IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 2369/2013
DATE HEARD: 24/10/2013
DATE DELIVERED: 7/11/13
REPORTABLE

In the matter between:

ESTHER NOMVUYO FENI **APPLICANT**

and

PHILLIP TOMMY GXOTHIWE **1ST RESPONDENT**
WESTONDALE FARMING CC **2ND RESPONDENT**

Close Corporations Act 69 of 1984 – application for relief in terms of s 36 and s 49 – first respondent, in effect, hijacking close corporation from applicant – applicant establishing case in terms of s 49 – oppressive conduct by first respondent preventing applicant from adducing evidence of fair value of member's interest for purpose of order that first respondent sell his member's interest to applicant – order granted divesting first respondent of management of close corporation, ordering him to give applicant access to records and books, and to property of close corporation, and to manage it – matter postponed to return day so that applicant can adduce evidence of fair value of first respondent's member's interest.

JUDGMENT

PLASKET J

[1] Ms Esther Nomvuyo Feni, the applicant, is a businesswoman who has a keen interest in farming. In 2000, she met Mr Phillip Tommy Gxothiwe, the first respondent, and a personal relationship developed between them. In due course they together formed Westondale Farming CC, the second respondent, as a vehicle for farming operations. (I shall refer to the second respondent as Westondale Farming.)

[2] The relationship between the applicant and the first respondent has now reached a point of complete breakdown and, the applicant avers, the first respondent has in effect hijacked Westondale Farming. As a result, she has applied for relief in terms of s 36 and s 49 of the Close Corporations Act 69 of 1984: essentially, she seeks an order terminating the first respondent's membership of Westondale Farming, an order determining a method for the valuation of his member's interest in it and an order directing him to sell his interest to her.

[3] Before dealing with the merits of the application, it is unfortunately necessary to say something of the way in which the first respondent's legal representatives have conducted themselves in this matter.

[4] When the matter was called, Mr Mvulana, the first respondent's attorneys' local correspondent, handed up heads of argument drafted by counsel (of which I shall say more below). When I asked him if he intended applying for condonation for the late filing of the heads, he informed me that he was unable to do so because he had no instructions in that regard and had not been informed of the reasons for the late filing of the heads.

[5] I asked Mr Nyangiwe, who appeared for the applicant, what his attitude was. He took the view, and understandably so, that he wished to argue the matter as the applicant had done all she was required to do in order for the matter to be heard and would be prejudiced by any delay. In these circumstances, I proceeded to hear the matter.

[6] Heads of argument are important for the proper administration of justice, as Marcus AJ pointed out in *S v Ntuli*[1] when he said:

'Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard.'

[7] The heads of argument that were handed up on behalf of the first respondent were not worthy of the name and were of no use at all. They are a shoddy piece of work that does not address the issues and discloses no insight into the matter whatsoever. They failed to engage with the facts, the issues that the application raised or the law. So, for instance, in purporting to set out the issues involved, the heads of argument state that '[w]e wish to argue that an application brought before the honourable court lack substance and cannot be true and correct and cannot stand in a trial'. I have no idea what this is supposed to mean. The rest of the document is in much the same vein. Apart from that, it is clear that the drafter did not even bother to proofread his work.

[8] Although the first respondent filed an answering affidavit, it consists of bare denial after bare denial. Mr Mvulana conceded, correctly and properly, that it did not, on this account create a real, genuine or bone fide dispute of fact and, that being so, the application had to be decided on the facts alleged by the applicant.[2] I turn now to a summary of those facts.

<u>The facts</u>

[9] The applicant and the first respondent, having commenced a personal relationship in 2000, began to live together in 2004. At all material times, the first

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[1] *S v Ntuli* 2003 (4) SA 258 (W) para 16.

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26; *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.

respondent was unemployed and had no source of income. She, on the other hand, appears to have been a businesswoman of substance.

