

SOUTH AFRICA / JUDGMENT

Mellet N O and Others v Vermeulen and Another (1049/2021) [2022] ZASCA 176 (7 December 2022)

[2022] ZASCA 176

COURT

Supreme Court of Appeal

BEFORE

Petse, Makgoka, Plasket, Makaula, Masipa

CASE / FILE NUMBER

1049/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1049/2021

In the matter between:

BLUCHER HAUMAN MELLET N O

FIRST APPELLANT

HENDRIK FRANCOIS MELLET N O

SECOND APPELLANT

CAROLINA JOHANNA PRINSLOO N O

THIRD APPELLANT

and

MARAIS ROCCO VERMEULEN

FIRST RESPONDENT

EVAN ERNEST CORBETT

SECOND RESPONDENT

Neutral citation: Mellet N O and Others v Vermeulen and Another (1049/2021)

[2022] ZASCA 176 (07 December 2022)

Coram: PETSE AP, MAKGOKA AND PLASKET JJA AND MAKAULA AND MASIPA AJJA

Heard: 07 September 2022

Delivered: 07 December 2022

Summary: Close Corporation Act 69 of 1984 – whether a Trust inter vivos can own member’s interest in a Close Corporation – ss 29(1) and 29(1A) of the Close Corporation Act – party alleging compliance with s 29(1A)(a) – (d) must prove it – onus not discharged – appeal dismissed with costs.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Musi JP, Loubser J concurring, Daffue J dissenting, sitting as court of appeal):

The appeal is dismissed with costs.

Makaula AJA (Petse AP, Makgoka and Plasket JJA and Masipa AJA concurring):

Introduction

- [1] This appeal relates to the application of s 29(1) and s 29(1A) of the Close Corporation Act 69 of 1984 (the CCA), in the instance where the Blucher Mellet Family Trust (the Trust) acquired a 60 percent member’s interest in a close corporation, Findaload CC (the close corporation), and sold it to the respondents. The core issue for determination is whether the Trust was legally able to acquire the member’s interest and it arose in the following circumstances. The respondents failed to perform their obligations in terms of the agreement of sale. The appellants brought an application in the Free State Division of the High Court, Bloemfontein (the high court) to compel them to do so. The respondents brought a counter-application in which they attacked the validity of the agreement of sale on the basis that s 29(1) of the CCA prohibited the Trust from holding a member’s interest in the close corporation.
- [2] The contention by the appellants before the high court was that the Trust did not, in fact, hold the member’s interest, but merely served as a conduit to channel the sale from the first appellant, in his personal capacity, to the first and second respondents. The high court, per Mbhele J, sitting as the court of first instance, upheld the application and ordered, amongst others, that: (a) a bond be registered over the properties owned or registered in the names of the respondents (as security for payment of the purchase price); and (b) for the respondents to pay 50 percent of the ‘transfer’ costs to the attorneys seized with the task of registering the bond. (The word ‘transfer’ in the order is a patent error. The parties agree that the word should be ‘registration’.)

- [3] Following this, the respondents appealed to the full court of the Free State Division of the High Court, Bloemfontein (the full court). Musi JP and Loubser J upheld the appeal with costs, with Daffue J dissenting. The further appeal is before us with the special leave of this Court.

Background facts

- [4] The appellants are members of the Trust. The first and the third appellants are also members of the close corporation. The first appellant held a 60 percent member's interest, and the third appellant a 40 percent member's interest, in the close corporation. The first appellant wanted to sell his member's interest to the respondents. He did not want the purchase price to be paid directly to him, so he asked the respondents to pay him via the Trust. To fulfil this arrangement, the Trust entered into an agreement titled a Deed of Sale of Membership Interest (the agreement) with the respondents.
- [5] I turn now to the salient provisions of the agreement. The seller is defined as the Trust and the purchaser is defined as both respondents. The subject of the sale, the 'membership interest' is defined as the 60 percent member's interest 'currently held by B H Mellet and to be transferred to the Seller as well as the

Claims consisting of the assets and liabilities listed in Annexure A, B, C and D hereto'.

- [6] Clause 4 provides that the 'Seller sells to the Purchaser, who purchases the Membership Interest and the claims consisting of the assets listed in Annexures A, B, C and D hereto with effect from the effective date, subject to the terms and conditions set out in this agreement'.
- [7] Clause 7 contains a warranty. The Trust warranted that Mellet would transfer his member's interest to the Trust, and that he would be bound by the agreement 'in the same manner as if he personally sold the interest to the Purchaser'.
- [8] Clause 14 is headed 'MISCELLANEOUS'. It inter alia provides that, when possible, every provision of the agreement should be interpreted 'in a manner which makes it effective and valid under applicable Law' but if a provision is 'held to be illegal, invalid or unenforceable under applicable Law, that illegality, invalidity or unenforceability shall not affect the other provisions of this Agreement, all of which shall remain in full force'.
- [9] Finally, in clause 26, the respondents undertook to furnish security 'for the due and proper payment of the purchase price'. They were required to do so by registering a bond over two properties. Clause 26.3 provides that the registration of the bond 'shall be handled by Blair Attorneys and the registration costs and fees shall be paid by the seller and the purchaser on a 50/50 basis'.

The issue

- [10] As indicated above, s 29(1) and s 29(1A) of the CCA are central to a determination of the issue before us. Together, they create a prohibition and an exception to the prohibition.

[11] Section 29(1) creates the prohibition. It provides:

‘Subject to subsection (1A) 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 29(1A) creates the exception. It provides:

‘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.’

