

SOUTH AFRICA / JUDGMENT

Mashiloane v Lopez and Others (25790/2014) [2016] ZAGPPHC 66 (26 January 2016) [2016] ZAGPPHC 66

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa

CASE / FILE NUMBER

25790/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 25790/2014

26/1/2016

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

SITSOTI
ENOCK
MASHILOANE Applicant
and
ANTONIO
AGUSTO SILVA
LOPEZ 1st
Respondent
LUKE
GABRIEL
SWARTS 2nd
Respondent
MAHLANGU
MAKIZIWE

XOLISWA 3rd
Respondent
NGCEBETSHA
XOLISWA 4th
Respondent
S
E MASHILOANE TRANSPORT
CC 5th
Respondent
THE
COMPANIES AND INTELLECTUAL
PROPERTY
COMMISSION
(THE
REGISTRAR OF
COMPANIES) 6th
Respondent
GOLDEN
RIBBON TRADING 297 (PTY)
LTD 7th
Respondent
JOHN
SINDISO
NGCEBETSHA 8th
Respondent

JUDGMENT

Bagwa J

- [1] This is an application for an order declaring the membership interest of the fourth respondent statutorily invalid and for the restoration of the status quo ante in the fifth respondent. The applicant initially sought a de bonis propriis costs order against the eighth respondent but has since amended that to seek a costs order against all the respondents.
- [2] The background to the matter is briefly as follows. The applicant founded the fifth respondent in 1998 and was initially the sole member of the close corporation.
- [3] In 2007 the applicant sold 50% of his membership interest to the second respondent. Thereafter the first respondent joined as a member on a 25% basis sharing the membership sold to the second respondent.
- [4] The business was in the main transportation of coal on behalf of Eskom and it initially started with a one horse and trailer

combination and later acquired four other horse and trailer combinations.

- [5] In 2013 when the son of the applicant attended a meeting at the offices of the sixth respondent, he came upon an agreement on file for the sale of membership interest between the third and fourth respondents, the first respondent and the applicant. The document was unsigned and purportedly sold part of the membership interest to the fourth respondent, to be held on behalf of the seventh respondent. The agreement was dated May 2012.
- [6] In terms of the agreement, the first and third respondent sold their membership interest and the fourth respondent purchased 50% of the membership interest in the fifth respondent for the sum of 2 million rands which would be paid as set out in the agreement.
- [7] A second document was also found on the file which purported to be an "addendum" to the original agreement. This agreement was purportedly signed by the second respondent on behalf of the applicant.
- [8] A third document being an alleged resolution of members was also found on file dated 27 November 2012. This document ostensibly
- "ratified" the sale of membership interest. The applicant initially denied signing this agreement but subsequently retracted the denial.
- [9] The position currently regarding members interest is that the applicant holds 25% and the fourth respondent holds 50% members
- interest. The first and third respondents resigned as members on 18 May 2012.
- [10] The issues to be decided in this matter are firstly whether a proper case has been made out that the membership interest of the fourth respondent is null and void and secondly whether it should be transferred back into the name of the fifth respondent and on what terms. This Court also has to decide whether the applicant is entitled to costs as prayed and whether the conduct of the eighth respondent is subject to censure.
- [11] Section 29 (1) of the Close Corporations Act 69 of 1984 (as amended) ("the Act") provides as follows:

"29. Requirements for Membership

- (1) Subject to subsection (1 A) or (2) (b) and (c), only natural persons may be members of a corporation and no juristic person or trustee of a trust inter vivos in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation."

- [12] Section 1 (A) states:

"(1A) A natural or juristic person in the capacity of a trustee of a trust inter vivos may be a member of a corporation: Provided that-

- (a) no juristic person shall directly or indirectly be a beneficiary of that trust;

- (b) the member concerned shall, as between himself or herself and the corporation, personally have all the obligations and rights of a member;
- (c) the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation; and
- (d) if at any time the number of natural persons at that time entitled to receive any benefit from the trust shall, when added to the number of members of the corporation at that time, exceed 10, the provisions of, and exemption under, this subsection shall cease to apply and shall not again become applicable notwithstanding any diminution in the number of members or beneficiaries."

[13] The legal position is further elucidated by Henochsberg: Commentary on the Close Corporations Act when the learned author states that it was the intention of the legislature to preclude membership by disqualified parties by any means whatsoever and any machinery whatsoever intended to circumvent the Section.

[14] It is common cause that the purported sale of 50% members interest to the fourth respondent was for and on behalf of the seventh respondent and is as such in direct contravention of the provisions of Section 29 (1) of the Act.

[15] The eighth respondent states in his papers that the parties "agreed" to this transfer. There is nothing in the section to suggest that any purported ratification could possibly legalise the actions of the other respondents involved in the transaction. The membership is invalid and cannot be cured.

[16] Regarding the liability for debt of the corporation, Section 63 (d) provides as follows:

"63. Joint Liability for Debts of Corporation

Notwithstanding anything to the contrary contained in any provision of this Act, the following persons shall in the following circumstances together with a corporation be jointly and severally liable for the specified debts of the corporation . . .

