

SOUTH AFRICA / JUDGMENT

Volkwyn and Another v Fredericks (21184/2022) [2024] ZAWCHC 348 (5 November 2024) [2024] ZAWCHC 348

COURT

Western Cape High Court, Cape Town

BEFORE

A Bhoopchand

CASE / FILE NUMBER

21184/2022

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

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 21184/2022

In the matter between

WASHIEF VOLKWYN

FIRST APPLICANT

THE NETWORK COMPUTER SERVICES

WESTERN CAPE CC

SECOND APPLICANT

and

ELVINA FREDERICKS

RESPONDENT

JUDGMENT

Date of hearing: 4 November 2024

Date of judgment: 5 November 2024

BHOOPCHAND AJ:

1. The Second Applicant, Network Computer Services, Western Cape CC (“the CC”), began trading in 1991, providing specialised network infrastructure and fibre optic services to state-owned enterprises, government departments, and private businesses in various industries such as telecommunications, mining, and financial industries. The First Applicant acquired a 25% member’s interest in the CC on 31 January 2013. In December 2017, the First Applicant and Marthinus Cornelius Fredericks (“Martin”) acquired the 75% member’s interest held by another individual. The Respondent is the wife of Martin. She acquired Martin’s member’s interest in March 2020 to retain certain tax considerations arising from the CC’s small business corporation status. The First Applicant held 62.5% and the Respondent 37.5% of the member’s interest in the CC.
 2. This application commenced on 13 December 2022. The First Applicant sought urgent relief, seeking, among others, an order to purchase the member’s interest held by the Respondent in the CC. The First Applicant alleged that the content of an email dated 20 September 2022 triggered the application. In that email, the Respondent informed the First Applicant that the Respondent had received an offer from a potential investor, which she was seriously considering. The Respondent acknowledged the memorandum of understanding (“MOU”) binding the First Applicant and Martin that obliged a retiring member to offer his interest in the CC to the existing member before offering it to any other potential buyer. The Respondent denied the MOU bound her, alleging that it fell away when Martin transferred his membership to her.
 3. The Applicant stated that on 8 August 2022, he sent the Respondent a valuation of the CC performed by TdP Chartered Accountants. The report is dated 8 June 2022, and the valuation is as of 28 February
2022. The Respondent’s email referred to in the preceding paragraph was a response to the valuation report. The relationship between the First Applicant, the Respondent and Martin had irretrievably collapsed by this time. Each party alleges that the other was to blame for the breakdown of the working relationship. It suffices to say, and to avoid burdening this judgment, that both parties gave the other sufficient reason to conclude that they could not work together. The First Applicant sought an order to purchase the Respondent’s member’s interest for R352 500 per the valuation, failing which he set out a procedure to re-evaluate the CC. The Respondent acknowledged that the First Applicant should purchase her member’s interest but declined the valuation performed by TdP Chartered Accountants on various grounds, primarily that it was a qualified valuation due to the lack of proper and complete financial information. The Respondent expanded the procedure set out by the First Applicant to revalue the CC.
4. When the application came to be heard, the First Applicant had accepted the procedure set out by the Respondent. The Applicant contended that the only issues remaining between the parties

concerned the costs relating to this application and the costs of the proposed valuation. The Applicant asserted that each party should pay its own costs arising from the application and the counterapplication. The Respondent contended that the First Applicant

pay the costs of this application. As for the costs of the proposed valuation, the Applicant contended that the parties bear the costs equally. In contrast, the Respondent contended in her written argument that the First Applicant bear the valuation costs. The Court shall return to these aspects.