[10] At some stage – the date is not stated in the papers but appears to be in 2009 – the applicant and the first respondent formed Westondale Farming. The applicant held a 40 percent member's interest and the first respondent held a 60 percent member's interest. She stated that there was no magic to the respective members' interests: she was happy for the first respondent to hold the majority interest 'out of trust and respect' for him and because it was their intention 'to balance the members' interest in another business venture' in which she would hold a 60 percent interest and the first respondent would hold a 40 percent interest. She proceeded to say:

'There was no monetary and/or resource injection that determined the percentage allocation in the business on the part of the first respondent. I provided the necessary resources for the second respondent to get operational.'

[11] In 2009, Westondale Farming leased the farm Westondale in the Pearston district from the Department of Rural Development and Land Affairs. (I shall refer to this department as 'the lessor' in what follows.) The rent payable for the use and enjoyment of the farm was R150 000 per annum. In order to purchase stock, Westondale Farming entered into a loan agreement with the Eastern Cape Rural Finance Corporation, which trades under the name of Uvimba Finance, in terms of which it borrowed R1 700 300. The loan was secured by a mortgage bond in favour of Uvimba Finance over a property of the applicant's at Debe Nek. In addition, both the applicant and the first respondent bound themselves as sureties for Westondale Farming's debt.

[12] The loan was utilised for the purchase of 1 200 ewes and 30 rams. On taking occupation of the farm, it became clear that the fencing was inadequate. While the lessor undertook to attend to the problem, the urgency of the situation compelled the applicant and the first respondent to secure another loan from Uvimba Finance, this time for R395 000. They were required to provide security in the amount of R200 000, which the applicant did. The applicant and the first respondent also bound themselves as sureties for the full amount of the loan.

[13] The amount that was borrowed was deposited into Westondale Farming's account. I presume the fencing was attended to because the lessor later reimbursed Westondale Farming. The first respondent enjoyed sole access to the bank accounts of Westondale Farming. He refused to pay to Uvimba Finance the reimbursement made by the lessor, and so repay the loan. This led to Uvimba Finance taking payment of the R200 000 that the applicant had furnished as security for the loan. It was only after she had made a number of requests to the first respondent that he reimbursed her from Westondale Farming's account.

[14] The applicant then demanded of the first respondent that she take over the management of the financial affairs of Westondale Farming. She particularly wanted to be able to take charge of the servicing of outstanding loans. Her request was rejected by the first respondent.

[15] Matters went from bad to worse for the applicant. In July 2011, the first respondent gave 500 pregnant ewes to his brother and in 2012, he gave him eight rams. When the applicant protested, the first respondent told her 'in no uncertain terms that he was the man and was in charge'. He refused to listen to the applicant. He also refused to service the loans from Uvimba Finance because, he said, 'loans made by Uvimba Finance are never repaid and they are simply written off as bad debt without any repercussions'. He appeared to be unconcerned that the applicant's property had been encumbered as security for the loans and that she was consequently at risk. In the meantime, the interest on the loans increased.

[16] The first respondent had the sole signing rights on Westondale Farming's account and access to its money. Apart from failing to service the loans, he also failed to pay the telephone and electricity accounts with the result that these services were terminated by the respective providers.

[17] In November 2012, the first respondent ejected the applicant from Westondale Farm. Not surprisingly, the applicant was of the view that by this stage her and the first respondent's relationship had broken down completely. Great animosity existed between them. She had to be accompanied by the police to retrieve personal belongings from the farm.

[18] In January 2013, a property owned by the applicant in the Cradock district was attached and sold in execution in order to repay part of the loan owed by Westondale Farming to Uvimba Finance. The first respondent continues to farm and he keeps the proceeds of the farming operation for himself. In addition, he has, from August 2009 to April 2013, made unauthorised withdrawals from Westondale Farming's account in excess of R1 600 000. He has refused to account to the applicant for his withdrawals of cash.

[19] The first respondent made sporadic payments of money into the applicant's account in respect of three motor vehicles used by Westondale Farming but purchased by the applicant. Payments for the vehicles were, in turn, deducted from the applicant's account. As a result of the sporadic nature of the payments, one of the vehicles was re-possessed and the applicant had to pay R16 684 in order to regain possession of it.

