

SOUTH AFRICA / JUDGMENT

Middleton v Middleton and Others (6440/2010) [2013]

ZAKZDHC 63 (1 November 2013)

[2013] ZAKZDHC 63

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Lopes

CASE / FILE NUMBER

6440/2010

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In the High Court of South Africa

KwaZulu-Natal Local Division, Durban

Case No : 6440/2010

In the matter between :

Garth MiddletonPlaintiff

and

Kim MiddletonFirst Defendant

Wendy-Anne MiddletonSecond Defendant

Bodyology Institute of Health CCThird Defendant

Registrar of Deeds for the Pietermaritzburg Deeds OfficeFourth Defendant

Registrar of Deeds for the Pretoria and Mpumalanga

Deeds OfficeFifth Defendant

Registrar of Close CorporationsSixth Defendant

Kenneth Gilbert SullivanSeventh Defendant

Judgment

Lopes J

- [1] The plaintiff in this action seeks the following relief :
- (a) that he and the second defendant are declared to be the lawful owners of certain immovable property;
 - (b) that the first defendant is interdicted and restrained from disposing of that property, unless authorised to do so in writing by the plaintiff and the second defendant;
 - (c) declaring that the plaintiff and the second defendant are each 50 % shareholders in the third defendant;
 - (d) interdicting and restraining the third defendant from in any way disposing of the membership or property or assets of the third defendant;
 - (e) costs of suit.
- [2] As this case concerns a dispute between family members, I shall refer to them by their first names for the sake of convenience. The fourth, fifth and sixth defendants are cited in their capacities as registrars and no relief per se is sought against them.
- [3] Garth Middleton is the plaintiff and Wendy-Anne Middleton is the second defendant. They were married to each other prior to 1978. They have one child, a daughter, Kim Middleton, the first defendant. Garth and Wendy-Anne worked together and pooled their resources from the time they got together in 1975. Garth has always been an entrepreneur and Wendy-Anne was a science graduate from the University of KwaZulu-Natal. Prior to their current situation they ran various businesses together including :
- (a) a fibreglass factory making moulds which were used as public telephone booths
 - (b) a very successful gift shop which was franchised to two other sites; and
 - (c) a business importing and distributing what are referred to as 'Tuk-Tuk' vehicles which were used as a form of taxi service to the community.
- [4] As is so often the case with entrepreneurial ventures, the finances of Garth and Wendy-Anne had its ups and downs. During the 1970s Garth's estate was sequestrated and he was rehabilitated in 1980. They thereafter lived in their matrimonial home at 156 Station Ridge Road, Durban North, and in 1990 they moved to 51 Quarry Road, Assagay.
- [5] As a result of the fact that they were found to have underpaid the duty on the 'Tuk-Tuk' taxis imported by them, and a long and protracted legal battle against the South African Revenue Services ('SARS') in this regard, which they lost, the Middletons lost their home, their motor vehicle was repossessed, and they were seriously indebted to creditors whose claims they could not meet. This was during the period between 1991 and 1994. At that stage they were being hounded by creditors and both Garth and Wendy-Anne were required from time to time to attend on the Magistrates' Court at Camperdown to answer s 65 proceedings. Kim attended at the Court on occasions with cash-in-hand to placate certain creditors.