5. The parties sought to incorporate into their draft order a clause to the effect that they would endeavour to agree to appoint a practising chartered accountant to perform the valuation. The Court was not inclined to grant this order, given the history of the matter and the inability of the First Applicant and the Respondent to cooperate. The parties readily agreed to forego this clause.
6. The parties had agreed that if they could not mutually appoint a valuator, then that task would devolve to the president of the South African Institute of Chartered Accountants (“the Institute”). The Court formed the impression that the parties had not thought this provision through. The CC was a small enterprise, and the allegations made in the papers suggested that its finances were limited. If the president of the Institute preferred a big firm of accountants to perform the valuation, it could compromise the finances of the CC or the party that would be ordered to pay the costs of the valuation. Neither did the parties consider recommending or seeking the appointment of an accountant from a previously disadvantaged group. The Court could not let this opportunity to transform practitioners' and, ultimately, litigants' thinking on selecting independent experts to perform specialised tasks slip.
7. This Division has endeavoured to expand the practitioner base to promote the interests of previously disadvantaged practitioners to act as curators. Practice directive 24G requires applicants seeking the appointment of curators to file the written consent of three potential curators on the roll of legal practitioners regarding transformation imperatives. There is no reason why the Court should not engage litigants and their legal representatives to promote the tenets of transformation when they seek orders to appoint experts to perform specialised tasks. This application provided the opportunity to appoint a valuator from the ranks of previously disadvantaged accountants to perform the valuation. The Court records with appreciation the willingness of the parties to participate and incorporate this imperative in the order. The Judiciary should coerce all litigants to inculcate the principles of transformation in practice where appropriate and applicable. This objective is even more compelling where parties benefit from transformation legislation but make little effort to advance or enable others. The First Applicant alluded to securing lucrative work through the broad-based Black economic empowerment policy.

8. The second consideration that should inform the President of the Institute's choice of chartered accountant relates to the CC's financial turnover. It would be counterproductive for the Institute's President to select a large accounting firm to perform the valuation of a small enterprise. The parties have included these considerations in the orders that they have agreed to.
9. The Court then turns to the issue of costs. The parties could not agree on this aspect of the application, leaving the Court the insalubrious task of doing so. The Court asked the Applicant's

Counsel at the outset why the CC should not bear the costs of the proposed valuation. Counsel for the Applicant seemed receptive to the idea, provided the costs were included in the valuation of the enterprise. The Respondent seemed more receptive to the idea. The parties stalled on reaching an agreement when invited to prepare the draft order for the Court's consideration. Apart from baldly asserting their respective Client's interests, the parties would not compromise on this aspect. Neither did they provide any cogent argument for the position each held. The MOU did not address the costs of the CC's valuation upon a member's retirement. It is unclear whether the CC shouldered the costs of the valuation performed by the First Applicant. In the circumstances, the Court is at large to order the most pragmatic means to resolve this issue. The CC shall bear the costs of the valuation.

10. There are other considerations relating to the costs of this application and the counterapplication. The First Applicant raised the application urgently, contending that the Respondent's intention to surrender her member's interest to a potential investor, contrary to the provisions of the MOU, precipitated the urgency. The First Applicant had valued the CC before receiving the Respondent's email. The Respondent admitted that there was no investor and that she was not entitled to resile from the MOU. The email was sent to the First Applicant to extract a reaction as he had ignored her requests for information.
11. The counterapplication sought to enforce the arbitration clause in the MOU and obtain the information that the First Applicant had denied the Respondent. Similarly to the Applicant, the Respondent did

not pursue the main thrust of the counterapplication. The Respondent argued that although the First Applicant had sought an interim

interdict on an urgent basis, he failed to pursue the application, meaning that he no longer sought urgent relief. Respondent contends

that the First Applicant created his own urgency. There is merit in the Respondent's assertion. The email was sent on 20 September

2022. The application was filed on 13 December 2023. Respondent argues that the launch of the counterapplication corresponded with the time that the issue of bonuses would have arisen. Respondent refers to irregular bonuses awarded to the First Applicant and his wife when the finances of the CC could not support the perk.

12. The Court has considered the conduct of both parties. In the final analysis, and for the reasons provided in the preceding paragraph, it would be equitable for each party to pay its own costs in the application and the counterapplication. The valuation costs are included in the valuation of the CC. Any costs incurred by the First Applicant and paid by the CC in litigating this application and the counterapplication will be excluded from the valuation. Neither party

requested in their papers that the Court consider the costs of the initial valuation conducted by the First Applicant.

13. In the premises, the Court makes the following orders, largely confirming the terms agreed upon by the parties. The Court has amended certain terms and timeframes to render them more coherent and realistic. The valuer has been given forty-five days to perform the valuation and the First Applicant sixty days to purchase the Respondent's member's interest, including the loan account, fairly valued, in the CC.

