

SOUTH AFRICA / JUDGMENT

Electronic Mining Supplies CC v Mabelane N.O and Another (807/2015) [2018] ZAGPPHC 648 (28 February 2018) [2018] ZAGPPHC 648

COURT

North Gauteng High Court, Pretoria

BEFORE

Roelofse

CASE / FILE NUMBER

807/2015

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Policy

REPUBLIC

OF SOUTH AFRICA

CASE:

807/2015

(1)

REPORTABLE

(2)

OF INTEREST TO OTHER JUDGES

(3)

REVISED.

ELECTRONIC

MINING SUPPLIES CC

Applicant

REGISTRATION

NUMBER: [...]

and

HLIPHI

ANNAH MABELANE

N.O.

1st

Respondent

IDENTITY

NUMBER: [...]

THE

COMMISSION OF THE COMPANIES AND
2nd Respondent
INTELLECTUAL
PROPERTY COMMISSION (CIPC)
THE
DELEGATED OFFICIAL FOR DECEASED ESTATES
3rd
Respondent
ON
BEHALF OF THE MASTER OF THE HIGH COURT
NELSPRUIT
FOR THE DISTRICT OF THABE CHWEU
HELD
AT MASHISHNG

JUDGMENT

Roelofse AJ:

- [1] The applicant is a close corporation. The applicant has two members, Ms Zodwa Christina Mabelane (who passed away on 15 February 2015 ("the deceased")), and Ms Anelize Lowis. Ms Lowis alleges that the deceased resigned as a member of the applicant on 5 January 2015. The deceased passed away before the applicant has registered the applicant's amended founding statement to reflect the deceased's purported resignation as contemplated in section 15 of the Close Corporations Act, Act 69 of 1984 ("the Act").
- [2] The close corporation seeks relief in terms of prayers which it has formulated as follows:
- ‘1. That the above Honourable Court make a finding that the deceased lawfully resigned from the Close Corporation before passing away,•
2. That the above Honourable Court make an order in terms of Section 36(1)(d) of the Close Corporations Act 69 of 1984 that the deceased ceases to be a member of the Close Corporation:
3. And\or that the Commissioner of Companies and Intellectual Property be ordered to remove the deceased as member of the Close Corporation:
4. And\or in the alternative that the Executrix, being the First Respondent be compelled to sign documentation to affect the removal of the deceased as member of the Close Corporation,•
5. That the above Honourable Court make a ruling in terms of Section 36(2)(b) of the Close Corporations Act 69 of 1984 with regard to the disposition of the shares;
6. And\or that the member\s of the Close Corporation can determine disposition of shares in terms of Section 37 of the Close Corporations Act 69 of 1984;
7. That the value of the shares, if any, be determined,•

8. That the procedure for establishing the value of the shares be provided, if applicable,·
9. And\or that the payment of the value of the shares, if any be determined with the provisions of Section 39 of the Close Corporations Act·
- [3] The first respondent is the executrix of the deceased's estate. The deceased was the first respondent's mother. The other respondents did not participate in the lis.
- [4] The deceased held 51% membership interest in the applicant. Ms Lewis holds the remaining membership interest.
- [5] I shall briefly dispose of the relief sought in prayers 1 to 6 because, at the end of the hearing. the parties' counsel had no objection to the granting an order with reference to section 35 of the Act. I shall do so. Thereby, prayers 7 to 9 of the notice of motion are addressed. I nevertheless proceed to deal with prayers 1 to 6 of the notice of motion.
- [6] Prayer 1 is for a declaratory order that the deceased has ..lawfully" resigned from the applicant. On J 8 May 2015, the executrix's attorneys informed the applicant's attorneys that the deceased's alleged resignation is denied. A real dispute of fact was therefore foreshadowed in this letter. Notwithstanding this knowledge, the applicant approached the court on motion.[1] Real disputes of fact are not resolved on paper.[2] In any event, prayer 1 contemplates a declaratory order.[3]. A declaratory order in this regard would have been incompetent as it would have been academic and would have had no practical effect as the deceased has passed away after her alleged resignation and before her resignation could be effected. The deceased's membership interest now falls to be dealt with in terms of section 35 of the Act.
- [7] Sections 33 to 37 of the Act provides for the acquisition and disposal of members' interest in a close corporation. Section 33 provides for the acquisition of a members' interest by a new member; section 34 provides for the disposal of an insolvent member's interest; section 34A provides for the attachment and sale in execution of a member's interest; section 35 provides for the manner in which a deceased member's membership must be dealt with by his/her executor[4] section 36 provides for the cessation of membership by an order of court; [5] and section 37 deals with other disposals of members' interest.
- [8] Section 36 of the Act empowers the court to make an order regarding the disposal of members' interest.[6], Only a member of a corporation has locus standi to approach court for relief in terms of section 36. Ms. Lewis in not a party to the proceedings. It is the close corporation that approaches the court for relief. I alerted counsel appearing for the applicant, Mr. Groenewald, to this insurmountable obstacle for the applicant. The applicant abandoned the relief sought prayer 2. In the result, prayer 5, where reliance is also placed on section 36, must likewise fail.
- [9] It is not open to the applicant to rely on section 37 of the Act for no other disposition of the deceased's membership interest applies. Therefore, prayer 6 must fail.