- [6] In 1995 Kim was in her matric year and was elected for a Rotary exchange programme for 1996. However, due to the financial plight of the family, she was unable to use the opportunity afforded to her. During 1995 Kim met Kenneth Gilbert Sullivan ('Ken'), with whom she has entered into a life partnership. They remain together.
- [7] The financial outlook for the family was so bleak, that in 1994 Garth wrote to Nedbank basically declaring himself to be insolvent. Notwithstanding this, during the period between 1995 and 1997 Garth and Wendy-Anne purchased an immovable property at 9 Williams Road, Assagay on which they built a new matrimonial home. This was done via the vehicle of the Blueberry Hill Trust which was registered by them in 1997.
- [8] Around this time Garth visited America and came across what was referred to in evidence as the 'BEST' machine. This was a machine which purported to be able to detect adverse medical conditions in people, and was claimed to be able to be used for diagnostic purposes. As Garth knew that Wendy-Anne was interested in this form of medical treatment, they imported a machine into South Africa and set up a practitioners' conference which attracted some interest. Wendy-Anne underwent extensive training to be able to operate the machine and train others to do so. At some stage Kim was also trained in the use of the equipment. As the technology was both new and different it was not easily received, and Wendy-Anne started off practising from their matrimonial home but later moved into the premises of Standard Bank in Hillcrest. This business became known as 'Bodyology' and was eventually conducted via the vehicle of the third defendant.
- [9] During 1999 Kim and Ken left for England. Their initial intention was to move there for two years on a working visa. However, once there, the laws of the United Kingdom were changed and Kim was able to obtain permanent residence because of the fact that Wendy-Anne was born in the United Kingdom. As a result Kim and Ken spent approximately seven years in England.
- [10] During this time Bodyology expanded and increased. The business moved into premises at 16 Old Main Road, Hillcrest and the Middletons eventually acquired the premises in stages. During the time Kim and Ken were overseas, more properties were acquired by the Middletons including two plots of land in Marloth Park Holiday Township, a further vacant plot of land in Marloth Park and two consolidated plots of undeveloped land in Inchanga.
- [11] When the property at 16 Old Main Road was initially purchased, it was purchased by the Middletons and Gordon Gavin Leach and his wife. They ran a business similar to that of Bodyology. Garth and Wendy-Anne, and the Leaches operated from the same premises for a few years until the Leaches eventually sold their share of the property to the Middletons.
- [12] When Kim and Ken were overseas, they kept in constant contact with Garth and Wendy-Anne, and indeed they enjoyed family holidays together almost every year. These holidays were in places such as Thailand, Italy and Morocco. Garth and Wendy-Anne dreamed of retiring and encouraged Kim and Ken to return to South Africa in order that they could,

together, run the business of Bodyology. Garth and Wendy-Anne envisaged that once Kim and Ken had returned and were successfully able to run the business on their own, they would take it over, and Garth and Wendy-Anne would retire to Marloth Park.

- [13] In 2005 Kim and Ken returned to South Africa and together with Garth and Wendy-Anne ran the business of Bodyology. For two years after their return the business was a success. However, the worldwide economic downturn of 2008 impacted severely on the business. Matters deteriorated to the point where Ken had to go out and seek other employment as the business could simply not support four of them. During 2009 Kim also had to find other employment. In addition, the matrimonial relationship between Garth and Wendy-Anne had deteriorated. Viewing the prospects of the business as becoming somewhat dismal, Garth opted out, notifying the others that he no longer wished to be involved in Bodyology. In terms of the agreement which the parties concluded in order to terminate that relationship, he was given a sauna business which included certain stock, and which had formerly been part of Bodyology. That business was then Garth's to run as he pleased.
- [14] Garth and Wendy-Anne were subsequently divorced (the order was eventually granted on the 19th June 2013). The business of Bodyology has deteriorated steadily and it remains heavily in debt to creditors, the most significant of which is SARS. The debt owed to SARS is for unpaid VAT and other taxes. SARS have been kept at bay, apparently by promises of payment and the eventual sale of some of the immovable properties referred to above, and the payment of the proceeds to SARS, which is owed approximately R650 000 with interest and penalties continuing to accumulate..
- [15] In order to overcome their financial problems and to avoid the ability of their creditors to recover from Garth and Wendy-Anne what was rightfully due to them, Garth and Wendy-Anne adopted various strategies including :
- (a) forming the Blueberry Hill Trust in 1997 as a vehicle for being able to run their finances and acquire assets;
 - (b) running the finances and rentals of 16 Old Main Road via an account named 'Garvin' which was an amalgamation of the name of Garth and Gavin Leach;
 - (c) after purchasing the remainder of the property from the Leaches, the finances of 16 Old Main Road were dealt with via a bank account using the name 'Midas Property Services' the proprietor of which was Kim;
 - (d) conducting the business of Bodyology using various trading names such as 'Best System' or 'Listen System';
 - (e) eventually, and after the registration of the third defendant, the business bank account was operated in the name of the close corporation;
 - (f) changing the terms of the Blueberry Hill Trust in order to enable Garth and Wendy-Anne to use it as a trading entity from which to operate Bodyology;

