragraph [8] hereunder in respect of Charleston North farm where the north camp was erected.

[6] From the outset and throughout the last 70 years since 1945 the focus in the purpose for keeping and using the camps on both properties was deep love for the land and nature. When the camps were constructed in or about 1950, they were built in such a way that it overlooked the Sand River which runs through the two properties. The river is described as "a major feature and attracts animals of all types". The South camp is said not to have changed to date. According to the applicants the camps were built by their families and have been used by them on an uninterrupted basis for some 60 years until what is referred to in these proceedings as "recent events".

[7] The 'recent events' of relevance, can be summed up as follows: Two entities namely Charleston Farm (Pty) Ltd and Charleston North (Pty) Ltd issued 300 shares each owned by Spulula Trust and Nan Trollip Trust respectively. Of these shares, 200 respectively were sold to an entity called Rattray Reserves (Pty) Ltd (Rattray) which was a family company as it would appear from "high level bridge agreement" referred to in paragraph [50] hereunder. During 1987 Rattray transferred its shares and ceded its loan accounts in the two Charleston companies to Malamala Ranch (Pty) Ltd which was Rattray's affiliate.

[8] Of relevance for the present proceedings, in clause 11 of the shareholding agreements and with references to the mother of the third and fourth applicants it was recorded:

11. …

11.1. PB shall have

11.1.1. the sole and exclusive use and occupation of Charleston North and South camp;

11.1.2. viewing rights;

11.1.3. the right to bring guest, who shall at all times be accompanied by PB, and not exceeding 16 (sixteen) in number, upon Charleston North in the normal course of the exercise of the rights hereby granted to PB provided that no consideration shall be given to or received by PB for the benefits enjoyed by such guests, provided further that PB shall procure that such guests shall abide by the provisions of this agreement.

11.2. Rattray Reserves undertakes to procure that the company or an affiliate shall:

11.2.1. supervise Charleston camp and to the extent that it is able to do so effect any repairs and maintenance by PB at her costs;

11.2.2. make available at no charge to PB during the times which PB is in occupation of Charleston North camp, the exclusive use of suitable four-wheel drive vehicle and 3 (three) servants as determined by Rattray Reserves as at PB's election shall pay to PB the costs providing such servants.

11.3. …

11.3.1. subject to any contractual prohibitions which may exist in respect of land not owned by Rattray Reserves and the Affiliates, Rattray Reserves hereby grants and undertakes to procure that the Affiliates grant to PHYLLIS MARIE BEAUMONT rights similar to the Viewing Rights in respect of any other property owned by or under the control of Rattray Reserves or any Affiliate. In exercising such rights PHYLLIS MARIE BEAUMONT shall have the right to bring not more than 2 (two) vehicles at a time onto such other property, and shall, where practicable, give reasonable notice to a responsible employee nominated by Rattray Reserves for the purpose from time to time, of their intention to exercise the rights to be granted to them in terms of this clause 11.3.1;

11.3.2. PHYLLIS MARIE BEAUMONT shall, in exercising the rights to be granted to her in terms of this clause 11.3 have the right to be accompanied by the guest referred to in Clause 11.1.3 provided that PHYLLIS MARIE BEAUMONT shall be present in each vehicle used in the exercise of such rights.

11.3.3. …

11.3.4. To the extent that the Viewing Rights and/or the rights hereby granted to PB in respect of Charleston North Camp are or may at any time in the future become registrable against the title deeds of the Company over Charleston North, Rattray Reserves shall, upon request in writing by PB addressed to the Company, and at the costs of PB, procure the adoption of all such resolutions, the granting of all such powers, the signature and lodgement of all such applications and the taking of all such other steps as may be necessary or expedient for the purpose of procuring registration of such rights in the appropriate Deeds Registray.

11.3.5. For as long as the Trust and/or her Successors in Title are shareholders in the Company and for as long as Rattray Reserves or their affiliates directly or indirectly own or control Charleston Farm (Proprietary) Limited or Toulon, PB and her Successors in Title shall be entitled to viewing rights on Charleston Farm (Proprietary) Limited, to cross the Sand River at Rocky Crossing (which is shown on the attached sketch) and for this purpose to traverse Toulon, and also to traverse the river road on Toulon which runs parallel to the Sand River between Charleston Farm (Proprietary) Limited and Toulon, (also as shown on the attached sketch).

