

SOUTH AFRICA / JUDGMENT

Mellet NO and Others v Vermeulen and Another (2702/2019) [2020] ZAFSHC 61 (13 March 2020)

[2020] ZAFSHC 61

COURT

Free State High Court, Bloemfontein

BEFORE

NM MBHELE

CASE / FILE NUMBER

2702/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2702/2019

In the matter between:

BLUCHER HAUMAN MELLET N.O

1st Applicant

HENDRIK FRANCOIS MELLET N.O

2nd Applicant

CAROLINA JOHANNA PRINSLOO N.O

3rd Applicant

(1st to 3rd Applicants act on behalf of the

THE BLUCHER MELLET FAMILY TRUST ITZ780/1998)

and

MARAIS ROCCO VERMEULEN 1stRespondent

EVAN ERNEST CORBETT

2nd Respondent

CORAM: MBHELE, J

HEARD ON: 12 DECEMBER 2019

DELIVERED ON: 13 MARCH 2020

- [1] This is an application wherein the applicant approached this court on motion requesting that the respondents be compelled to register bonds over certain properties as security for payment of an amount relating to the parties' members interests in Findaload CC. (Findaload).
- [2] The first and second respondent have lodged a counter application wherein they move for a declaratory relief in terms of which it be declared that the agreement of sale concluded between the parties is unlawful and thus null and void.
- [3] The first, second and third applicant are the trustees of the Blucher Mellet Family Trust, IT 780/1998 (the trust) . The first and third applicant were members of Findaload and held 60% and 40% membership interest respectively.
- [4] The trust entered into a written sale agreement (the agreement) with the respondents On 10 April 2017 in terms of which the trust sold its 60% member's interest in a Close Corporation, FINDALOAD CC, to the respondents (the purchaser). The agreement came into effect on 1 March 2017 irrespective of the date of signature.
- [5] The membership interest is defined as follows in the agreement:

"the Membership Interest" shall mean 60% (SIXTY PERCENT) membership 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] Paragraph 26 of the Agreement reads as follows:

"26.1. The Parties agree that Purchaser shall furnish security for the due and proper payment of the purchase price by registering bonds over the following properties held in the names of Marais Rocco Vermeulen (ID [...]) and Evan Ernest Corbett (ID [...]):

26.1.1. Portion [...] of Plot [...] Dealesgift Kleinplase District Bloemfontein Value: R3 000 000
Outstanding Bond ABSA: R700 000

26.1.2. Erf [...] Dan Pienaar Bloemfontein ([...] Street), Value: R5 000 000 Outstanding Bond ABSA: R2 170 000

26.3 The registration of the bonds 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."

- [7] Paragraph 7.1 of the agreement provides:

“7.1 Blucher Hauman Mellet will transfer the member’s share to the Seller and that he is bound by this agreement in the same manner as if he personally sold the interest to the Purchaser, in as far as it relates to all the terms and conditions of this contract. Thereafter the member’s share shall be transferred to the Purchaser. “

[8] The membership interest was transferred into the names of the trust on 28 April 2017 for the purpose of facilitating transfer to the respondents. The respondents enlisted the services of SJ Gerber Chartered Accountants (SJ Gerber) to transfer the members interest from the trust into their names. The parties agreed that the risk in and benefit arising from the members interest shall pass to the respondents on the effective date.

[9] On 27 July 2017 SJ Gerber confirmed the sale and advised all interested parties that the trust has ceased to hold membership

interest in the close corporation and that Findaload has been acquired by the respondents, 3rd applicant and one Sarel Van Zyl as new members. In terms of the notification the membership interest was distributed as follows:

Mr. MR Vermuelen 30%

Mr. EE Corbett 30%

Mrs J Prinsloo 30%

Mr. SF Van Zyl 10%

The 60% membership interest was later transferred to the third applicant who as a result owns 100% membership interest in Findaload. It later emerged from SJ Gerber that the transfer of the 60% membership interest was fraudulently done by one of SJ Gerber’s employees whose actions were reported to the police.

[10] The question to be decided is:

1. Can a trust hold membership interest in a close corporation?
2. If so, was the agreement entered into between the trust and the respondents valid?

[11] These are motion proceedings for final relief. The Plascon Evans rule finds application. The factual disputes must be decided on the respondent’s version together with those facts that are undisputed and common cause. The respondent’s version should be rejected if it is untenable and far-fetched. See (Plascon-Evans Paints v Van Riebeeck Paints

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635A) .