- (g) registering the immovable properties, and the membership of Bodyology in the name of Kim; and
- (h) using the identity of Kim as a vehicle for various transactions which Garth and Wendy-Anne could not have concluded – mainly by using Powers of Attorney granted by Kim to Garth and Wendy-Anne.

[16] The very clear picture which emerged at the trial was that :

- (a) Garth and Wendy-Anne worked hard to create wealth for themselves including the purchase of the immovable properties and the building of the Bodyology business;
- (b) because of their past financial difficulties they enlisted the various mechanisms set out above to enable themselves to operate without hindrance from their creditors;
- (c) in building up their wealth and the business of Bodyology they studiously avoided repaying their past debts and enjoyed a relatively luxurious lifestyle with frequent overseas holidays for the whole family; and
- (d) matters came to a head with the failure of the Bodyology business and the divorce of Garth and Wendy-Anne.

[17] What is also clear from the evidence is that, prior to the return of Kim and Ken from the United Kingdom, all the business decisions were made by Garth and Wendy-Anne, and Kim simply went along with them. Garth and Wendy-Anne did all the negotiations and paid all the amounts due. The involvement of Kim was, however, necessary from time to time, for example, when her salary and finances were used as the basis for persuading a bank to finance the purchase of 16 Old Main Road. The Marloth Park properties appear to have been paid principally from the Blueberry Hill Trust monies.

[18] The problems giving rise to this action then arose with the alienation of Garth from the family. Kim adopted the attitude that Bodyology and the properties were registered in her name, and that Garth was not entitled to deal with them. Garth maintains that the registration of the immovable properties and the shares in Bodyology in the name of Kim were on the basis that she was merely a ‘nominee’ and that in the event of their needing to do so, he and Wendy-Anne could reverse that process or deal with the immovable properties because they were the de facto owners thereof.

[19] In his evidence Garth sought to advance the reason for their registration of the membership interest in Bodyology and the properties in the name of Kim, as being to secure the position of Kim as their eventual heir and he said that the registration of the properties in the name of Kim was for ‘estate planning purposes’. In my view this explanation is simply untrue. It became abundantly clear from the evidence of all the witnesses that the reason why the membership interest and the properties were put into the name of Kim was to avoid the creditors of Garth and Wendy-Anne and to enable them to conduct business and live a comfortable lifestyle without the legal constraints which would have followed upon their

poor financial history. In this regard Kim originally assisted her parents by allowing the properties to be registered in her name and allowing her finances to be used as the basis for the purchase of 16 Old Main Road. This was evident from the fact that Garth and Wendy-Anne conducted negotiations for the properties, and paid for them. In addition, and to facilitate the various devices they employed, they obtained two Powers of Attorney from Kim, who was in the United Kingdom.