11.3.6. Should PB or the Trust sell or otherwise dispose of the Shares held by PB or the Trust to any person other than Rattray Reserves or an Affiliate, the rights created in terms of clauses 11.1, 11.2 and 11.3, shall terminate with effect from the date of such sale. Should, however, the shares be sold, or otherwise disposed of to Rattray Reserves or an Affiliate, the said rights shall endure until the death of the last dying of PB's Successors in Title.

11.3.7. For so long as Rattray Reserves or an Affiliate is a shareholder in the company, it and its affiliates shall be entitled to exercise viewing rights as part of a commercial

undertaking over Charleston North by such number of vehicles and by such number of guests as Rattray Reserves, from time to time, determines".

[9] The underlining in quotation above are my emphasis. The same recordal was made in respect of the shareholding agreement relating to the mother of the first and second applicants or her successors in title to the shares. During 1987 Rattray transferred its shares and ceded its loan accounts in the two Charleston companies to Malamala Ranch (Pty) Ltd. During or about 2013 the Charleston companies referred to in paragraph [7] above sold all of their shares to Malamala Ranch (Pty) Ltd and therefore Malamala Ranch (Pty) Ltd became the sole shareholder of the two entities and only ownership of the two properties namely; South Charleston and North Charleston were retained by the Charleston Companies.

[10] On 30 October 2013 the first respondent acquired ownership of the two properties as alluded to earlier in paragraph [3] of this judgment. The transfer of the two properties was preceded by the sale agreements executed on 3 September 2013 in terms of which the Charleston North Farm and Charleston South property (the farms) were sold to the first respondent through the Government in the amounts of R129 161 430.00 and R128 743 924.00 respectively.

[11] In paragraph 10.3 of the deed of sale it was recorded:

10.3 It is recorded that the Purchaser and the Mhlanganisweni Community are aware of the fact that two entities have enjoyed defined rights of use of the Properties described in clauses 1.7.1.8 and 1.7.1.9, and that the nature and extent of the continued existence of such rights pursuant to the sale of the Properties in terms hereof is to be determined and where appropriate enforced. The Seller has made full disclosure of such rights".

[12] The focus of the dispute in the present proceedings is directed at clause 11 of the 1986 shareholding agreements quoted in part in paragraph [8] of this judgment. Clause 11 appears to be the applicants' ace-card for their cause of action in addition to the alleged oral agreement with the first respondent or alleged waiver by the first respondent. Furthermore, the applicants seek to rely on clause 10.3 of the sale agreement quoted in the preceding paragraph [11].

[13] The premise of the application is that the applicants are entitled to occupy and use the two camps and be provided with a four- wheeled vehicle to traverse the Charleston properties in order to enjoy nature and view of natural species in particular fauna and flora within the Charleston Farm for generations to come. The cause of action relied upon is refuted by the respondents who articulate their defence in two main categories as it appears hereunder. It is alleged the first respondent is obliged to honour the terms of the shareholding agreements as stated in clause 11 and as per the high bridge level agreement of 28 May 2004.

Non-compliance with section 3 of Act 70 of 1970

[14] The defence *inter alia*, is pleaded as follows: "*No permission has been granted ... prior to the granting of these rights in the respective shareholder agreements, nor was such permission granted any time thereafter*". This averment has to be seen in the context of section 3 of the Act which is referred to hereunder.

[15] The Subdivisions of Agricultural Land Act 70 of 1970 in section 3 deals with prohibition of certain activities regarding agricultural land. Paragraph (e) of section 3 provides:

"(i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act 27 of 1956); and

(ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or the same person for a period aggregating more than 10 years, or advertised for sale or with a view to any such granting except for the purposes of a mine as defined in section 1 of the Mine and Works Act, 1956."

[16] To the defence raised as indicated in paragraph [14] above, the applicants in their replying affidavit contend:

22.1 The applicants do not concede that the relevant land is agricultural land.

22.2 The applicants contend that their rights neither fall within nor are contrary to any provisions of the Act.

22.3 The applicants contend that they have the rights, in regard to Charleston South and Charleston North to access the entire properties to view fauna and flora and to occupy the Charleston South Camp and Charleston North Camp from time to time.

22.4 In the circumstances no permission was required from the Minister for any of the transactions to which reference has been made.

