

SOUTH AFRICA / JUDGMENT

Yokwe and Another v Moitlhwe and Others (M389.2022) [2024] ZANWHC 260 (10 October 2024)

[2024] ZANWHC 260

COURT

North West High Court, Mafikeng

BEFORE

JT Djaje

CASE / FILE NUMBER

M389/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: M389/2022

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES /

NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:

NELISA
YOKWE
1st Applicant
DECADES
INVESTMENT (PTY)
LTD
2nd Applicant
AND
DAVID
MOITLHWE
1st Respondent
DICK
'N ROLL CONSTRUCTION
CC
2nd Respondent
DEPARTMENT
OF HUMAN SETTLEMENTS,
NORTHWEST
PROVINCE
3rd Respondent

Heard:

7 JUNE 2024

Delivered:

This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 10
OCTOBER 2024
ORDER
I

make the following order:

1.
The first applicant is declared an unconditional
fifty-percent member's interest owner of the second respondent,
Dick 'n
Roll Construction CC;
2.
The first respondent, Mr David Moithlwe, is interdicted
and restrained from running the affairs of the second respondent
without
following due processes, primarily acting without a
resolution by the meeting of the members of the second respondent;
3.
The first respondent is directed to grant the first
applicant full rights and access to the administration of the affairs
of the
second respondent;
4.
The first respondent is directed to grant the first
applicant access to all banking accounts held in the name of the
second respondent
within five days of service of this order;
- 5.

The first respondent is directed to hand over all financial books of account in respect of the second respondent within 5 days of service of this order;

6.

The third respondent to provide the first and or second applicants with a detailed inventory of all payments made to the second respondent from the period 1 June 2021 to the date of this order;

7.

The counter application by the first and second respondents is dismissed;

8.

The first respondent is personally ordered to pay the costs of the main application and counter application.

JUDGMENT

DJAJE DJP

- [1] The applicants brought an application for the relief set out as follows in the notice of motion:

“1. The First Applicant be declared an unconditional fifty-percent member’s interest owner of the Second Respondent, Dick ‘N Roll Construction CO;

2. The First Respondent, Mr David Moithlwe, be interdicted and restrained from running the affairs of the Second Respondent without following due processes, primarily acting without a due resolution by the meeting of the members of the Second Respondent;
3. The First Respondent be directed to grant the First Applicant full rights and access to the administration of the affairs of the Second Respondent;
4. The First Respondent be directed to grant the First Applicant access to all banking accounts held in the name of the Second Respondent within five days (5) upon service of this order;
5. The First Respondent be directed to handover all financial books of account in respect of the Second Respondent within five (5) days upon service of this order;
6. The Third Respondent be directed to provide the First and/or Second Applicants with a detailed inventory of all payments made to the Second respondent from the period 1 June 2021 to the date of this order;
7. Alternatively, to prayers 1 up to 6, the First and Second Respondent be ordered to debate the account in respect of the Profit-Sharing Agreement with the Second Applicant and the Second Respondent be ordered to make payment that would be held to be due to the Second Applicant upon the aforesaid debatement.

8. That the First Respondent, personally, be ordered to bear the costs of this application on an attorney and client scale, alternatively, and in the event that Second Applicant succeeds on the alternative prayers, then the First and Second Respondents be ordered to pay cost of this application jointly and severally, the one paying the other to be absolved.”
- [2] The first applicant in her founding affidavit stated that she first met the first respondent in 2011 when the first respondent required funding for a project. The project was for the construction of low-cost houses in various villages in Ganyesa- Vryburg. The first respondent’s company, Dick ‘N Roll Construction (second respondent) was responsible for the project. The applicant was able to assist the first respondent financially and the project was successfully completed. The applicant was thereafter reimbursed for the capital injected in the project.
- [3] In October 2019 the second respondent was awarded a tender by the third respondent for the construction of 300 low-cost houses at Sutelong Village in Moretele Local Municipality. The first applicant was again approached by the first respondent to provide human and financial resources to the second respondent for the completion of the project. This time around the first applicant involved her company Decades Investment (PTY) LTD (second applicant) to provide the assistance requested by the first respondent. The negotiations between the first respondent on behalf of the second respondent and the applicant on behalf of the second applicant resulted in a Profit

Sharing Agreement (PSA) between the parties. The purpose of the PSA was to ensure that the second applicant would be reimbursed for the resources provided.