[20] The first respondent has, however, purchased a further three vehicles with funds of Westondale Farming. He gave these vehicles to a nephew, the brother of his lover and a second nephew.

The law

[21] Section 36 of the Close Corporations Act provides:

'(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

(a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation;

(b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself or herself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or

(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

(2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to-

(a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or

(b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or

(c) any other matter regarding the cessation of membership which the Court deems fit.'

[22] Section 49 of the Act provides:

'(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.

(3) When an order under this section makes any alteration or addition to the relevant founding statement or association agreement, or replaces any association agreement, the alteration or addition or replacement shall have effect as if it were duly made by agreement of the members concerned.

(4) A copy of an order made under this section which-

(a) alters or adds to a founding statement shall within 28 days of the making thereof be lodged by the corporation with the Registrar for registration; or

(b) alters or adds to or replaces any association agreement, shall be kept by the corporation at its registered office where any member of the corporation may inspect it.'

[23] Section 49 was interpreted and applied in this court in *Gatenby v Gatenby & others*.[3] Jones J stated:[4]

'The object of s 49 is to come to the relief of the victim of oppressive conduct. The section gives the Court the power to make orders "with a view to settling the dispute" between the members of a close corporation if it is just and equitable to do so. To this end the Court is given a wide discretion. It may "make such order as it thinks fit", within the framework of either "regulating the future conduct of the affairs of the corporation" or "the purchase of the interest of any member of the corporation by other members thereof or by the corporation". These are far-reaching powers. One member can be compelled to purchase the interest of another at a fair price, whether he wants to or not.'

[24] The learned judge stressed that the section grants to the court a wide discretion as to the order that it will make to settle the dispute.[5] Drawing on the case law concerning s 252 of the Companies Act 61 of 1973, he held that s 49 required an applicant to show that a particular act or omission of the close corporation (or a member) was itself unfairly prejudicial, unjust or inequitable and that it had results that were unfairly prejudicial, unjust or inequitable; or if reliance is placed on the manner in which the close corporation's business is conducted, that both the conduct and the result of the conduct is unfairly prejudicial, unjust or inequitable.[6]

[25] In *De Franca v Exhaust Pro CC (De Franca Intervening)*[7] Nepgen J dealt with both s 49 and s 36 and their respective requirements in the context of a breakdown in the relationship between the two members of a close corporation. He said:[8]

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[3] *Gatenby v Gatenby & others* 1996 (3) SA 118 (E).

[4] At 122D-F.

[5] At 122F-123J.

[6] At 124B-H. Reliance was placed on *Garden Province Investment & others v Aleph (Pty) Ltd & others* 1979 (2) SA 525 (D) at 531C-H.

[7] *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SE).

[8] At 893C-I.

'Section 49 deals with the situation where conduct (an act or an omission) of the close corporation or of one or more of its members, or where the manner in which the affairs of the close corporation are being conducted, is unfairly prejudicial, unjust or inequitable to a member of the close corporation. When this occurs such member may make application to the Court for an order that will have the effect of "settling the dispute" (s 252 of Act 61 of 1973 provides for an order having the effect of "bringing to an end the matters complained of") . . . The Court has a wide discretion with regard to the order that it decides to make to bring about the required result . . . Such order can, however, only be made "if the Court considers it just and equitable" to do so.

Section 36 of the Act also deals with an application to Court by a member of a close corporation, but such member is not required to establish conduct of the nature referred to above when discussing s 49 of the Act, namely conduct affecting him. It is the carrying on of the business of the close corporation that must be affected, either by the existence of circumstances envisaged by ss (1)(a) or by conduct as described in ss (1)(b) and (1)(c). Subsection (1)(d), however, gives wide and virtually unlimited scope for the application of s 36 of the Act, the only limitation being the "just and equitable" requirement. The order that a Court can make in terms of s 36(1) of the Act is circumscribed, namely an order that a member shall cease to be a member of the close corporation. Once a Court decides that an order for such cessation of membership should be made, it has a discretion to make further orders as referred to in s 36(2) of the Act. While a Court could, applying the provisions of s 49 of the Act, make an order compelling one member to purchase the interest of another, which would have the effect of such member's membership in the close corporation ceasing, that which would have to be established before this is done is quite different to what would have to be established under s 36 of the Act.'