[17] The gloves are off. And the question is whether the Charleston land is agricultural land as defined and if so whether the applicants were obliged to obtain a consent for their rights to be protected. I deal first with the former in brief. In terms of section 1 of the Act and of relevance, agricultural land means *'any land, except (a) land situated in an area of jurisdiction of municipal council, city council, town council, village council village management board, village management council, local board, health board or health committees* ...' In their written heads of argument the respondents contend that *'the argument is, not surprisingly, not repeated in their written heads*."

[18] I am prepared to accept upfront that the land in question is an agricultural land. It is agricultural land seen in context. The applicants did not object to Mr Dacomb's opinion to be relied upon as evidence for the purpose of determining the question whether or not the property or land in question is an agricultural land. Mr Dacomb is a professional planner. He is Town and Regional Planner of note. He specialises in Spatial Planning and Land Use Management. He has 32 years' experience as a practising Town Planner. His work includes applying on behalf of clients for subdivisions of land, which includes subdivisions of agricultural land as defined in the Subdivision of Agricultural Land Act (the Act).

[19] His finding in relation to these proceedings is that as at February and September 1986 the land in question was an agricultural land as defined. That is, it was an agricultural land during the conclusion of the shareholding agreements in terms of which right to use and occupy the two camps referred to earlier in this judgment for the purpose of viewing flora and fauna was granted.

[20] His conclusion is premised in brief from these set of facts: He was instructed by the legal representatives of the respondents to investigate the question under consideration and to determine whether or not the properties in question are indeed agricultural land as defined. The land does not fall within any of the exceptions in the Act.

[21] There is a farm immediately south of the subject properties (Charlestson Properties) known or described as Farm Toulon 383 KU. There are other properties within the Malamala Reserve

immediately to the north of Charleston properties and these properties are described as Flockfield 361 KU, MalaMala 359 KU and Eyrefield 343 KU. On 29 May 2007 an application in terms of section 40 of the Deeds Registries Act 47 of 1937 was made for consolidation of Portion 2 of the Farm Malamala 359 KU and the Remaining Extent of the Farm Flockfield 361 KU to form the Farm Flockfield 414 KU. Based on this, Mr Dacomb concludes that 'it is apparent that the immediately neighbouring farms to the subject property, as well as the other properties within the Malamala Reserve were at all relevant times both before and after the effective date agricultural land subject to the provisions of the Act'.

[22] For the conclusion above, Mr Dacomb alludes further in his statement to the following: On 15 November 1978 the subdivision of Portion 1 of the farm Flockfield 361 KU was approved. On 2 October 1978 consent no 6724 was granted well before the effective date. Similarly on 10 August 1994 and as per subdivision diagram SG 4334/1994 the application in respect of Portion 1 of the farm Eyrefield 343 KU was approved and a consent no 21894 was issued as contemplated in the Act. On 10 August 1994 a sub-divisional diagram SG 4335/1994 in respect of Portion 1 of the Farm Malamala 359 KU was approved and consent 21893 for such subdivision was granted in terms of the Act. On 10 November 1998 subdivision diagram SG 12716/1998 in respect of Portion 7 (a portion of Portions 5) of the Farm Toulon 383 KU was approved and consent 29566 was granted under the Act. Lastly on 5 April 2007 the consolidation diagram of Flockfield 414 KU consolidating Portion 2 of Malamala 359 KU and Flockfield 361 KU as approved and as part of the process leading up to the consolidation consent 38150 was granted in terms of the Act.

[23] In paragraph 9 of his statement, Mr Dacomb concludes: "...From the aforegoing it is clear that the provisions of the Act requiring the consent of the Minister in terms of section 3 for the subdivision of the neighbouring farms and other farms in the Malamala Reserve, were applicable to the adjoining properties before and after the effective dates and the inescapable conclusion is that the subject properties were also at the relevant dates agricultural land as defined".

[24] The applicants in the face of all of this elected to close their case without leading any oral evidence despite the opportunity to do so. The conclusion of Mr Dacomb therefore is unchallenged. This, in my view, reinforces the finding made earlier in this judgment. That is, the land in question is an agricultural land. I now turn to the other question in relation to an agricultural land.

Were the applicants obliged to obtain consent?

[25] Section 3 (e) (ii) of the Act is quoted in paragraph [15] of this judgment. Based on its provisions it was contended on behalf of the respondents that for the rights to be enforceable as contained in clause 11 of the shareholding agreements quoted in paragraph [8] above, consent should have been obtained from the Minister.

