**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 55974/2021**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

**13 March 2023**
**.....**
DATE
SIGNATURE

In the matter between:

| | |
|---|---|
| **THEODOR WILHELM VAN DEN HEEVER N.O.** | First Applicant |
| **CLINTON ARTHUR JOHANNES N.O.** | Second Applicant |
| **And** | |
| **LOGGONATHAN MOODLEY** | Respondent |

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 March 2023.)

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**JUDGMENT**

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**MIA, J**

[1] The applicants bring an application seeking two declaratory orders in relation to the membership of Co-props 1099 CC(Co-Props):

> "1. That Draharama Lingum Moodley be declared the sole member of Co-props 1099 CC (Registration No 1997/031376/23) (Co-Props CC) since August 1997;
>
> 2. That the respondent be declared not to be, and to have never been a member of Co-Props CC;
>
> 3. That the respondent pay the costs of the application only in the event of his opposition thereto."

[2] The respondent opposed the application. Pursuant to the opposition the applicants brought an application to strike out paragraphs 22.2-22.16 inclusive as well paragraphs 22.27 and 22.28 of the answering affidavit as well as Annexures "SO" and "AA". I deal with the application to strike out first.

[3] The applicants are the joint Trustees in the insolvent estate of the late Draharama Lingum Moodley (the insolvent estate), which has been registered at the Master's Office. Both Trustees are based within the court's jurisdiction in Florida Park and Centurion respectively. The second respondent Loggonathan Moodley resides in Rynefield Benoni.

[4] The respondent and Draharama Lingum Moodley were brothers. Draharama Lingum Moodley passed on 29 March 2016 (the deceased). Prior to his passing, the deceased's estate was placed under provisional sequestration. On 10 March 2017, the estate was finally sequestrated. Pursuant to the final order the joint trustees were appointed. During investigations, it was established that the deceased was a member of the Co-Props CC.

[5] In relation to Co-Props, the Trustees established there was a founding statement dated 9 June 1997 and a further amended founding statement dated 22 August 1997. The first founding statement indicates that the only member was Glynis Meril Bishop (Bishop) and the principal business of Co-Props was to *"act as a principal for investment in movable and immovable property*". The later amended founding statement records that there are two members of Co-Props and the principal business is property investment. The aggregate members' contribution was R200. The deceased and the respondent are each 50% members. The contribution of each member is recorded as a cash payment of R100 each. Bishop's membership is terminated upon the registration of the amended founding statement. Co-Props is the registered owner of a sectional title property situated at North Beach Road Umdloti, measuring 95 square metres (the apartment). Co-Props never traded as an entity and appears to have been the vehicle for the ownership of the immovable property.

[6] On 19 August 2019, Co-Props was placed into final liquidation. According to the first Liquidation and Distribution account of Co-Props, there is a surplus of funds available for distribution to the members of Co-Props. The note to the first liquidation and distribution account indicates the Liquidation and Distribution account is finalised save for capital gains tax and the membership which needs to be confirmed. This was in view of evidence tendered by the respondent at a section 152 Enquiry held in terms of the Insolvency Act 24 of 1936.

[7] The respondent abandoned the point *in limine* in his heads of arguments. Thus the issues raised for determination are :

7.1 whether paragraphs 22.2-22.16 and 22.27 and 22.28 should be struck out.

7.2 whether the respondent is a member of Co-Props CC or not?

**STRIKING OUT**

[8] The applicants bring an application to strike out paragraphs 22.2 -22.16 and 22.27 and 22.28 as well as Annexures “SO” and “AA” because they allege the paragraphs are irrelevant to the application and are prejudicial, as they were without prejudice discussions. Counsel for the applicant submitted that the agreement related to settlement negotiations which were without prejudice. The context in which the negotiations were conducted and two annexures attached to the answering affidavits must be taken into account. Counsel for the respondent responded by submitting that the disclosure of the negotiation related to a settlement relating to an act of insolvency that affected creditors and the public and was in the interest of the public.

[9] Counsel for the respondent referred the court’s view in *ABSA Bank Ltd v Hammerle Group*[1] where the Court said:

> “It is true. As a general rule, negotiations between parties which are undertaken with a view to settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be on a “without prejudice”. However, there are exception to this rule. One of these exceptions is that an offer made, even on a without prejudice basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest.”

[10] Counsel argued further that creditors affected and impacted and thus public policy required disclosure. The respondent requested information about the surplus available for distribution to the creditors but this was not

[1] *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215(SCA)

forthcoming from the applicants. Counsel for the respondent submitted that the respondent was not a creditor but was a member in response to a question posed in clarity. He argued however that the negotiations were conducted in an oppressive manner and it was for this reason as well as the reasons mentioned in the cases such as *ABSA* above and *Lynn and Main Incorporated v Naidoo*[2] below.

[11] In *Lynn and Main Incorporated v Naidoo,*[3] the Court said at paragraph [22]*:*

> "Now, as a general rule, negotiations between parties, whether oral or written, which are undertaken with a view to a settlement of their disputes or differences, are privileged from disclosure. This is so, whether there are express stipulations that they shall be without prejudice or not. (See *Millward v Glaser* 1950(3) SA 547 [W]) Indeed in *Jili v South African Eagle Insurance Co. Ltd.* 1995(3) SA 269 (N) at 275 C it was decided that:
>
> "No conclusive legal significance attaches to the phrase 'without prejudice'. The mere fact that a communication carries that phrase does not *per se* confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of a genuine attempt at settlement ..... nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations ...."