- [4] The parties agreed to the following terms in the PSA:

“19. The material terms of the PSA provides as follows:

1.1.5 “The project” means DH 25/19: APPOINTMENT OF A TURNKEY DEVELOPER TO CONSTRUCT 300 LOW-COST HOUSES TOP STRUCTURE AT SUTELONG: MORETELE LOCAL MUNICIPALITY: PROJECT NO. B19040022/4.

2. Profit Share

2.1 The parties agree that, subject to the terms herein below, they shall share in the profits of the project. These profits shall be shared in the following manner: 50/50 % split of the Nett Profit excluding the capital contributions (loans) from both parties to be refunded back to Decades Investments and Dick ‘N Roll construction on receipt of payments per milestones from Department of Human Settlements North West Province and not later than 3 days from date of receiving a payment to be transferred into the account to be supplied by each party electronically. The share in profits shall be payable from progress payments received from the project and each Party shall be entitled to refer the financial transaction prepared to their own auditors or accountant as the case may be, for the latter to confirm its acceptance or not of the said statement/invoices/payments.

3. Obligations of the parties in terms of this agreement.

3.1 Decades Investments and Dick 'N Roll

3.1.1 shall be responsible for the co-administration of the venture, which shall include, but not be limited to:

3.1.1.1 the control and settlement of the debtors and Creditors'

accounts and the management of the financial affairs;

3.1.1.2 the maintenance of proper and generally accepted accounting records, including the extracting of monthly management accounts;

3.1.1.3 Dick 'N Roll agrees that Decades shall nominate one member of Decades to be a signatory on project bank account which shall be operated jointly.

6. Executive authority

No party shall have the authority to bind or make any commitment on behalf of this project or the other party, unless such authorization is expressed in writing by the parties, jointly with regard to the agreement, or by the party individually with regard to that party.

9. Documents

9.1 All documents relevant to the business, including existing securities, shall be made available to the parties.

9.2 The parties shall have unrestricted, but not unreasonable access to all and any documentation prepared.

10. Liability

Both parties

11. Assignment and third parties

11.1 No party shall sell, assign, mortgage, pledge, transfer, cede or in any way dispose of any rights or interests in terms of this agreement without prior written consent of the remaining part

13. Dispute resolution

14.1 In the event of a dispute arising between the parties, in respect of any cause whatsoever, it shall be referred to mediation within 5(five) business days of written notification by either party to the other.

14. Notices

15.1 Notices in terms of this agreement shall be in writing and will take effect from receipt at the addresses of the parties indicated on the front cover of this agreement."

- [5] An amount of R2 067 177.57 was provided by the second applicant for the project and the first applicant was assigned as the Project Manager and Safety Officer.
- [6] The first applicant now alleges that the first respondent in September 2020, unilaterally ceded the whole project of the 300 low-cost houses to an entity known as Tantalase Projects CC. In terms of the new arrangement, the second respondent was entitled to receive 30% and the third party 70%. In October 2020 the first applicant was offered 50% membership interest in the second respondent by the first respondent. The resolution for the 50% ownership by the first applicant in the second respondent was affected in May 2021. Both the first respondent and the first applicant continued working together with the first applicant attending meetings at the Department of Human Settlements in North West Province. The first applicant was however never included in the bank account of the second respondent. This resulted in the deterioration of the working relationship between the first applicant and the second respondent.
- [7] The applicants challenged the first respondent's authority to act on behalf of the second respondent by way of a Rule 7 notice which was delivered and no response received thereto. It was argued that in the absence of any authority, the second respondent cannot be opposing this application and the relief sought can be granted against the second respondent.
- [8] In contention to the issue of lack of authority it was submitted that the second respondent did not initiate the legal proceedings against the applicants. Instead, the second respondent was cited in these proceedings and entitled to participate. It was argued that the second respondent is not required to prove a mandate to the party that brought it to court. It was further contended that the Rule 7(1) notice by the applicants to the second respondent was served out of time and no condonation application was made.
- [9] During argument counsel for the first and second respondent relied on the case of Van Staden and Others NNO v Pro-Wiz (Pty) Ltd (412/2018) [2019] ZASCA 7 (8 March 2019) in relation to the issue of authority to act where the following was said:
- "Furthermore, as a matter of principle, your party is cited in legal proceedings they are entitled without more to participate in those proceedings. The fact that they were cited as parties gives them that right. Here the liquidators were sighted and decided to resist the application. They were entitled to do so by the mere fact of their joinder as parties. It is not open to an applicant who has joined a respondent to contend thereafter that this was a misjoinder and on that footing resist an adverse order for costs. Were that the case a party who took the point that they had been wrongly joined would not be entitled to recover their costs, when that argument succeeded. On this simple ground the liquidators were entitled to oppose the application and, as a matter of principle were entitled to their costs when it was withdrawn."*
- [10] In this matter the second respondent delivered its notice to oppose on 23 September 2022 and on 13 October 2022 delivered a counter application. The Rule 7(1) notice by the applicants was delivered on 23 November 2022 which was six weeks out of time. The notice in