- [20] Whilst they were in the United Kingdom, the financial circumstances of Kim and Ken were on a somewhat different footing. They were gainfully employed, and accumulating funds, to the extent that by 2005 they were able to purchase an immovable property at 7 Bracken Ridge Estate in Hillcrest. This was done with the purpose of providing them with a home when they re-located to South Africa.
- [21] What is also clear from the evidence is that it was the intention of Garth and Wendy-Anne, that when Ken and Kim returned from the United Kingdom, they would become partners in the Bodyology business and they would eventually take over the running of the business. This intention was evidenced by the conduct of Garth and Wendy-Anne, and the fact that Kim largely took over responsibility for the running of the Bodyology business after their return to South Africa.
- [22] With regard to the claims of Garth, the evidence of Kim was significant. She confirmed that the Bracken Ridge property had been purchased from funds belonging to her and Ken. She maintained that she, Ken, Garth and Wendy-Anne were equal partners in Bodyology, and with regard to the treatment of the remaining assets, she said it would be fair if the assets were sold, and all four of them would have to be involved in the distribution of the proceeds of those sales. She maintained that this was fair because the assets had been bought from the proceeds principally of the Bodyology business. She conceded that this would not have been the case back in 2002. She also accepted that had her parents experienced financial problems and whilst she and Ken were in the United Kingdom, the properties could have been sold. She was certain that her parents would not have been able to have obtained a bond in their own names for the property situated at 16 Old Main Road, and that is the reason why her finances had to be used to justify the purchase of the property.
- [23] The claims of Kim with regard to the ownership of the membership of Bodyology is supported by the agreement signed by the four family members giving Garth ownership of the sauna business when he left Bodyology.
- [24] Wendy-Anne conceded that Garth was the owner of a one-quarter share in the 16 Old Main Road property, but regarded the Marloth Park properties as being in a somewhat different category because the residence there constituted the family holiday home which had no part of the business. That property had been partly funded by monies coming from the Blueberry Hill Trust and partly by the business bank account at the time. This was not the bank account of the close corporation.

[25] The registration of land in the name of a ‘nominee’ has been dealt with in several cases.

[26] In *Dadabhai v Dadabhai and Another* 1981 (3) SA 1039 (A) at 1047 F – H and 1050 A – C the concept of nominee ownership was dealt with, including the origin of the concept of a ‘nominee’ in our law.

[27] In *Hadebe v Hadebe and Another* [2000] 3 All SA 518 (LCC) the plaintiff claimed transfer of certain immovable property allegedly owned by the first defendant as her nominee. The right to claim title to the property in this case was found in the provisions of s 3 of the Restitution of Land Rights Act, 1994. However, in dealing with the relationship between the parties Gildenhuys J stated at paragraph 17 :

‘The legal relationship between the plaintiff and the first defendant which emanated from the facts set out above, is that of an informal trust whereunder the first defendant (as “nominee”, which could also mean trustee) would hold the property for the plaintiff. The defendant has no more than the bare dominium of the property. The beneficial ownership (*genotsregte*) vests in the plaintiff. Until the dominium in the property is transferred to the plaintiff, the plaintiff has the right to, not the right of ownership. The terms of the oral agreement between the plaintiff and the first defendant, as set out by the plaintiff, do not include a right for the plaintiff to claim transfer of the property. Such right may be a tacit or essential term of the nominee agreement.’

[28] On all the evidence I find that Kim acted as a nominee on behalf of Garth and Wendy-Anne in the purchase of the various properties. Garth and Wendy-Anne accordingly had the right to ownership, and Kim had no more than dominium of the membership interest and the properties.

[29] That finding does not, of itself, entitle Garth to the shares he claims in the membership of Bodyology and the immovable properties. I say that because :

- (a) after their return from England, Kim and Ken together with Garth and Wendy-Anne were equal owners of that membership, each with an undivided 25% share;
- (b) Garth decided that he no longer wished to have a member’s interest in Bodyology, and he was given the sauna business when he left. On his own version then, he no longer has a claim to a member’s interest in Bodyology;
- (c) with regard to the immovable properties situated at Marloth Park Holiday Township, being Erf 2547, Erf 3470 and Erf 3471, those properties are registered in the name of Kim. It is clear from the evidence that it was intended that they be put into Kim’s name for convenience because of the financial difficulties of Garth and Wendy-Anne. They are the *de facto* owners of the property, and entitled to ownership thereof; and
- (d) with regard to the property situated at 16 Old Main Road, although that property is registered in the name of Kim, it formed part and parcel of the business of Bodyology, and as that business was to be owned by Garth, Wendy-Anne, Kim and Ken in equal shares, so should the property. It existed prior to Garth leaving Bodyology and was not considered in

the distribution of assets at that stage. The problem with registering the ownership of the 16 Old Main Road property in the names of Garth, Wendy-Anne and Kim and Ken is that there is a bond holder over the property in respect of a debt for which Kim is the sole debtor. The only equitable way in dealing with this problem is to make a declaration that upon the sale of the property, the net proceeds, after settlement of the bond debt and selling expenses, is to be distributed equally to Garth, Wendy-Anne, Kim and Ken.