[12] In *Naidoo v Marine Trade Insurance Co Ltd*[4] the Court said:

> "The bona fide of the parties in that regard was not questioned. At first blush, therefore it would appear that, in accordance with the general; "without prejudice" rule such correspondence, once respondent objected to its being adduced in evidence, was wholly inadmissible. The rationale of the rule is public policy: disputes are to be encouraged

[2] *Lynn and Main Incorporated v Naidoo* 2005 JDR 0972 N
[3] 2005 JDR 0972 N
[4] 1978 (3) SA 666 (A) at 677A-E

> to avoid litigation and expenses (nowadays very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in ensuing litigation. (Kapeller v Rondalia Versekeringskorporasie van Suid Afrika Bpk 1964 (4) 722 (T) at 728 F-G, Scmidt Bewysreg at 420; Hoffman SA Law of Evidence 2nd en at 155; Vaver at 94.)

[13] Both counsel referred to the applicable and relevant case law above. The communication relating to the offers were made without prejudice. The negotiations engaged in related to the insolvency and the amount due to members of Co-Props as a result of the surplus in the liquidation and distribution account. The negotiations were conducted without prejudice as was the counter offer. The respondent relied on discussions conducted without prejudice where there was no active insolvency. The applicant's submissions that the paragraphs and annexures are irrelevant as the conversation was conducted without prejudice, and the respondent's reference to the conversation is irrelevant, is accurate. It is evident that the applicant as submitted that these are now used to the applicant's prejudice. The communications are privileged from disclosure consequently paragraphs 22.2 22.16 and 22.27 and 22.28 as well as Annexures "SO" and "AA" are struck from the record.

**WHETHER THE RESPONDENT WAS A MEMBER OF CO-PROPS CC OR NOT**

[14] The respondent does not dispute and confirms his responses given at the enquiry. The section 152 enquiry revealed that the respondent stated under oath that he was the brainchild behind the investment in the apartment. The deceased was the investor. The deceased paid for the deposit on the property, he signed and paid for the bond repayments, he paid for the rates and taxes as well as the levies and the furniture in the property. In fact, all

payments in respect of the property were paid by the deceased. When the deceased passed, the property was not rented out to derive an income. The respondent indicated “he never thought of that”. At the date of the enquiry, he had not paid any of the expenses related to the apartment. The deceased made the initial and every payment thereafter in respect of the apartment and utilised the apartment for his own benefit from the date of payment onward. The respondent visited the apartment five times in twenty years.

[15] In addition to the above, the evidence at the enquiry indicated that the respondent did not sign financial statements over a period of twenty years. Despite the purpose of Co-Props being for investment purposes neither the deceased nor the respondent considered renting out the apartment in twenty years, whilst the deceased was alive or upon his passing. The unit was still vacant and the respondent had still not contributed to payment of the expenses due in respect of the apartment.

[16] Even if it were accepted according to the amended founding statement that the respondent contributed R100, this does not change the remainder of the evidence that on his version he was the brainchild of the business of Co-Props which was an investment entity and did not realise its potential as an investment entity. After the property was identified by the respondent, the deceased took every action and dealt with every expense in relation to Co-Props. He attended to securing the bond, signed the surety, a fact the respondent was not aware of. The deceased paid the rates and levies each month and took every decision in relation to the apartment and the financials of the apartment which was owned by Co-Props.

[17] The respondent’s assumption that someone else will be enriched does not take account of the creditors of the insolvent estate of the deceased who will gain less if the money were distributed to a person who was not a member. The respondent has not dealt with the investment property he states he identified as an investment for Co-Props. His brainchild in the absence of his brother the deceased *“was just sitting there”*. Despite the purpose of the

apartment being an investment opportunity and his evidence that he was the brain behind the investment, he took no further decisions in relation to the investment of Co-Props during the twenty years after the deceased paid the deposit and signed as surety for the bond. If he attended to maintenance over the years this ought to have been accounted for especially in the respondent's precarious financial position. None of this is accounted for. He visited the apartment that was his brainchild five times after he identified it and took no decisions regarding it. The inescapable conclusion is that the deceased was the only member of Co-Props.

**ORDER**

[18] For the reasons above, I make the following order:

16.1 Paragraphs 22.2 -22.16 and 22.27 and 22.28 as well as Annexures "SO" and "AA" are struck from the record.

16.2 Draharama Lingum Moodley is declared the sole member of Co-props 1099 CC (Registration No 1997/031376/23) (Co-Props CC) from August 1997;

16.3 The respondent is declared not to be, and to have never been a member of Co-Props CC;

16.4 The respondent shall pay the costs of the application.

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**S C MIA**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances:**

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| On behalf of the applicants | : Adv. A Cooke |
| Instructed by | : Mathopo Moshimane Mulangaphuma Inc |
| On behalf of the respondent | : Mr Q Khumalo |
| Instructed by | : Quinton Khumalo Inc |
| Date of hearing | : 31 January 2023 |
| Date of judgment | : 13 March 2023 |