- [10] Without establishing the relief in prayers 1, 2, 5 and 6, there is no basis for the granting of prayers 3 and 4. These prayers must therefore also fail. This leaves prayers 6 to 9. As aforesaid, the relief sought in these prayers is addressed in the order.
- [11] However, this is not the end of the matter. Judges are duty bound to uphold the law - they may not close their eyes to injustice for injustice must be confronted head-on and, decisively dealt with. I was alarmed because what emerged from the papers appeared to be a fronting practice.[7] Fronting is a crime. Rightly so. It is nothing else than a modern-day exploitation of people based on race and gender through the shameful abuse of a well-intended and lawful mechanism that was created with the noble objective of redressing the ills of our recent past so movingly described by the Chief Justice His Lordship Mr Justice Mogoeng in *VIKING PONY AFRICA PUMPS (PTY) LTD t/a TRICOM AFRICA v HIDRO-TECH SYSTEMS (PTY) LTD AND ANOTHER*[8] as follows:

"One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent

development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic

assets. After 1948, this exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty. Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad-based black economic empowerment programme. Although Viking was decided in the context of public procurement, I do not see why the principles in Viking should not also apply in other instances where reliance is placed upon certain levels broad-based black empowerment compliance in order to secure business, whether big or small, lucrative or not.

- [12] The Broad-Based Black Economic Empowerment Act 53 of 2003 ("the B-BBEE Act") commenced on 21 April 2004. The objectives of the B-BBEE Act are to facilitate broad-based black economic empowerment.[9]
- [13] On 24 October 2014[10] an amendment to the B-BBEE Act came into force. The B-BBEE Act was enhanced in order to address fronting. The B-BBEE Act now includes a definition of a fronting practice; it established the Broad-Based Black Economic Empowerment Commission which has the power to investigate fronting practices; and, it criminalizes fronting.
- [14] In section I of the B-BBEE Act, a fronting practice is defined as follows:

"fronting practice" means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative-

- (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person: or
- (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-
 - (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;
 - (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
 - (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis;"

[15] Section 13B of the B-BBEE Act established the Broad-Based Black Economic Empowerment Commission. The Commission has authority throughout the Republic. The Commission must oversee, supervise and promote adherence with the Act in the interest of the public. [11] Two of the further functions of the Commission are to receive complaints relating to broad-based black economic empowerment in

accordance with the provisions of the Act and to, either of its own initiative or in response to complaints received, investigate any matter concerning broad-based black economic empowerment[12]. The Commission is the proper statutory authority to receive complaints and to investigate matters concerning broad-based black

economic empowerment is the Commission. Fronting disregards the very purpose of broad-based black economic empowerment. The Commission

has a duty to investigate fronting.

[16] Section 130 of the B-BBEE Act criminalizes fronting practices.[13] Sub-section (3) provides that a natural person who commits a fronting practice is liable to a fine or imprisonment of not exceeding 10 years and in the instance of a legal person, to a fine not exceeding 10% of its annual turnover.

[17] I turn to the facts that gave rise to this court's concerns. The applicant mainly assembles and supplies electrical power boxes. It is the applicant's case that compliance with B-BBEE requirements are important to the applicant because without B-BBEE certification, the applicant would be unable to retain its vendor numbers. During September 20_13, and in order to comply with B-BBEE requirements, Ms Lewis approached the deceased to become a member of the applicant. At that stage, the deceased was employed by Ms Lewis as a domestic worker. The deceased became a member in the applicant on 22 October

2013. The first respondent alleges that her mother was employed as a cleaner or domestic helper.

[18] Ms Lewis alleges that, during January 2015, the deceased approached her because she wanted to resign from her employment and as a member of the applicant due to ill health. In support of this allegation, Ms Lewis relies upon the purported minutes of a meeting of the members of the applicant, allegedly attended by both members and a letter of resignation that was allegedly signed by the deceased.