ORDER

1. The First Applicant is directed to purchase the Respondent's member's interest and loan account in the Second Applicant at a fair value as specified in paragraphs 2 to 9 below.
2. The valuation of the Second Applicant shall be undertaken by a practising chartered accountant of not less than 10 years standing, to be nominated by the President or Chairman of the Cape Town Regional Association of the South African Institute of Chartered Accountants ("SAICA"). The President or Chairperson shall consider the following factors when appointing the valuer:

2.1 The appointed valuer is to be a member of a previously disadvantaged group in line with the principles of transformation and any transformation objectives of SAICA and,

2.2 The Second Applicant is a small business with an annual turnover of approximately R3 million (three million rand).

3. The valuer is to make the determination per the provisions of paragraphs 3 to 7 of this order in respect of the fair value of the member's interest and loan account within 45 (forty-five) calendar days from the date of this order and shall communicate in writing the fair value of the member's interest and loan account of the Respondent in the Second Applicant.
4. In determining the aforesaid fair value, the valuer shall act as an expert and not an arbitrator and:

4.1 the fair value of the member's interest and loan account shall be determined with regard to the financial condition of the Second Applicant as at the date that this application was issued (i.e. 13 December 2022), being the value at which the member's interest and loan account would have exchanged between a willing buyer and willing seller, neither being under compulsion, each having full knowledge of the relevant facts and with equity to both;

4.2 All costs relating to the valuation shall be borne by the Second Applicant, i.e., the Network Computer Services, Western Cape CC. The costs shall be included in the valuation. All legal costs relating to this application paid by the Second Applicant shall be excluded from the valuation.

5. The First Applicant and the Respondent shall fully and timeously cooperate with the valuer and furnish all information, appropriately vouched, and all documentation required by him or her to undertake the valuation and determination, failing which the valuer is authorised to make an application through the chamber book to a judge for such further directions and relief as may be appropriate. The valuer shall have the following further powers:

5.1 the right to conduct all investigations necessary and, in particular, to obtain from the parties or any third party or entity all information and documentation considered by the valuer reasonably necessary for the valuer's determination, including but not limited to bank statements, paychecks, deposit books and personal statement of affairs and liabilities which the valuer considers relevant for the determination; and the right to make physical inspection of assets and take inventories;

5.2 the right to obtain information regarding the financial affairs from any bank, financial institution or other entity where monies may have been invested or to which/whom monies may be owed by any of the entities relevant to the determination;

5.3 the right to question any person or party and obtain explanations deemed necessary for making the determination; to do anything or to take any such steps as may reasonably be considered by the valuer to be relevant to the valuer's determination, including the appointment of an expert valuer to value the commercial property of the Second Applicant situated at 6[...] W[...] Street, Sunbird Park, Cape Town ("the immovable property");

5.4 to be entitled to apply to this court for any further direction that the valuer shall or may consider necessary to perform his determination; and

5.5 to consider any matter the valuer considers relevant to determining what the valuer considers a fair value as of 13 December 2022.

6. The First Applicant and the Respondent shall be entitled to forward any documents or make representations to the valuer and shall be entitled to copies of any documents or representations made available by the other party and in respect of which the other party is entitled to comment to the valuer.

7. The valuer's determination shall be final and binding on the parties.

8. The First Applicant shall pay the Respondent the fair value of the member's interest and the loan account determined within 60 (sixty) calendar days of such determination.
9. Upon the full payment by the First Applicant, the Respondent shall transfer her member's interest to the First Applicant.
10. The First Applicant shall take all reasonable steps to procure the release of the Respondent from any liability which she may have under any guarantee that she may have given for the Second Applicant's obligations (including the suretyship that she signed in favour of the First Rand Bank Limited) and that, until such release is procured, each of the First and Second applicants shall be jointly and severally liable to indemnify the respondent against such liability.
11. Each party shall pay its own costs arising from this application and the counterapplication.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

Cape Town

Judgment

was handed down and delivered to the parties by e-mail on 5 November 2024

Applicant's Counsel: Advocate M Holland

Instructed by SB Attorneys Inc

Counsel for the Respondents: Advocate Lee Gabriel

Instructed by Dixon Attorneys Michael Dixon Attorneys Inc

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/ZAWCHC/2024/348.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/volkwyn-and-another-v-fredericks-unknown-topic-awchc-2024>

Prepared on 13 October 2026 · Esheria