[12] The terms of the contract are not in dispute. The respondents attack the validity of the contract. Mr. Van der Merwe, on behalf of the respondents submitted that the contract offends the provisions of sections 29 (1) of the Close Corporations Act 69 OF 1984(the Act). He contended that the Act prohibits juristic persons or trustees of an inter vivos trust to hold a members interest in a close corporation. He finds support for his argument in BLESOVSKY

N.O AND OTHERS v SHIPPER AND ANOTHER 2001 (4) SA 1269 (W) and BOERBOONFONTEIN BK v LE GRANGE N.O EN ANDER 2011 (1) SA 58 (WCC) at page 62 par. 9. He further argued that the trust's right to enforce the agreement is dependent upon its ability to be the holder of member's

interest in a close corporation and the legality of the agreement. In his view the agreement is void ab initio and unenforceable.

[13] The trust was established in 1998 whilst Findaload was established in

2004. It follows that Section 29 (1A) of Close Corporations Amendment Act 25 of 2005 finds application in the current matter.

[14] Section 29 (1) and 1 (A) of the Close Corporation Act 69 of 1984 provides as follows:

“(1) 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.

(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.”

[15] Paragraphs 3.2.2 and 3.2.3 of the agreement provide as follows:

3.2.2. References to “Parties” shall include the Parties’ respective successors-in-title and, if permitted in this Agreement, their respective cessionaries and assignees. The headings of clauses and sub-clauses are included for convenience only and shall not affect the interpretation of this Agreement.

3.2.3. The Parties acknowledge that each of them has the opportunity to take legal advice concerning this Agreement, and agree that no provision or word used in this Agreement shall be interpreted to the disadvantage of either Party because that Party was responsible for or participated in the preparation or drafting of this Agreement or any part of it. The Purchaser, with the assistance of their auditor and the Third Party conducted a thorough investigation of Findaload's financial situation and each and every aspect related to it.

[16] From the wording of section 29(1A)(a) and 29(1), it is clear that an inter vivos trust, which has no juristic person as a beneficiary to the trust, can hold or own an interest in a close corporation. There is no evidence to indicate that the trust in the current matter does not meet the requirements stipulated in section 29 (1) and 1A). BLESOVSKY supra was decided before 11 January 2006, the date on which the 2005 amendment came into effect. Before the amendment only natural persons were allowed to be members of a close corporation. The argument by Mr. Van der Merwe falls to be rejected.

[17] It is clear from the reading of the contract itself that parties understood what their obligations were when signing the agreement. It is, further, clear that the respondents agreed that they had legal advice at their disposal and instructed auditors to conduct due diligence before signing the contract. I cannot find that they were misled in any manner. I am, further, unable to find that the agreement in its current form offends the provisions of section 29

(1) of the Act. I am persuaded that the agreement is enforceable and that the counter application must fail.

[18] There is no reason why the costs cannot follow the event. I, therefore, issue the following order:

1. The 1st and 2nd Respondents are directed to:
 - a. instruct a Conveyancer of their choice to register bonds over the properties, being, Portion [...] of Plot [...], Dealesgift Kleinplase, District Bloemfontein and Erf [...] Dan Pienaar, Bloemfontein ([...] Street) to the value of R4 504 000.00;
 - b. pay 50% of the transfer costs to the said conveyancer ; and
 - c. sign all documentation necessary to effect the aforesaid transfer; within 21 days of the date of this order.
2. In the event of the 1st and 2nd Respondents failing to do so, Applicants' attorney, Eugene Holtzhausen, is authorized to instruct a Conveyancer of the applicants' choice to register bonds over the properties, being Portion 1 of Plot 1, Dealesgift Kleinplase, District Bloemfontein and Erf [...], Dan Pienaar, Bloemfontein ([...] Street) to the value of R4 504 000.00, pay 50% of the transfer costs and sign all documentation necessary to effect the transfer.

3. Respondents are ordered to pay costs of these proceedings, jointly and severally, the one paying the other to be absolved.
4. The counter application is dismissed with costs

NM MBHELE, J

On behalf of the Applicant: Adv S Reinders & Adv Berry

Instructed by: Eugene Attorneys

BLOEMFONTEIN

On behalf of the Respondent: Adv Van der Merwe

Instructed by: Lovious Block Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2020/61.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mellet-no-and-others-v-vermeulen-unknown-topic-afshc-2020>

Prepared on 10 October 2026 · Esheria