[19] The minutes of the meeting. in relevant part, reads as follows:

"Attendance

- All members were present:

CZ Mapelane

A Lewis

The meeting took place to discuss the resignation of member C. Z. Mapelane (id nr [...]) where she decided out of her free will to resign from the Company, referring her notice letter she supplied to the Company.

The changes were approved by all members.

Resignation would be effective 1 February 2015.

Minutes signed at Lydenburg on this 5th day of January 2015".

The minutes appears to be signed by the deceased as "Resigning Member" and A Lewis "active member".

[20] The letter of resignation, not directed only to Ms Lewis, but to Mr Lewis, reads as follows:

"Dear Mr and Mrs Lewis

I would like to inform that I am resigning from my position, effective 01 February 2015.

Thank you for the opportunities that you have provided for me. I have enjoyed working for EMS and appreciate the support you provided me during my time with the company.

If I can be of any help during this transition please for me know.

Sincerely,”

The letter of resignation appears to have been signed by the deceased on 5 January 2015. The minutes of the meeting and the letter of resignation is completely silent over the fate of the deceased's membership interest.

- [21] Ms Lowis alleges that she had a long and amicable relationship with the deceased. Ms Lowis alleges that the deceased had not requested any payment of dividends or share value when she resigned. Ms Lowis also alleges that the deceased was well aware of the fact that there was no dividend declared as " ... E.M.S. did not show a profit, in the alternative a marginal profit ... ". Ms Lowis continues to allege that if there had been any dispute over dividends or share payments same would have been aired by the deceased as she was well aware of her rights. Even if this is so, one would have expected th.at, whatever the current value of the deceased's membership interest, or whatever the deceased ' s knowledge of her rights when she resigned, the membership interest should have been dealt with in terms of the applicant's articles of association. The applicant's articles and the provisions therein have not been traversed at all. It was not before court. The alleged minutes of the members' meeting is also silent on this issue.
- [22] Ms. Lowis did not effect the changes brought about by the purported resignation of the deceased on the records of the applicant because, so Ms Lowis alleges, the applicant was unable to contact the deceased despite several and prolonged attempts. J have serious doubts over the truthfulness of this allegation. The first respondent alleges that an employee of the applicant, who she describes as "Doppies" transported the deceased to and from her workplace. A person by the name of "Doppies" is listed on the applicant's letterhead as a contact person.[14] There is therefore credence in the first respondent's allegation in this regard. This being so, it is highly improbable that Ms Lewis could not contact the deceased so that the changes could be effected. Why not simply visit the deceased at her home in order to sign the necessary documents after she had resigned if it was so important to the applicant?
- [23] On 9 May 2015, the applicant received a letter from N & A Ngomane and Associates Attorneys who acts for the first respondent. This was allegedly the first notification Ms Lowis received or the deceased's death. Ms Lowis responded by forwarding the deceased's resignation letter to the first respondent's attorneys.
- [24] The first respondent's attorneys' response was that the first respondent disputed that the deceased resigned and that, if the deceased indeed resigned, her share of the dividends and/or equity had to be paid out to the deceaseds estate.

