

SOUTH AFRICA / JUDGMENT

Madise v Maswikeng Transport CC and Others (22250/2018) [2018] ZAGPPHC 435 (18 May 2018)

[2018] ZAGPPHC 435

COURT

North Gauteng High Court, Pretoria

BEFORE

N Kollapen

CASE / FILE NUMBER

22250/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE

NO: 22250/2018

DATE:

18/5/2018

IN

THE MATIER BETWEEN: RACHEL
SEBESHO MADISE
Applicant
and
MASWIKENG
TRANSPORT CC
(Registration
Number: 2007/
102365/23)
1st
Respondent
MATHATHO
SAMUEL
PHALAFALA
2nd
Respondent
ABSA
BANK LIMITED
3rd
Respondent
THE
COMPANIES AND INTELLECTUAL
PROPERTY
COMMISSION
4th
Respondent

JUDGMENT

KOLLAPEN J:

1. The Applicant and the second Respondent are the two members of the first Respondent and in these proceedings the Applicant seeks an order in the following terms:
"2. That the member's interest of the Second Respondent in the First Respondent be ceded to the Applicant in terms of Section 36 of the Close Corporations Act, Act 69 of 1984; and
3. That it be ordered that the cession of the First Respondent's member hip interest in the First Respondent be ceded without any payment from the First Respondent or the Applicant.
4. Alternatively, that the Honourable Court determine the value of any payment to be made to the second respondent (as envisaged in Section 36 of the Act) including 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; and
5. Costs of the Application..."

2. The second Respondent opposes the relief sought.

The background facts

3. The Applicant has described the relationship between herself and the second Respondent as being deadlocked. The Applicant alleges that she holds 60% of the members interest in the first Respondent and the second Respondent the remaining 40% . The second Respondent disputes the extent of the Applicant's members interest and alleges it is 20% as that was the basis upon which the Applicant became involved in the first Respondent sometime in 2015 when she invested R200 000.00 in return for a 20% member' s interest. He contends that the administration of the first Respondent was poor as it had no formal secretariat and states that it is a mystery how the Applicant sits with a majority stakeholding of 60%.
4. The Applicant seeks the relief she does primarily on two bases:
 - a) She alleges that the second Respondent is nothing more than the 'paymaster' of the first Respondent; is not involved or interested in its operations; and has over time expressed a desire to exit from the first Respondent.
 - b) That the conduct of the second Respondent in dealing with the affairs of the first Respondent are such that it brings it within the circumstances contemplated in Section 36(1) (b) to (d) of the Close Corporations Act (Act 69 of 1984) ("the Act").

Urgency

5. The second Respondent placed the question of urgency in dispute, pointing out that the Applicant issued no less than 4 urgent applications from January 2018, none of which were pursued and that there was an abuse of the process of Court.
6. While it is so that numerous applications were issued, the Applicant states that administrative oversights in the office of her attorneys resulted in those matters being issued with incorrect dates and timeframes. While this may have at best been clumsy, I am not satisfied that it constitutes an abuse of the legal process.
7. On the other hand, the deadlock between the parties and the freezing of the bank account of the first Respondent may well carry consequences for the parties as well as third parties, and to this extent I am satisfied that the matter warrants the urgent attention of this Court .
8. Section 36 of the Act provides as follows:

"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:
 - (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 himself (or herself) in matters relating to the corporation's business that it is not reasonably practicable for the other 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 ..."
9. The dispute and the litigation between the parties, have a long history. On the 30th of January 2018 the Applicant obtained an order directing the second Respondent to sign all documents required to grant the Applicant

joint access to the first Respondent's bank account. For the sake of completeness the relevant sections of the order read as follows:

"1. That the Second Respondent be ordered to sign all associated documents required to grant the Applicant joint access, within 24 hours of the order, to the First Respondent's Account and to sign all documents that may be necessary to allow the Applicant to transact on the following account:

ABSA Classic Business Account number: [...]