[26] The contention is refuted by the applicants based on the case of De Villiers v Elspiek Boerdery (Pty) Ltd[1] wherein it was held:

> *"...The granting of the right to use of the farm house for dwelling purposes did not derogate from the character of the farm as a unit of agricultural enterprise. Bearing in mind the object of the Act, the granting of the right had no sub-divisional effect on the property and no effect on the use of the property as a notional single unit for farming purposes.*[2] (My emphasis).

[1] 2017 JDR 0465 (SCA)

[2] See De Villiers supra at para [27]

[27] What is sought to be controlled is not both subdivision and also the use of agricultural land, but 'the subdivision and in connection therewith' the use of such land...[3] This should be seen in the context of the long title of the Act which states the object of the Act as being 'to control the subdivision and in connection therewith the use of agricultural land'.

[28] "Subdivision" is defined, but not in the Act as 'a division of a land, lot, tract, or parcel of land into two or more lots, plats, sites or other divisions of land for purposes, whether immediately or future of sale or of building developments'. The essence of the contention by the applicants is that rights which they seek to exercise do not result in or from a subdivision. It is rather about rights which they have been exercising on a continuous basis without changing the character of the land. That was done long before the purchase of the subject Charleston properties by the first respondent. Based on this, it is contended that no consent from the Minister as envisaged in section 3 (e) (ii) was required.

[29] I tend to agree. The exercise of the applicants' rights was not dependant on division of the land in question. It was not a right granted or conferred on a sub-division. In other words, the shareholding agreements did not confer or grant the rights which the applicants seek to assert in connection with a sub-division of the land in question. Consent as contemplated in section 3 was not required in the circumstances. Therefore, the point of lack of consent ought to be dismissed. This then brings me to another critical issue.

Enforceability or otherwise of the applicants' rights

[30] This topic under discussion requires the interpretation of the shareholding agreements to determine the intention of the parties when they concluded the agreements. Interpretation is a matter of law and not of fact and accordingly interpretation is a matter for the court and not for witnesses.[4] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other instrument or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstance attendant to upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or unbusinesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made.[5]

[31] The Supreme Court of Appeal has consistently held, for many decades, that the interpretation process is one of ascertaining the intention of the parties - what they meant to achieve- and doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. What is stated above will be theme in dealing with the topic under discussion in particular to determine the intention of the parties to the shareholding agreements and the high level bridge agreements.

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[3] Adlew & another v Arlow 2013 (3) SA 1 (SCA) at para 12; [2012] ZASCA 164

[4] KPMG Chartered Accountants SA vs Securefin Ltd & Another 2009(4) SA 395 (SCA) at para 39

[5] National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 at para 18

[32] The respondents took a swipe at the applicants' relief in terms of which they wanted the first respondent to be bound by clause 11 of the shareholding agreements. The defence of the respondents is that upon sale of the land to the first respondent the rights of the applicants in terms of the shareholding agreements ceased to exist.

[33] To the defence raised above and the contention in relation thereto, the applicants are of the view that the first respondent in particular, is barred from raising such a defence based on the 'doctrine of notice or knowledge'. It was contended that the existence of the alleged rights were known at the time of conclusion of the sale agreements and transfer of the properties into the names of the first respondent on 3 September 2013 and 30 October 2013 respectively.

[34] As I said, this calls for the intention of the parties to the shareholding agreements of February 1986 and traversing of rights in the high level bridge agreements concluded during May 2004 to be determined. It requires one to navigate and traverse through the agreements and sniff-out through the method of interpretation alluded to in the preceding paragraphs [30] and [31] to determine the intention of the parties to the shareholding agreements aforesaid and high level bridge agreements quoted in part in paragraph [47] hereunder.

[35] Starting with "Recital" in clause 2.3 of the shareholding agreement, is recorded that the respective rights and obligations as shareholders in the company are intended 'to provide for the creation and entrenchment of the right to use and occupy Charleston Camp and the viewing Rights in favour of NT'. This was with reference to the parents of the first and second applicants and same provision was made with reference to the parents of the third and fourth respondents.

[36] The intention to entrench these rights in favour of the parents of the applicants and the life-span of such entrenchment of viewing rights and so-forth, have to be looked at in context. Charleston companies were the owners of the Charleston Properties/Farm on which the rights of the applicants as per the shareholding agreements were to be exercised. In clause 6.1 of the shareholding agreements the business of the Charleston companies is described as being 'to own the properties and to conduct and undertake activities for and incidental to nature conservation and the granting of viewing Rights subject to the provisions of the shareholding agreements'.