- [25] After some correspondence between the applicant's attorneys and the first respondent's attorneys, the first respondent's attorneys made the first respondent's stance clear the first respondent was not going to sign any documents for the transfer of the deceased's membership interest.
- [26] Faced with the first respondent's final stance on the matter, the applicant approached the court for the relief referred to above.
- [27] The matter was called before me on 31 January 2018. During Mr. Groenewald's address, I raised the provisions of the 8-BBEE Act, specifically enquiring as to the purpose for which the deceased was appointed the manner in which the applicant and Ms. Lowis dealt with the deceased alleged resignation; and the applicant's response to the executrix's attorneys' queries as these were some of the issues which concerned me. Simply put, I was concerned because, save for some vague statements, it did not appear from the papers at all what (if any) economic benefits flowed to the deceased by virtue of the majority membership interests she held so that the applicant could achieve a certain level of broad-based black economic empowerment compliance.
- [28] I postponed the matter to 20 February 2018. I made the following order:
- "2. The applicant and Ms Anneliz Lewi [sic] (ID No. [...]) is called upon to show cause why the conduct of the applicant and/or any person related to the applicant within the contemplation of the Companies Act 71 of 2008 should not be referred to the Broad-Based Black Economic Empowerment commission for investigation in terms of Section 13()) of the BBB-EE of Act 53 of 2003.
3. The parties are directed to file and deliver written submissions and such further evidence they do need on or before 16h00 on 12 February 2018.
4. Costs are reserved..
- [29] The matter came before me on 20 February 2018. Ms Lowis filed and delivered a supplementary affidavit on behalf of the applicant in terms of paragraph 3 of the order. The first respondent filed no further evidence.
- [30] The reason for the deceased's involvement in the applicant is confirmed in Ms Lowis's supplementary affidavit as follows:
- "it is so that the deceased's involvement in the applicant [sic , the deceased] was prompted by the so-called B-BBEE requirements of the applicants' vendors. but to say /hat the applicant should be branded as an entity that acted contrary to the Broad Based Black Economic Empowerment Act 53 of 2003 is a bridge to far." [15]*
- [31] I interpose to say that the deceased's "involvement" must surely have benefitted the applicant because, after the granting of the majority membership interests in the applicant to the deceased, the applicant's sales increased from R 87 861.00 in the 2014 financial year to R 7 069 553.00 in the following year. A gross loss of R 155 996.00 increased to a gross profit of R 2

256 499.00.[16] Notwithstanding these dramatic changes, the applicant's attorneys threatened the first respondent on 27 October 2015 that, should Ms Lowis call up her loan account in the applicant in her favour, the deceased estate would be liable to contribute R 857 378.85. No indication appears in the relevant financial statements of the loan and there is no indication that the members approved the alleged loan from Ms Lowis to the applicant.

[32] In paragraphs 4.2 to 4.5 of her affidavit, Lowis sets out as follows:

"4.2 The applicant shared resources with the deceased and gave her the opportunity to develop her skills. The applicant strived to better the deceased in many aspects of her life. Throughout, the applicant noticed that the deceased's economic situation bettered drastically and she was afforded economic stability which in turn resulted in a marked increase in her living quality.

4.3 Through the applicant the deceased was given an opportunity to prosper.

4.4 The deceased was content and satisfied whilst being a member of the applicant. She was afforded opportunities which she would not have otherwise had. She was nurtured and developed, she was not exploited in any manner whatsoever.

4.5 She was given an opportunity to be part of economic transformation and to take part in the economy. Undoubtedly the opposing respondent [the executrix] also benefitted from the better life the deceased lived. "

[33] Ms Lowis seeks to support the allegations aforesaid by alleging that the deceased was "very involved, had unfettered access to the applicant and was part and parcel of the management of the applicant[17]: the deceased received "members remuneration" in 2014/2015 to the tune of R 124 000.00[18] the deceased was responsible for marketing and tending to the applicant's clients, a "marketing strategist..... with other administration responsibilities such as filing etc"[19] and the deceased was bought a stand and she was given building materials.

[34] In respect of the deceased alleged involvement in the applicant, no proof is given at all. As a matter of fact, the deceased's name and contact details are not even recorded upon the applicant's letterhead upon which the purported resolution accepting the deceased's resignation is purportedly recorded. Ms Lowis attaches to her affidavit the deceased's pay slips for the months of March 2014 to January 2015 which, on the face of it, were issued by the applicant. Thereupon it is recorded that the deceased received a salary and some other payment of R 5000.00 per month. What this payment is for was not disclosed. What the pay slips further disclose is that the deceased was granted loans from time to time which she was required to repay in instalments. A Deeds Search is attached by Lowis to the affidavit in order to sustain that the deceased was bought a property.[20] The Deeds Search reveals that the property was a RDP property and already transferred to the deceased in 2001, long before her relationship with Lowis started. Moreover, the purchase price was nil Rand. No proof was furnished of any other immovable property and of the building materials that were allegedly bought for the deceased. No proof is furnished of the alleged transfer of skills

to the deceased. The allegations in paragraphs 4.2 to 4.5 of the affidavit are simply unsupported.

[35] Having regard to the evidence presented, I find that the acts and/or conduct of the applicant, alternatively Ms. Lewis may have directly and/or indirectly undermined and/or frustrated the objects of the 8-BBEE Act in that the deceased was a black woman who was appointed by the applicant and who may have been discouraged and/or that the deceased may have been inhibited from substantially participating in the core activities of the applicant; and/or in that the economic benefits received by the applicant as a result of its broad-based black economic empowerment status may not have flowed to the deceased in the ratio expected by virtue of the deceased membership interest in the applicant; and/or that the deceased was in a legal relationship with the applicant and/or Ms Lewis, for the purpose of the applicant achieving a certain level of broad-based black economic empowerment compliance. In my view, the Commission should investigate the applicant's and Ms Lewis's conduct with a view of determining whether or not their conduct falls within the definition of 'fronting' as defined in section 1 of the 8-BBEE Act and then to take such steps the Commission deems meet.