Pretoria Van Der Walt Branch

2. That under circumstances that the second Respondent refuses and/or neglects to sign the documentation referred to in paragraph 2 above that the sheriff of the area within which the branch of the Third Respondent is located be authorised to sign all the required documents in the stead of the Second Respondent,
3. That a meeting be scheduled between the Applicant and the Third Respondent within 7 (seven) days of this order to deal with the removal of the Second Respondent as member of the First Respondent and that any party will have the right to approach the above mentioned Honourable Court in the event that any party refuses to attend such a meeting."
10. The Notice of Motion in those proceedings also sought an interim order that the second Respondent be removed as a member of the first Respondent. This part of the relief mirrors the relief sought in these proceedings.
11. In addition in her founding affidavit in support of the January application, the Applicant contended that the second Respondent made payments to himself totalling some R645 000.00 from the account of the first Respondent. In those proceedings however, the Applicant did not seek any relief relative to these payments taking the view rather that:

"34. I respectfully submit that the Honourable Court is not requested, at this point in time, to make a finding pertaining to the nature of the above-mentioned payments and whether or not these payments that the Second Respondent made to himself represented lawful payments or not. The issue with regard to the nature of the payments and whether or not the Second Respondent should be held accountable and/or liable toward the CC in this regard, will be dealt with in due course and at such a point in time when the CC was allowed to properly deal with the

transactions in its financial statements. "

12. The issue relating to the payments of R 645 000.00 is once again raised in these proceedings and the Applicant places considerable reliance on it in support of the relief she seeks in terms of Section 36(1)(b) to (d). At the same time the stance taken by the Applicant in these proceedings mirrors that which she took in the January proceedings when she says about the payments that:

"At a point in time in the future when the financial position of the CC has stabilised a calculation and subsequent decision will be made as to whether or not certain amounts need to be recovered from the Respondent."

13. The stance of the second Respondent with regard to these payments is that this is money due to him from the first Respondent relating to his capitalisation of the first Respondent. He states that his contribution totalled R762 000 which was R 645 000 more than the contribution of the other member and that it was agreed between the members that if and when the financial situation of the

first Respondent improves he should reduce his exposure to the level of R117 000 which was the contribution of the other members .

14. Accordingly he takes the position that he was entitled to the "repayment" of R645 000 and there is nothing untoward about it justifying the relief sought for his removal as a member. The Applicant's response to these assertions is a general denial offering no views with regard to the contribution made by the second Respondent and the liability of the first Respondent towards him. This, taken in conjunction with the stance of the Applicant in the January proceedings, that the payments be the subject of a proper accounting process, must at the very least suggest that there is a real and live dispute about the payments, and the second Respondent's entitlement to it.
15. The Applicant however seeks to rely on the provisions of Section 51 of the Act which provides as follows:

"51. Payments by corporation to members

51.(1) Any payment by a corporation to any member by reason only of his membership, may be made only-

- (a) if, after such payment is made, the corporation's assets, fairly valued, exceed all its liabilities;
- (b) if the corporation is able to pay its debts as they become due in the ordinary course of its business; and
- (c) if such payment will in the particular circumstances not in fact render the corporation unable to pay its debts as they become due in the ordinary course of its business.

- (2) A member shall be liable to a corporation for any payment received contrary to any provision of subsection (1).
- 3) For the purposes of this section-
- (a) without prejudice to the generality of the expression 'payment by a corporation to any member by reason only of his membership', that expression-
- (i) shall include a distribution, or a repayment of any contribution, or part thereof, to a member;
- (ii) shall exclude any payment to a member in his capacity as a creditor of the relevant corporation and, in particular, a payment as remuneration for services rendered as an employee or officer of the corporation, a repayment of a loan or of interest thereon or a payment of rental; and
- (b) 'payment' shall include the delivery or transfer of any property."
16. The view of the Applicant is that the onus is on the second Respondent, having admitted to the making of the payments, to prove that they were made in accordance with the provisions of Section 51 and that the second Respondent has not discharged this onus, which in turn should serve to advance the case for the Applicant in the relief she seeks.
17. I am not convinced that the interpretation that the Applicant contends for is sustainable. The section is silent on this but given that the Applicant locates the relief she seeks in Section 36 of the Act, it is worth noting that in terms of that section, the learned authors of Henochsberg on the Close Corporations Act offer the following commentary:
- "A member who makes the application envisaged by s36 (1) bears the onus of proving that he is entitled to the relief which he seeks and it is incumbent upon him to place before the Court the necessary evidence not only to enable the Court to decide whether it should grant an order in terms of s 36 (1) (a), (b), (c) or (d), but also to make any further order envisaged by s 36 (2) (Geaney v Portion 117 Kalkheuwel Properties CC and Others [1998] JOL 3769 (T), 1998 (1) SA 622 (T) at 631)..."
18. In my view it would be impermissible if the Applicant, who bears the onus in terms of section 36, were able to simply shift the onus to the second Respondent by invoking the provisions of Section 51 of the Act. In any event the Applicant did not in her Founding Affidavit give any indication that she sought to rely on Section 51 of the Act, and it would in my view, be unfair to expect the second Respondent to now discharge an onus on an issue not raised in those terms in the papers.