[37] The quotation above must be clear. For as long as the companies are the owners of the properties, Rattray and or its affiliates have an obligation to grant to the applicants the viewing rights subject to the provisions of the shareholding agreements. This raises the question what then if the companies are no longer the owners of the properties or land on which the rights had to be exercised as is now the situation.

[38] Clause 9.1.4 of the shareholding agreements deal with what ought to happen to the shares upon death of the applicants' parents or their last successor in title to the shares". It provides that 'upon the death of the last of NT's in title, who at the date of his or her death, is a shareholder of the company, the legal representative of the last dying of NT's successor in title shall be deemed to have determined to dispose of the shares in question then held by such last dying successor in Title in terms of this clause and shall, in consequence, forthwith act according to the provisions of this 9'.

[39] NT is with reference to the mother of the first and second applicants. Same provision is made with regards to the third and fourth applicants. This is confined to the parents of the applicants or the applicants as successors in tittle still holding shares in the companies which owed the properties on which the rights were exercised. There is no mention in this clause of any rights with regard to occupation and use of the camps and viewing rights upon disposal by the Charleston companies of the land or properties upon which the rights must be exercised. It is clear that it was the intention of

the parties to the shareholding agreements that once the parents of the applicants or their successors in tittle ceased to be shareholders, their incidental rights to the properties would fall by the way side upon sale of the Charleston Properties unless the properties are disposed of within RattrayReserves or its affiliates as it would appear later in this judgment.

[40] Clause 11.3.6 quoted in paragraph [8] of this judgment is important to the topic under discussion. 'Should, however the shares be sold or otherwise disposed of to Rattray Reserve or an affiliate, the said rights, should endure until the death of the last dying of - or 'successor in title', could only have been intended to apply to a situation where the shares which were owned by the applicants' parents or trusts are sold or disposed of to the Rattray Reserves or an affiliate. It was clearly not the intention that such rights will endure even when the shares are sold to a third party and or where the properties are sold and transferred to third parties outside Rattray and its affiliates. It is on this basis that the respondents referred to such rights as being personal in nature. But personal rights can also be protected provided the intention of the parties covered such protection beyond disposal of the land to third parties.

[41] Clause 11.3.1 envisages the granting of viewing rights in respect of any other property owned by or under control of Rattray Reserves or by any of its affiliate. This disposes any notion of enforceable viewing rights after the sale of the property to the first respondent. The land is no longer owned by Rattray or its affiliates. The undertaking 'to procure to grant Phillis Marie Beaumont rights similar to the viewing rights' insofar as exercise of such rights is connected to 'land not owned by Rattray Reserves and the affiliate', cannot find cover under clause 10.3 of the sale agreement concluded on 3 September 2013. Failure to procure such rights is not a matter between the first respondent and the applicants, but rather between the applicants and the second respondent as an affiliate of Rattray. The route to sue for damages in the future resulted in the applicants abandoning prayer 1.6 of the amended notice of motion in which the applicants wanted this court to declare that the second respondent unlawfully induced the Charleston Companies and or the first respondent not to allow the applicants to exercise their alleged continued rights. I say they abandoned this prayer because they elected not to lead oral evidence despite the opportunity to do so having been availed to them.

[42] An obligation to procure viewing rights never extended to the first respondent as the latter was never an affiliate of Rattray and procuring of viewing rights was never the first respondent's undertaking. Speaking about the first respondent's undertaking, in prayer 1.4.1, the applicants wanted this court to declare in the alternative that after transfer of the land in question to the first respondent, the latter undertook to allow the applicants to continue exercising their rights in terms of the shareholding agreements. This was denied by the first respondent which denial resulted in this court ordering oral evidence to be tendered on the issue as it could not be resolved on papers without oral evidence. In other words, dispute of facts arose. However on 8 October 2018 the applicants closed their case without evidence. Instead it was recorded that the applicants were no longer proceeding with the relief so sought. The alternative prayers in paragraphs 1.4.1 and 1.6 of the amended notice of motion in a way was an acknowledgement of the difficulties the applicants are faced with in relying on the literal interpretation of the wording of the shareholding agreements.