[36] Whatever the ultimate outcome of the fronting issue will be, the dispute over the transfer of the deceased's membership interest has delayed for too long. Had the parties properly considered the law and had they not made unreasonable demands, this matter may have been put to rest much sooner. Mr Groenewald confirmed at the hearing of the matter that Ms Lewis would not consent to a transfer of the deceased's membership interest in terms of section 35(b) of the Act. There is therefore no purpose to wait for the 28 days prescribed in section 35(b) to elapse before the deceased membership interest is

sold to either the applicant, Ms Lewis or any other person. Through the order this court makes, this court intends to bring the parties to a swift resolution of the deceased's membership issue. Both parties' conduct lead to this application, however ill conceived. In my view, both parties should bear the costs. Through this order I also intend to send a strong message to persons that are acting (or intend to act) with disregard or who are abusing (or intend to abuse) the provisions of the B-BBEE Act, that same may be visited with consequences.

I make the following order:

1. ELECTRONIC MINING SUPPLIES CC, REGISTRATION NUMBER: 2008 /13922 0/23 ("the corporation"), shall be valued by an independent Chartered Accountant as at the date of this order ("the valuation").
2. The applicant and first respondent shall each nominate one Chartered Accountant for purposes of the valuation within 5 (FIVE) days of the date of this order.
3. The parties shall provide to each other the details of the Chartered Accountant nominated by them.

4. Within 5 (FIVE) days after the nomination by each party of its Chartered

Accountant, the parties shall agree on the Chartered Accountant to be appointed to determine the valuation.

5. In the event the parties do not agree on the Chartered Accountant for

the valuation, either or both of the parties may approach court on the same papers, amplified to the extent it is necessary, for the court to appoint the Chartered Accountant for the valuation.

6. The applicant shall pay the nominated Chartered Accountant his/her fees for the preparation of the valuation.

7. Within 30 (THIRTY) days after completion the valuation, the applicant,

alternatively, Ms. Annelize Lowis shall purchase Ms Zodwa Christina Mabelane ("the deceased")s membership in the corporation,

failing which, the first respondent shall transfer the deceased membership to the deceased's lawful heir/ heirs, alternatively

sell the deceased's membership to any person entitled to membership in terms of section 29 of the Close Corporations Act. Act 69 of 1984.

8. The applicant's attorneys of record are directed to serve a copy of this order upon the Broad-Based Black Economic Empowerment Commission and the second respondent forthwith.

9. Each party shall pay their own costs.

JH Roelofse

Acting Judge of the High Court

APPEARANCES

FOR THE APPLICANT:

MR GROENEWALD

INSTRUCTED BY VAN DER

WESTHUIZEN ATTORNEY,

VERENEGING AND PIETER NEL

ATTORNEYS, MBOMBELA

FOR THE FIRST RESPONDENT: MRLUBISI

INSTRUCTED BY JACOBS ATTORNEYS

FOR THE SECOND AND

NO APPEARANCE

THIRD RESPONDENTS

DATE OF HEARING:

31 January 2018 and 20 February 2018

DATE OF JUDGMENT: 28 February 2018

[1] The application was issued on 15 June 2017.

[2] Room Hire Co. (Pty.) Ltd. v .Jeppe Street Mansion (Pty.) Ltd., 1949 (3) SA 1155 (T) at

p. 1162 where Murray AJP said as follows: “It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts, not capable of easy ascertainment , hut in the hope of inducing the Court to apply Rule 9. To what is essentially the subject of a trial action ”

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[3] ' In Rumdel Cape v SA National Road,· Agency (234/2015) [2016] ZASCA 23 (18 March 2016), at para. 15, Leach JA set out as follows: "The mere fact that parties are locked in dispute on a point of law or fact does not necessarily entitle either of them to an order declaring which standpoint is correct. Generally speaking, a court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues. Instead, in order to entertain an application for declaratory relief. a court must be persuaded that the applicant has an interest m an existing, future and contingent right or obligation that will be determined by the declarator and that its order will be binding upon other interested parties. If it is so satisfied, the court then exercises a discretion whether to grant or refuse the order sought. In doing so the court may decline to deaf with the matter where there is no actual dispute, where the question raised is, in truth. hypothetical, abstract or academic, or where the declarator sought

have no practical effect.”