[26] On the facts of this matter either s 36 or s 49 could be applied. That said, it seems to me that s 49 is the most apposite section to apply: while the focus of s 36 is on the effect of a member's capability or conduct on *the business of the close corporation*, the focus of s 49 is on the effect of conduct of either the close corporation or a member or members on *another member*.[9] The applicant's complaint in this matter is, ultimately, that the first respondent's conduct – his acts and omissions – are unfairly prejudicial, unjust or inequitable to her. I shall, accordingly, deal with the matter in terms of s 49, although I am of the view that the

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[9] Emphasis added.

same result would follow from the application of s 36[10] and that the cases dealing with s 36 are, by and large, applicable to s 49 as well.

[27] As with s 36, a member of a close corporation who seeks relief in terms of s 49 bears the onus of establishing that the court should exercise its discretion in favour of ordering the disposal of a respondent's interest in the close corporation and as to the terms and conditions of that disposition[11] and, I would add, any other ancillary relief that may be claimed.

[28] The cases dealing with s 36 make it clear, in particular, that an applicant must, in order to succeed, place acceptable evidence before the court as to a fair value for the member's interest of the member who will be forced to dispose thereof. So, in *Geaney v Portion 117 Kalkheuwel Properties CC & others*[12] Kirk-Cohen J said that an applicant 'must set out the relevant facts to place the Court in a position', inter alia, 'to decide what financial adjustments should be made'. In *Kanakia v Ritzshelf 1004 CC t/a Passage to India & another*[13] Jali J held that it is incumbent on an applicant to place sufficient evidence before the court to enable it to decide both legs of the s 36 enquiry – the entitlement to both an order in terms of s 36(1) and any further relief in terms of s 36(2). It was made clear in *Smyth & another v Mew*[14] that the discretion vested in the court can only be exercised in an applicant's favour 'if there is sufficient evidence before the court to enable it to "make such further orders as it deems fit" in regard to the matters referred to in s 36(2)'. And, finally, in *Daniels & another v Stander*[15] Olivier AJ stated that where 'the applicants seek an order that the member's interest be acquired at fair value, they must at least disclose the financial position of the close corporation and the manner in which such fair value is to be arrived at'.

[10] *Kanakia v Ritzshelf 1004 CC t/a Passage to India & another* 2003 (2) SA 39 (D) at 49C.

[11] See *Smyth & another v Mew* 2010 (6) SA 537 (SCA) para 25; *Geaney v Portion 117 Kalkfontein Properties CC & others* 1998 (1) SA 622 (T) at 631G-I; *Kanakia v Ritzshelf 1004 CC t/a Passage to India & another* (note 10) at 48E-F.

[12] Note 11 at 631G-I.

[13] Note 10 at 48E-F.

[14] Note 11 para 26.

[15] *Daniels & another v Stander* 2012 (2) SA 586 (WCC) para 58.

Conclusions

[29] I have set out the facts in some detail above. It is clear from those facts that a series of acts or omissions can be attributed to the first respondent that were unfairly prejudicial, unjust or inequitable to the applicant and that the results of these acts or omissions were also unfairly prejudicial, unfair or inequitable.