[43] Clause 11.3.4 must also be looked at with a needle eye. In prayer 1.3.1 of the notice of motion as amended, the applicants want the alleged applicants' traversing, use and occupation rights to be registered as personal servitude in their favour. This cannot be done. The train has already passed seen in this context: Attempts to invoke clause 11.3.4 of the shareholding agreements cannot work. Such rights were only registrable against the title deeds of the company over the Charleston Properties. Rattray Reserves or its affiliate is no longer in a position to 'procure the adoption' for

registration as it is no longer the owner of the properties against which registration must be made. 'Title deeds of the company' must be emphasised. Registration was to take place against the title deed of the company over the Charleston Properties and not against the title deed of the first respondent over the Charleston Properties.

[44] Clause 11.3.5 also hits the final nail in the coffin. 'For as long as the Trust or her Successors in Title are shareholders in the company and for as long as Rattray Reserves or their affiliate directly or indirectly own or control Charleston Farm in relation to the viewing rights', in clause 11.3.5 should be seen in the context of clause 11.3.4 alluded to in the preceding paragraph [43]. This clause insofar as it relates to crossing the Sand River, should also be seen in the context of the 'high level bridge' agreement which I allude to later in paragraphs [47-48] hereunder. If it was the intention of the parties to the shareholding agreements to extend the viewing and traversing rights of the applicants and obligations to bind third parties, that would have been inserted or provided for in clause 11.3.5 or elsewhere in the shareholding agreements.

[45] At the risk of repetition, clause 11.3. should be read together with the 'high level bridge agreement' and should be seen as bringing to an end any notion that the terms of the shareholding agreements were intended to bind any subsequent owner of the land once the Charleston Companies through Rattray or its affiliates have ceased to be the owners of the Charleston Properties. The terms are restricted to ownership of the shares within the parties to the shareholding agreements. For example, sale of shares or disposal thereof 'to any other person than Rattray Reserves or an affiliate the rights created in terms of' the shareholding agreements 'shall terminate with effect from the date of such sale'. Clearly the intention of the parties must have been not to involve third parties in the binding terms and obligations of the shareholding agreements regarding the rights under discussion. The latter part of clause 11.3.6 cannot be seen as sanctioning endurance of the applicants' rights until the death of the last dying of their successors in title after the Charleston companies have disposed of or sold to a third party (first respondent) the only assets they had.

[46] There is another interesting feature relevant to this aspect. The applicants or their parents wanted to use what was referred to in these proceedings as the high level bridge agreements. In a document (agreement) dated 17 May 2004 and signed on 28 May 2004 of relevance, the recordal is made as follows:

> *"1. These undertakings will apply for as long as the Traversing Agreement and existing shareholders Agreement in relation to CF continues to exist".*
>
> *(d) …….*
>
> *(e) ……..*
>
> *2. Regarding the shareholders agreement entered into between you and MR dated 26 February 1986 and subsequent amendments, we agree to the following further amendments and additions*
>
> *(a) You and your successor in - title will be entitled to cross at the High Level Bridge on Malamala Farm while I and or my wife and or any of our children or grandchildren (the Rattray Family RF) directly or indirectly control MR and MR owns MalaMala Farm and, if such control of ownership ceases, RF will endeavour to avail the continuation of such entitlements with leave of the transferee of such control or ownership; and*
>
> *(b) …"*

[47] "CF" in the quotation refers to Charleston Farm. With regard to the quotation above put it bluntly this way: Because the only existence of the Charleston Companies was 'to own the properties' as per clause 6.1 of the shareholding agreements, disposal of such properties to a third party (the first respondent) terminated life in the Charleston Companies. Once Rattray Family or its affiliate loses control or ownership of the farm or land, entitlements cease to exist. The entitlements are conditional on Rattray or its affiliate retaining ownership of the properties within Rattray Group or succeeding 'to avail the continuation of such entitlements'. In this case the second respondent was supposed to seek a permission for such continuance from the first respondent who was not a party to the undertaking. For as long as the Rattray or its affiliate does not own the land directly or indirectly enforceability of rights in favour of the applicants in terms of clause 11 does not arise. On this alone the application ought to be dismissed. I now turn to deal with what I refer to as the "ace-card" argument for the applicants.