19. In any event and when I have regard to the papers as a whole, then it is evident that the second Respondent's stance was that the payment would only be made when the Close Corporation's financial position improved and that he then acted in accordance with that arrangement and that the stance of the Applicant indeed is that a proper accounting process will determine the validity or otherwise of the payments made and the recoverability or otherwise thereof.
20. It is therefore clear that the issue of the payments and whether they were authorised or whether the second Respondent was entitled to them is not only in dispute but the Applicant herself suggests a mechanism through the accounting process, through which the matter can be resolved.
21. That being the case I am reluctant to utilise those allegations in support of the relief sought in these proceedings, given not only the very contested nature of the allegations, but the Applicant's own stance as to how they can be resolved and properly determined.
22. Thus this basis for the relief sought is not sustainable for the reason I have already given. I pause to point out that the allegations of unauthorised payments surfaced in the January application but there the Applicant was content with relief that only related to her access to the bank account of the first Respondent.
23. It would seem that the problems she describes in giving effect to and operationalising the order of the 30th of January may have then prompted this application. I am at a loss to understand why the order of the 30th of January has not been put into operation. Its terms are clear and unambiguous and require the second Respondent to take certain steps to facilitate access by the Applicant, failing which the Sheriff of the Court is empowered to do the necessary.
24. One gets the clear sense that if the relief the Applicant obtained on the 30th of January was put into effect, this application would have not become necessary. If the relief granted in the January order is not practical or capable of being implemented, then the Applicant must either seek a variation of that order or other relief that may be suitable under circumstances where a Close Corporation is deadlocked. In particular there can be no valid reason why the meeting directed in paragraph 3 of the order of the 30th of January 2018 cannot be given effect to. It does seem logical that if the parties are deadlocked then their best interests may well be served by convening such a meeting.
25. I have already indicated why I do not hold the view that a proper case has been made out for the relief sought. While there is little doubt that there is a deadlock between the Applicant and the second Respondent, my view is that the Applicant has not made out a case in terms of Section 36 for the cessation of the membership of the second Respondent.

It is for these reasons that the application must fail

Costs

26. Ordinarily costs should follow the result but I have some understanding for the position the Applicant finds herself in. She succeeded in securing relief in January that in her view would have resolved some of the difficulties she experienced in becoming involved and exercising the necessary oversight over the affairs of the first Respondent. That order has for a variety of reasons not yielded the result that she had hoped for. She then proceeded to bring this application and while I have not been satisfied that the grounds she relies on are sustainable on the information currently before the Court, I have some sympathy for her in her desire to ensure that the first Respondent is not prejudiced in its operations; that it is able to operate a bank account with the input of both its members; and that it can discharge its obligations to third parties. The freezing of the bank account would certainly stand in the way of all of that happening.
27. It is for these reasons that I conclude that her actions may well resonate with the best interests of the first Respondent even though she was unable to secure the relief that she ultimately sought. It is for these reasons that I have decided to exercise my discretion with regard to costs by directing that each party pay its own costs.

Order

28. I make the following order:

- I. The application is dismissed;
- II. Each party is to bear its own costs.

N KOLLAPEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARD ON: 11 April 2018

FOR THE APPLICANT: Advocate L K van der Merwe

INSTRUCTED BY: Cawood Attorneys (ref.: Cawood/4M05 1/ZS)

FOR THE 2ND RESPONDENT: Advocate M.D SEKWAKWENG

INSTRUCTED BY: Mohulatsi Attorneys Inc (ref.: A Mohulatsi/A0152-B)

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Prepared on 11 October 2026 · Esheria