- [30] The only remaining property is the consolidated plots in Inchanga. Although in the name of Kim, it was clear that these properties belonged to Garth and Wendy-Anne
- [31] The final matter to be dealt with is costs. In that regard I am required to make a decision regarding the reserved costs of an interdict application brought by Garth to prevent the sale of 16 Old Main Road and the alienation of the member's interest in, and the assets of, Bodyology pending the outcome of this action. As I understand the position, the orders in that application were taken by consent. Whether that was so or not does not affect my thinking on the question of costs.
- [32] This action sadly concerned a family dispute. Making orders for costs would only further alienate the relationship between the parties. They were all responsible in some way for the unfortunate circumstance that a court of law should be required to settle their differences. None of them was entirely successful. They should each pay their own costs.
- [33] In relation to any order which I make (save costs) it was agreed between the Middletons and Ken that he be joined in the action as seventh defendant, and he agreed to be bound by any order which I may make with regard to the relief sought by the parties. This was done with the express purpose that the disputes which involve him could be resolved without further litigation.

[34] I make the following order :

It is declared that the first, second and seventh defendants are each owners of an equal and undivided share in the membership interest of the third defendant.

The sixth defendant is directed forthwith to amend his/her records to accord with paragraph

(1) above.

It is declared that the plaintiff and the second defendant are the lawful owners of the following immovable properties:

- (a) Erf 2547 Marloth Park Holiday Township;
- (b) Erf 3470 Marloth Park Holiday Township;
- (c) Erf 3471 Marloth Park Holiday Township;

held in the name of the first defendant under Deeds of Transfer numbered T 71745/1987, T 167/1986 and T 31159/1984 respectively.

The fifth defendant is directed forthwith to amend his/her records to record that the ownership of the properties set out in 3 above, are owned by the plaintiff and the second defendant in equal and undivided shares.

It is declared that the plaintiff, and the first, second and seventh defendants are each entitled to be paid a one quarter share of the nett proceeds of the sale of the sectional title units described as :

- (a) SS 16 Old Main Road, Unit 1;
- (b) SS 16 Old Main Road,EUA 61;
- (c) SS 16 Old Main Road, Unit 2;
- (d) SS 16 Old Main Road, EUA 62

held in the name of the first defendant under Deeds of Transfer numbered 033840/07 and 033841/07, and the Notarial Cessions of the Exclusive Use Areas notarially numbered 07/3250 and 07/3251, after the sale and transfer of the sectional title units to any person by the first defendant, such amounts to be paid to them after payment to the bond holder of all amounts owed to it and payment of the expenses of the sale of the sectional title units.

It is declared that the plaintiff and the second defendant are the lawful owners, in equal and undivided shares, of the immovable property described as portion 357 of Farm 'Drift', registration division FT, Pietermaritzburg held in the name of the first defendant under Deed of Transfer No T58656/2005 and situated at 6 Kingfisher Road, Inchanga.

The fourth defendant is directed forthwith to amend its records so that they accord with paragraph 6 above.

Each party is to pay his/her own costs of the action and the costs of the interdict application under case number 3284/10.

Date of hearing : 9th October 2013

Date of judgment : 1st November 2013

Counsel for the Plaintiff :W N Shapiro and attorney R A Crockart (instructed by CalitzCrockart& Associates)

Counsel for the Defendants : R A Suhr (instructed byMacrae Bath &Batchelor (second defendant's attorneys) and McGlashanMcKeownInc (first and third defendant's attorneys)

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