[30] Indeed, so gross in its oppression of the applicant was the conduct of the first respondent that his acts and omissions only have to be stated for their unreasonableness to be manifest: a refusal to repay a loan despite the funds to do so being available with the result that the applicant's security of R200 000 was taken by the creditor; his reckless failure to service the loan from Uvimba Finance on the assumption that it would simply be written off as a bad debt, with the result of placing at risk the continued viability of Westondale Farming and the applicant's security; the unilateral donation of 500 ewes and eight rams, belonging to Westondale Farming, to the first respondent's brother with the result that the ability of Westondale Farming to farm profitably was compromised, the assets of the close corporation were unreasonably diminished to the detriment of the applicant's interest in it and the security that she had furnished for the loan for the purchase of the livestock was placed at risk; the unauthorised withdrawal of over R1 600 000 from Westondale Farming for his own purposes and the purchase of motor vehicles with its money for two nephews and the brother of his lover, with the result of prejudicing the applicant's interest in Westondale Farming; and the ejectment of the applicant from the farm and her total exclusion from the management of and the benefits of the business of Westondale Farming, amounting to the hijacking of her interest in it. In excluding the applicant completely from Westondale Farming, the first applicant has denied her any of the benefits of her membership, while her obligations continue to exist to the benefit of the first respondent and Westondale Farming and to the detriment of the applicant.

[31] In *Gatenby*[16] Jones J held that s 49 was designed for extraordinary situations. I venture to suggest that so oppressive is the conduct of the first respondent in this matter that it is a case study of precisely the type of circumstances that s 49 is intended to remedy.

[32] In my view, it is just and equitable to make an order that will settle the dispute between the applicant and the first respondent that will divest the first respondent of his management of Westondale Farming as a prelude to the sale of his member's interest in it to the applicant at a fair price.

[33] I have not lost sight of cases such as *Smyth*[17] and *Daniels*[18] that require of an applicant that he or she place everything necessary before the court in order that it can exercise its discretion properly; that, in particular, evidence upon which a court can determine a fair value for the buy-out of a member's interest is before it; and that in the absence of that evidence the application must fail. In this matter, that evidence is not before me precisely because of the oppressive conduct on the part of the first respondent that entitles the applicant to relief. To dismiss her application for want of evidence as to the value of the first respondent's interest – information that is not available to her because of his hijacking of the management and the business of Westondale Farming – would defeat the purpose of s 49. For that reason, I intend making an order to settle the dispute that will give the applicant relief immediately, that will place her in a position to manage Westondale Farming and obtain necessary information, and then to postpone the matter to a return day to enable her to furnish evidence as to the fair value of the first respondent's member's interest, so that she can acquire it. That, in the circumstances of this case, is, in my view, just and equitable.

The order

[34] For the reasons set out above, I make the following order.

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[16] Note 3 at 123G-H.

[17] Note 11.

[18] Note 15.

(a) Pending the sale of the first respondent's member's interest in the second respondent to the applicant, the first respondent is divested of the right to manage the business of the second respondent, to operate any of its accounts and to enter into any contracts on its behalf.

(b) The first respondent is ordered:

(i) to provide the applicant forthwith with access to all financial records, books of account, contracts and other records of the second respondent;

(ii) to provide the applicant immediately with unhindered access to Westondale Farm; and

(iii) to take whatever steps are necessary, and to do so forthwith, to ensure that the applicant is authorised to operate the bank accounts of the second respondent and to manage its business.

(c) The application is postponed to 23 January 2014 for an order to be made terminating the first respondent's membership of the second respondent and the sale of his member's interest to the applicant against the payment by her of a fair value for his member's interest, subject to the following:

(i) the applicant is directed to take such steps as may be necessary to have the fair value of the first respondent's member's interest in the second respondent determined;

(ii) she is directed to place evidence of such value before the court by way of an affidavit to be filed and served by not later than 19 December 2013;

(iii) if the first respondent files an answering affidavit, he shall do so by not later than 9 January 2014; and

(iv) the applicant may respond thereto by not later than 16 January 2014.

(d) The costs of this application are reserved for determination on 23 January 2014.

C Plasket

Judge of the High Court

APPEARANCES

Applicant: X Nyangiwe instructed by Potelwa & Co, East London and Yokwana Attorneys, Grahamstown

First Respondent: X Mvulana of Mvulana Attorneys, Grahamstown and Ntwendala Attorneys, East London