The appellants’ argument

[13] Before the court of first instance, the appellants sought an order enforcing the provisions of clause 26 of the agreement. They averred that the Trust had already complied with the provisions of clause 26.3 by paying its 50 percent contribution towards the costs of registering the bond.

[14] The appellants contended that it was common cause between the parties that the Trust would take transfer of the member’s interest solely as a conduit between Mellet and the respondents. It was never the intention of the parties that the Trust should hold the member’s interest. They contended, however, that s 29(1A) makes it clear that an inter vivos Trust can hold or own an interest in a close corporation.

[15] In addition, the appellants argued that it was not incumbent upon them to attach the Trust Deed, the relevant resolutions, and other documents to show that the Trust met the requirements of s 29(1A). A bald statement that the Trust met the requirements, without any evidence to support it, was made in the appellants’ replying affidavit. The appellants also stated that a certificate issued by the Companies and Intellectual Property Commission proved that the requirements of s 29(1A) had been met.

The respondents' argument

- [16] The respondents pleaded that the agreement is in direct conflict with s 29(1) of the CCA in that the seller was not a natural person and could not have been a holder of a member's interest in a close corporation. Their counter-application sought declaratory orders that the agreement was, as a result, unlawful, void ab initio and consequently unenforceable.
- [17] The respondents submitted that the legality of the agreement was pertinently raised in the papers and the appellants did not place any evidence before the court that brought them within the terms of s 29(1A) of the CCA. They submitted that the agreement is unambiguous and means that the Trust and not the appellants in their personal capacities would own 60 percent of the member's interest, and then sell it to the respondents.

Analysis

- [18] The agreement makes it clear that the seller of the member's interest is the Trust. It is common cause that the Trust held a member's interest in a close corporation and purported to sell it to the respondents. If there had been any doubt, it was dispelled by the first appellant himself when he stated that as he was 'desirous to transfer the benefits of the sale to the Trust' provision was made in the agreement 'that the member's interest held by myself, was to be transferred to the Trust and directly be sold to the Respondents'. Section 29(1) of the CCA is thus implicated. It was raised squarely by the respondents to assail the validity of the sale.
- [19] A member of a close corporation is defined in s 1 of the CCA to mean 'a person qualified for membership of a corporation in terms of section 29 . . .'. Section 29(1) is clear and unambiguous. It provides that only natural persons can become members of a close corporation. The word 'only' is prescriptive and disqualifies juristic persons and Trustees of trusts inter vivos from either directly or indirectly holding a member's interest in a close corporation unless there is compliance with s 29(1A).
- [20] Section 29(1) is qualified by s 29(1A). It specifies the circumstances in which natural or juristic persons who are trustees of inter vivos trusts may hold member's interests in close corporations. Two of the four requirements are that no juristic person may be a beneficiary of the trust whether directly or indirectly; and the total of natural persons who are beneficiaries plus the members of the close corporation do not exceed ten. Furthermore, s 29(2) specifies in positive terms who may hold member's interests. Three categories of person qualify. They are: a natural person and two categories of natural or juristic persons who are trustees.
- [21] It stands out starkly that s 29 contemplates, as a default position, that only natural persons are capable of holding member's interests. The exception created by s 29(1A) is qualified: natural as well as juristic persons may hold member's interests but only in the capacity of a trustee in certain circumstances. This point was made by Boruchowitz J in *Southern African Bank of Athens Ltd v Salvadora Properties Ninety Nine CC*[1] when, with reference to the

definition of a member of a close corporation in terms of s 1, he held that the definition 'envisages

membership of the person representing the trust and not the trust itself'.

[22] It seems to me that because the Trust purported to hold the member's interest, rather than a trustee, the appellants do not get out of the starting blocks to bring themselves within the terms of s 29(1A). In any event, they have adduced no evidence whatsoever to do so. It was suggested by counsel for the appellants that a certificate issued by the Companies and Intellectual Property Commission (CIPC) that reflects the first appellant and third appellant, Ms Carolina Prinsloo, as members of the close corporation in their capacity as trustees, proves compliance with s 29(1A). There is no merit in this argument. Speculation that some unknown functionary must have satisfied himself that Mellet and Prinsloo were authorised and met the requirements of s 29(1A) is not evidence of these facts.

[23] It is as well to remember that it is incumbent on parties to set out their cause of action or defence, as the case may be, in clear and concise terms to enable opposing party to know the nature of the case or defence advanced.[2] It was accordingly crucial that the appellants place relevant facts to prove compliance with s 29(1) and s 29(1A) and not merely rely on a copy of the CK document which was an annexure to the replying affidavit. In view of the appellants' failure to adequately prove compliance with the provisions of s 29, there was insufficient evidence upon which the court of first instance could find in their favour.

[24] The respondents have established that the agreement is in conflict with s 29(1) and was accordingly invalid. The appeal must therefore fail. There is nothing to suggest that costs should not follow the result. Counsel for the respondents requested that costs of two counsel be allowed. The matter is not at all complex. The costs of two counsel are not warranted.

[25] In the result, the following order is made:

M Makaula

Acting Judge of Appeal

APPEARANCES

For appellants: SJ Reinders

Instructed by:

Eugene Attorneys, Bloemfontein

For respondents: N Snellenburg SC (with R van der Merwe)

Instructed by:

Lovius Block Attorneys, Bloemfontein

[1] Southern African Bank of Athens Ltd v Salvadora Properties Ninety Nine CC

[2010] ZAGPJHC 37 para 15.

[2] Rule 18 of the Uniform Rules of Court.

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