terms of Rule 7(1) should be delivered within 10 days after the knowledge of who is acting on behalf of such party. In this case it should have been done by 7 October 2022. There was no condonation for the late delivery of such notice by the applicant. The applicants argued that the second respondent should have delivered a Rule 30 notice that the Rule 7(1) was out of time. This is a concession that the applicants delivered the Rule 7(1) notice out of time. It cannot be argued that the second respondent should have responded with a Rule 30 notice. It is the applicants who are challenging the authority of the first respondent's attorneys and should have complied with the Rules.

- [11] In addition to the above and what is stated in Van Staden, the second respondent has been cited in these proceedings and entitled to participate. The argument of lack of authority by the applicants is dismissed.

Points in limine

- [12] The third respondent raised four points in limine but only persisted with the one of non-joinder. The three of locus standi, jurisdiction and non-compliance with the State Liability Act were abandoned and as such will not be dealt with in this judgment. The argument on non-joinder was that the applicants failed to join Tantalase Project CC to these proceedings as a respondent. According to the third respondent, Tantalase has a direct and substantial interest in these proceedings as the first respondent ceded the low-cost housing project to it.
- [13] The applicants contended that Tantalase has no interest in this matter as the rights in respect of the payments made by the third respondent, have been retained by the second respondent. These are the payments that the applicants are interested in. Furthermore, that there will be no prejudice to Tantalase if the relief sought is granted in favour of the applicants.
- [14] It is trite that joinder of a party is only required if that party has a direct and substantial interest which may be affected prejudicially by the judgement of the court. See: Judicial Service Commission and Another v Cape Bar Council and another 2013 (1) SA 170 (SCA). In this matter the relief sought against the third respondent is to provide the applicants with and inventory of all payments made to the second respondent. In the respondents' answering affidavit, the first respondent under oath stated that the cession to Tantalase was not an outright cession and the largest portion of the contract value would be paid to Tantalase with the balance paid to the second respondent. Considering the relief sought in the notice of motion, there is no prejudice that could be suffered

by Tantalase if any of the prayers sought is granted. The relief sought in the notice of motion will not affect any rights of Tantalase in the cession. In the result the point in limine of non-joinder is without merit and should be dismissed.

Main application

First ground

- [15] The applicants argued that there was a resolution concluded by the first applicant and the first respondent that the first applicant be appointed as a member of the second respondent. There were no conditions attached to the resolution and should be enforced. In contention the first and second respondents argued that the relief sought is unlawful and incompetent. The submission made was that the resolution to allocate the first applicant 50%-member interest in the second respondent was to secure the debt due to the second applicant by the second respondent. This was done after the PSA between the second applicant and the second respondent. The 50%-member interest was only allocated to first applicant in her representative capacity on behalf of the second applicant. The reason for that was that the second applicant as a juristic person is prohibited in terms of section 29 of the Close Corporations Act 69 of 1984 from holding a member interest in a Close Corporation.
- [16] The PSA between the second applicant and the second respondent was entered into in February 2020 with the terms as stated above. At that time there was no discussion of appointing the first applicant as a member of the second respondent either in a representative capacity or personal capacity. In May 2021 the first respondent as the sole member of the second respondent took a resolution to appoint the first applicant as a member of the second respondent. The resolution is as follows:

“RESOLUTION BY MEMBERS IN TERMS OF THE COMPANIES ACT 71 OF 2008

Resolution of a meeting of Members of Dick n Roll Construction CC (Reg. No: 2006/114769/23) held at Ganyesa on the 15th of May 2021 at 10:00am.

IT IS HEREBY RESOLVED THAT:

1. Nelisa Yokwe, with Identity Number 7[...] is hereby appointed as a Member of Dick n Roll Construction CC.
2. Senkokile David Moitlhwe is to do all that is necessary to update the CIPC records of Dick n Roll Construction CC, to reflect the member changes accordingly.

PASSING OF RESOLUTIONS

The resolutions herein have been adopted by all members present in the meeting and duly signed by the members.”