Doctrine of Notice

[48] Counsel for the applicants spent the bulk of his oral argument time dealing with the doctrine of notice which is explained in a more simple way as follows: If A and B enter into an agreement which entitles A to have a servitude registered over the land of B, A has a personal right to claim that B should cooperate in procuring registration of the servitude as this is a requirement for the creation of the real right that has been bargained for. Once registration has taken place any subsequent purchaser of the land will be bound by the servitude.[6]

[49] If however, B should sell his land and transfer ownership to C before registration has occurred, C would normally not be bound to give effect to the servitude. But, if C had knowledge of A's unregistered servitude at the time the contract of sale was entered into between B and C, C will be bound, not only to give effect to the servitude, but also to cooperate in having the servitude registered.[7]

[50] Any right which a party to legal proceedings seeks to protect, has to be a good right. In other words, it must be shown on the balance of probability that such a right does exist and that a party claiming such a right is entitled to rely on or assert it. In the present case, the contention is that the right to use and occupy the two Charleston camps, north and south and to traverse Charleston properties in order to view flora and fauna extended beyond the disposal of Charleston properties to third parties. The properties forming the subject of the exercise of such rights were never intended to be limited to ownership of such properties by Rattray Reserves and its affiliates but also to ownership thereof by third parties, so was the argument. I have already made a finding that such rights and enforceability thereof did not exist beyond the disposal of Charleston properties to the first respondent. In other words, the doctrine of notice, that is, knowledge by the first respondent of the existence of the alleged rights, does not apply in the present proceedings.

[51] The question is not whether one is dealing with personal or real right for the purpose of protection by the doctrine of notice, but rather whether such rights exist and were extended to be honoured by third parties like the first respondent. There is nothing in the shareholding agreements which is the source of the applicants' cause of action obliging any third party becoming the subsequent owner of the properties to be bound by and honour rights created in the shareholding agreements. The rights were simply entrenched in favour of the applicants against Rattray or its

[6] Francis Leslie Bowring NO v Vrededorp Properties CC and others [2007] SCA 80 (RSA) at [7]
[7] See Bowring NO *supra* at para [8]

affiliates only. Such rights ceased to exist upon the only assets of the Charleston Companies been sold to the first respondent. The doctrine of notice does not apply to a right which does not exist.

[52] Just before I sign-off from the topic under discussion, the respondents in their answering affidavit re-emphasised their defence framed as "Non protection of rights" by stating as follows:

> "40.1 .....No other safe-guards existed in the shareholders agreements for the protection of the rights conferred in clauses 11.1 to 11.6 of the shareholders agreements in the event of the sale of the properties by two companies.
>
> 40.2 In particular, no clause in the said agreements alleged the two companies to only sell the property if the purchaser would recognise and continue the rights conferred in clause 11 of the two respect agreements".

[53] I cannot agree more. Just to recap; The Charleston properties were sold to the first respondent after a successful land claim. The Charleston companies were paid a whopping amount of R129 161 430.00 and R128 743 924.00 in respect of the two Charleston properties which were owned by the companies as their only business assets. Without the properties there is no life in the companies' existence. Perhaps when the parties entered into the shareholding agreements they never thought that one day there will be a constitutional dispensation and that one day there will be a land claim divesting, with compensation of course, as it has been the case here, the right of ownership by the companies in the Charleston properties. However the wording in the 28 May 2004 agreement in terms of which the rights to be exercised were limited not only to the existence of the shareholding agreements but also to the ownership of the properties amongst the parties to the agreements, disposes of any contention to the contrary as to what the intention of the parties was.

[54] Clause 10.3 of the sale agreements concluded on 3 September 2013 and effected upon transfer on 30 October 2013 relating to Charleston Properties in my view, implemented and effected the demise of the applicants' rights which they now want to assert. The applicants too were aware of the probable demise of such rights. It is for this reason that way-back before the sale of properties they wrote to the Minister seeking to convince him to save the life-span of such rights. This was round about 2011 or so. Failure by the second respondent to secure the rights of the applicants when the land on which the rights were to be exercised was sold to the first respondent, is a matter between the applicants and the second respondent. Perhaps this is the subject of a further litigation in the form of damages claim intimated on behalf of the applicants. Such failure by the second respondent to procure continuation of exercise of rights by the applicants did not make the terms of the shareholding agreements and high level bridge agreements enforceable against the first respondent and the doctrine of notice did not apply.

[55] Consequently I hereby make an order as follows:

> *55.1 The application is hereby dismissed with costs, such costs to include the costs of two counsel.*

FOR THE APPLICANT: ADV M VAN DER NEST SC / ADV D TURNER

INSTRUCTED BY BOWMAN GILFILLAN

FOR THE RESPONDENTS: ADV G.L GROBLER SC and ADV H S HAVENGER SC

INSTRUCTED BY LARSON FALCONER HASSAN PARSEE INC