[3] ' In Rumdel Cape v SA National Road,· Agency (234/2015) [2016] ZASCA 23 (18 March 2016), at para. 15, Leach JA set out as follows:

"The mere fact that parties are locked in dispute on a point of law or fact does not necessarily entitle either of them to an order declaring which standpoint is correct. Generally speaking, a court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues. Instead, in order to entertain an application for declaratory relief. a court must

be persuaded that the applicant has an interest in an existing, future and contingent right or obligation that will be determined by the declarator and that its order will be binding upon other interested parties. If it is so satisfied, the court then exercises a discretion whether to grant or refuse the order sought. In doing so the court may decline to deal with the matter where there is no actual dispute, where the question raised is, in truth, hypothetical, abstract or academic, or where the declarator sought

have no practical effect.”

[4] 4 Section 35 provides as follows: “Disposal of interest of deceased member. - Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties- (a) Cause the deceased member's interest in the corporation to be transferred to a person who qualifies, for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person; or (b) If any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member's interest- to the corporation, if there is any other member or members than the deceased member”.

[4] 4 Section 35 provides as follows:

“Disposal of interest of deceased member. - Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties-

- (a) Cause the deceased member's interest in the corporation to be transferred to a person who qualifies, for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person; or
- (b) If any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member's interest- to the corporation, if there is any other member or members than the deceased member”.

[6]"36. Cessation of membership by order of Court.- (1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation: (a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation; (b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business; (c) that the member so conducts his or her in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or (d) that circumstances have arisen which render it just and

equitable that such member should cease to be a member of the corporation: Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply. (2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to (a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or (b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member. the manner and times of such payments and the persons to whom they shall be made; or (c) any other matter regarding the cessation of membership which the Court deems fit."

[6]"36. Cessation of membership by order of Court.- (1) On application by any member of a corporation a Court may on any of the .following grounds order that any member shall cease to be a member of the corporation:

- (a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason. of performing his or her part in the carrying on of the business of the corporation;
- (b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business:
- (c) that the member so conducts his or her in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or
- (d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

- (2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to
 - (a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or
 - (b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member. the manner and times of such payments and the persons to whom they shall be made; or
 - (c) any other matter regarding the cessation of membership which the Court deems fit."

- [7] Also known as "window dressing" or "tokenism". Bolton The Law of Government Procurement in South Africa (LexisNexis Butterworths, Durban 2007) at 293-4 describes fronting as "the practice of black people being signed up as fictitious shareholders in essentially 'white' companies."
- [8] CCT 34/10) [2011] ZACC 5; 2011
- (6) BCLR 646 (CC) (10 March 2011) at paragraphs 1 and 2.
- [9] "2. Objectives of Act. The objectives of this Act are to facilitate broad-based black economic empowerment by-- (a) promoting economic transformation in order to enable meaningful participation of black people in the economy: (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprise.,; (c) increasing: the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training: (d) increasing the extent to which black women own and manage existing and new enterprises. and increasing their access to economic activities. infrastructure and skills training: (a) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to
- achieve sustainable development and general prosperity; (b) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; (g) promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs,
- including those in the informal business sector; and (h) increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support...
- [9] "2. Objectives of Act. The objectives of this Act are to facilitate broad-based black economic empowerment by--
- (a) promoting economic transformation in order to enable meaningful participation of black people in the economy:
- (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprise.,;
- (c) increasing: the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training:
- (d) increasing the extent to which black women own and manage existing and new enterprises. and increasing their access to economic activities. infrastructure and skills training:

- (a) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- (b) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;
- (g) promoting access to .finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and
- (h) increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support...

[10] ROAD-BASEDBLACK ECONOMIC EMPOWERMENT AMENDMENT ACT NO. 46 OF 2013

[11] Section 13F(1)(a).

[12] Section 13F(1)(c) and (d).

[13] Sub-section 1(d).

[14] Upon the minutes.

[15] Para. 4.6 of the affidavit.

[16] Income Statement for the period 1 March 2014 to 28 February 2015.

[17] Para. 5.5 of the affidavit.

[18] Para. 6.2.1 of the affidavit.

[19] Para. 7.9 of the affidavit.

[20] Annexure "SA6"

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