- [17] The resolution mentioned herein above does not refer to the appointment of the first applicant in any representative capacity. She is appointed as a member of the second respondent and the first respondent undertook to do all that is necessary to update the CIPC records. The argument that the first applicant was appointed in her representative capacity cannot be sustained when one looks at the resolution taken on 15 May 2021 by the first respondent as the sole member of the second respondent. The resolution was only taken months after the PSA between the second applicant and the second respondent. If indeed the member interest was done to secure the debt owed to the second applicant, the resolution could have been included in the agreement. All that is stated in the PSA is that the

parties shall share the profits 50/50% split of the net profit excluding the capital contributions from both parties to be refunded back to the second applicant.

- [18] It is astonishing that the first respondent in the answering affidavit denies having offered the first applicant member interest in the second respondent when he signed the resolution himself. There was no argument or evidence of misrepresentation when the resolution was signed by the first respondent. The signature on the resolution was not disputed by the first respondent. The argument on the provisions of section 29 of the Close Corporation Act finds no application in this matter and stands to fail.
- [19] The first applicant has produced a CK2 document that indicates the Close Corporation Dick 'N Roll as having two members with each holding 50%-member interest. This document was also signed by the first respondent. It follows axiomatically that for all intents and purposes, the first respondent intended for the applicant to be appointed a member of the second respondent, and for that reason she is entitled to be involved in the affairs of the second respondent.
- [20] Section 49(1) and (2) of the Close Corporations Act 69 of 1984 Provides that:
- “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 her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section.
- (2) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in subsection (1), or that the corporation's affairs are being conducted as so contemplated, and if the Court considers it just and equitable, the Court may with a view to settling the dispute make such order as it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.”
- [21] The first applicant enjoys protection under section 49 of the Close Corporation Act and is entitled to a relief sought in the notice of motion.
- [22] The first applicant seeks an interdict against the first respondent from running the affairs of the second respondent without following due processes, primarily acting without a due resolution of the members of the second respondent. The requirements for an interdict should be satisfied being a clear right, irreparable harm and no alternative remedy.

- [23] By virtue of her member interest in the second respondent, the first applicant has established a clear right entitling her to the relief sought. Her right is protected under section 46 of the Close Corporations Act that every member of a Close Corporation is entitled to participate in the carrying on of the business of the corporation. The first applicant stands to suffer irreparable harm if the first respondent continues to run the second respondent excluding her and there is no alternative remedy. The first applicant has satisfied the requirements of an interdict against the first respondent.
- [24] As a member of the second respondent, the first applicant is entitled to an inventory of all payments made to the second respondent by the third respondent.

Counter application

- [25] The first and second respondent have raised a counter application in the event the relief sought in the main application succeeds. The respondents seek an order as follows:

“1. Directing the First Applicant to take all steps required and to sign all documents necessary to remove her name as a co-member of the Second Respondent, upon receipt by the Second Applicant of the payment in respect of 25 low-cost housing units to be constructed by the Second Applicant under contract number: B190400224/4 at Sutelong Village.

2. That in the event of the First Applicant failing to comply with her obligations in terms of prayer 1 above within 15 days from date of payment, the Sheriff of the High Court be directed and authorised to sign all documents required on her behalf.
3. Directing the First Applicant to pay the costs of this Counter Application.
4. Affording the First and Second Respondents such further and/or alternative relief as this Honourable Court may deem just.”

- [26] The first respondent’s argument was that the first applicant was allocated 50%-member interest in the second respondent temporarily until the outstanding monies due to the second applicant were paid. It was submitted that the outstanding amount of R330 000.00 was already paid and a further payment of R31 268.17 would be made. This is the same argument advanced earlier that the appointment of the first applicant as a 50% shareholder in the second respondent was conditional. I have already dealt with the issue of whether the appointment was conditional or not and have found that on the face of the resolution, the appointment was not conditional. There is no basis for the counter application to be granted and should be dismissed.

Costs

- [27] The applicants have succeeded in the relief they seek and are entitled to the costs of the application and the counter application.

Order

[28] Consequently, the following order is made:

2. The first respondent, Mr David Moitlhwe, is interdicted and restrained from running the affairs of the second respondent without following due processes, primarily acting without a due resolution by the meeting of the members of the second respondent;

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 07 JUNE 2024

DATE OF JUDGMENT

: 10 OCTOBER 2024

COUNSEL FOR THE APPLICANTS

: ADV MASHELE

COUNSEL FOR THE 1ST & 2ND RESPONDENTS : ADV HITGE

COUNSEL FOR THE 3RD RESPONDENT

: ADV NGOETJANA

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