- (d) where a juristic person or a trustee of a trust inter vivos in that capacity purports to hold, whether directly or indirectly, a member's interest in the corporation in contravention of any provision of section 29, such juristic person or trustee of a trust inter vivos and any nominee referred to in that section shall, notwithstanding the invalidity of the holding of such interest, be so liable for every debt of the corporation incurred during the time the contravention continues."

[17] Henochsberg elaborates as follows under 63.5

"63.5. Subsection (d)

These provisions predicate a period during which the invalid holding of an interest subsists, and concerns the incurrence of debts during such period, ie irrespective of the length of its duration.

The liability created by the section attaches to the juristic person or to the trustee (or either's nominee as envisaged by s 29 (1)) notwithstanding the validity of the holding. . . ."

[18] According to Henochsberg the liability which arises in terms of these provisions does not cease to exist once the relevant invalid holding is eliminated. It ceases only when the liability is discharged or otherwise ceases to be enforceable against the juristic person or trustee (or either's nominee) concerned.

[19] In casu the fourth and seventh respondent's current relationship with the corporation illustrates precisely what is referred to and discussed by Henochsberg and provided for in Sections 29 (1) and Section 63 (d). A detailed account of the relationship is given in the affidavit deposed to by the eighth respondent.

[20] Section 49 (1) provides as follows:

"49. Unfairly Prejudicial Conduct

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

[21] The applicant, after having taken other members on board in the corporation, seems to have been given a rough ride or the short end of the stick with regard to the financial affairs and management of the corporation. This is in my view what Section 49 refers to by "unfairly prejudicial conduct" which would justify some relief in this regard.

[22] Mr Rossouw for the respondents submits that the applicant had no business in bringing this application as the members' interest sold to the fourth respondent was sold by the first and third respondents. If this is accepted a member of a Close Corporation would be left powerless against other members acting in contravention of the law. In my view the applicant derives his authority to act from the provisions of Section 49. The applicant derives authority also from his membership of the corporation to act in any situation where his fellow members act in any manner that might be prejudicial to his interests.

Mr Rossouw has also made submissions regarding the applicant's credibility where he initially denied having signed the resolution

purportedly ratifying the sale of members' interest to the fourth respondent. He at the same time conceded that the provisions of the law cannot be overridden by whatever question that might arise concerning the applicant's credibility.

- [23] Mr Rossouw submits that the application stands to be dismissed in the light of the judgment by my brother, Mr Justice Boruchowitz in the matter of the South African Bank of Athens Ltd v Salvadora Properties Nine Nine CC 2010 JDR 0542 (GSJ). Mr Kriel for the applicant submits that the case can be distinguished from the present case as it dealt with a trust which is dealt with under sub Section 1 A inserted by Section 1 of Act 17 of 1990 and substituted by Section 2 of Act 25 of 2005. I accept Mr Kriel's submission.
- [24] The fact of the matter is that the respondents were aware even as they purported to enter into the transaction that the transaction was not valid in law. Mr Rossouw conceded that the transaction contravenes Section 29 (1). I cannot envisage any manner in which the situation can be viewed differently.
- [25] Regarding the applicant's credibility Mr Kriel submits that his act of signing the resolution, denying having signed it and later retracting his denial should be viewed in the light of his advanced age. The main issue that I have to decide bears no relation to the applicant's credibility. For that reason I propose to confine my order to that issue so as not to be seen to be condoning any credibility issues that have arisen.
- [26] A member's interest in an interest in the corporation. When a member has sold his interest and then resigned from the corporation the member's interest remains in the corporation. If it later transpires that the sale transaction is for whatever reason void or invalid, the member's interest cannot for that reason revert to the member who has resigned. It can only be returned to the corporation. Any other issues stand to be resolved between the departing member and the buyer regarding the void transaction.
- [27] Regarding costs, the costs must follow the result

Order

- [28] In the result I make the following order:

28.1. A declaratory order that the membership interest of the fourth respondent, held on behalf of the seventh respondent, is null and void.

28.2. An order that the sixth respondent be and is hereby ordered and authorised to transfer those membership interests alternatively just the membership interest of the fourth respondent back into the name of the fifth respondent.

28.3. In terms of Section 63 (d) the fourth and seventh respondent are jointly and severally liable for all the debts of the fifth respondent from the date on which the fourth respondent became a member to date of this order.

28.4. Any purported transfer of the member's interest of the fourth respondent to the eighth respondent is null and void.

28.5. The second, fourth, seventh and eighth respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

S. A. M. BAQWA

JUDGE OF THE HIGHCOURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of Hearing: 26 January 2016

Date of Judgment: 26 January 2016

For the Applicant: Adv. Z. F. Kriel

Instructed by:

Ngcebetsha Madlanga Attorneys

For the 2nd, 4th, 5th, Adv. Z. F. Rossouw Adv

7th & 8th Respondents: Adv T. Govender

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