




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

CASE NO: 29232/2016

1. Reportable: Yes/No
2. Of interest to other judges: Yes/No
3. Revised: Yes/No
23 November 2017



(Signature)

DA CRUZ, MANUEL JORGE MAIA

Applicant

and

MANZELLA, FRANCESCO

1st Respondent

MANZELLA, PATRICIA MARLENE

2nd Respondent

SOLBEL PROPERTIES CC

3rd Respondent

Heard on: 14 November 2017

Delivered on: 28 November 2017

JUDGMENT

DE VILLIERS AJ:

[1] On the applicant's version, he seeks interim management rights in a close corporation pending completion of an action to obtain transfer of a 50% membership interest therein.

[2] The material facts are not complicated:

[2.1] The applicant avers that he transferred his 50% '*membership interest*' in the third respondent to the first respondent for no consideration in March 2010. He does not give an explanation for this conduct. He admits in reply that the parties had concluded a written sale agreement that purports to be a normal sale. The contract provided for a selling price of R600 000 of which R400 000 would be paid by way of a set off a debt, and R200 000 which had to be paid. The applicant avers that the selling price was not paid and the first respondent baldly avers that it was. The parties have not alleged that the set-off was a fraud, I assume therefore that it was common cause that the set-off had taken place;

[2.2] The applicant avers that the first respondent had to keep this membership interest as his nominee, and had to re-transfer it to him upon demand. He does not give an explanation for this arrangement. The written sale agreement does not contain such a term. The applicant relies on an oral agreement to this effect in reply. The matter becomes unclear, as the first respondent admits that he holds the membership interest as a nominee, but denies being obliged to retransfer it to the applicant, in any event not without being paid for it. Still, the first respondent undertakes to pay the applicant 45% of the (third respondent's) net profits

and that he will make the (third respondent's) financial statements available to the applicant;

- [2.3] It seems to me to be common cause that the sale agreement was a sham. The first and second respondents allege that the purported sale of the applicant's membership took place as the applicant was being pursued by creditors, and that there was a real risk that he would have been sequestered. In short, it was an attempt to hide the applicant's assets from his creditors. The applicant denies the averments in reply, but does not give another exculpatory explanation;
- [2.4] No case has been made out that the applicant has exercised any real management '*rights*' in the period 2006 to 2010 (when the sale took place) and in the period 2010 to March 2016 when access to records and retransfer of the membership were demanded. It seems that the applicant was content to leave the management of the third respondent to the first and second respondents;
- [2.5] The current registered members of the third respondent are the first respondent, who holds 90%, and his wife, the second respondent, who holds 10%. This is common cause;
- [2.6] The third respondent owns an immovable, commercial property. Its business is to rent the property out to commercial tenants. The first and second respondents intend to sell the property and liquidate the third respondent once it stops trading. This is common cause. It is not in issue that this is an appropriate cause of action to take;
- [2.7] The applicant avers that as a matter of law he has a prima facie right to participate in the decisions taken by the third respondent and to have access to its financial records. The applicant's case in the replying affidavit was that this right arises from his claim for retransfer of a 50% membership in the third respondent.

- [3] Both parties assumed in argument that a (registered) member could be a nominee member for another individual who would hold the membership in close corporation. The matter has not been argued and I make no finding in this regard.
- [4] Having made demand on 2 March 2016, the application was launched on 25 August 2016. The applicant appointed new attorneys on 8 August 2017, who enrolled the matter for hearing. The summons has not been issued as yet, some 20 months after demand was made.
- [5] Whether or not the relief sought is interim or final relief, depends largely on the form of the relief sought, and on its effect. (**Cipla Agrimed v Merck Sharp Dohme Corporation** (972/16) ZASCA 134 (29 September 2017 para 19).
- [6] The applicant seeks the following relief:
- '1. *That pending the finalisation of an action to be instituted by the applicant against the respondents:*
 - 1.1. *The First and Second Respondents are interdicted and restrained from taking steps to dispose of the immovable property described as Erf 2152, Kensington, Johannesburg, and situated at Lancaster Square, 141 Roberts (Avenue, Kensington, Johannesburg, without the written approval of the applicant, which approval shall not to be unreasonable withheld;*
 - 1.2. *The First and Second Respondents are to grant the Applicant access to the financial records of the Third Respondent;*
 - 1.3. *The First and Second Respondents are to grant the Applicant an equal right of participation in the business and management of the Third Respondent.*
 - 2. *That, within 20 (twenty) days from date of this order, the applicant is to institute its action against the respondents for the transfer of 50% member's interest in the third respondent, failing which this interim order shall lapse;*

3. *That the first and second respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved."*

- [7] I make no finding whether prayer 1.1 about reasonable conduct would be a competent interim order to make or not. The real issue is if the relief sought would be interim or final relief. It seems to me that the applicant in fact does not seek interim relief, despite it being applicable only for a defined period. The relief sought will not be re-considered by another court, the management rights that the applicant seeks to exercise (prayer 1.1 and 1.3) and the access to documents (prayer 1.2), will not be undone should he fail in his action for the return of the membership claimed. This matter had not been fully argued before me and I make no final finding in this regard due to two further problems that the applicant faces.
- [8] The applicant has not made out a case that there is any duty to account in terms of the sham arrangement or because he distrusts his "partner" (**Rectifier and Communication Systems (Pty) Ltd v Harrison and Others** 1981 (2) SA 283 (C) at 286E-288B, and **ABSA Bank Bpk v Janse Van Rensburg** 2002 (3) SA 701 (SCA) para 15) and he has difficulties in terms of the **Close Corporations Act** 69 of 1984 ("**the CC Act**") that does not recognise that a person who is not a member may exercise such rights.
- [9] Leaving aside the **CC Act**, under the Common Law the applicant has made out no case for a duty to account, not as a clear right (in as far as the relief claimed is final relief), or even as a prima facie right.
- [10] The relief that the applicant seeks, is that he may act as if he were a member of a close corporation. The **CC Act** provides for the exercise of those powers inter alia in section 46 (variable rules regarding internal relations), 54 (power of members to bind corporation), 56 (accounting records), and the like. In each case the rights claimed by the applicant is subject to the qualification that '*a member*' must/may exercise the right. The definition of a member, read with section 15 of the act, makes it clear that

such a person is the registered member, in this case the first and second respondents.

- [11] Our law in this regard seems clear. The position under the **Companies Act** 61 of 1973 ("**the 1973 Act**"), which was in force when the **CC Act** was promulgated, was that a company only concerned itself with registered members or owners of shares (**Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others** 1983 (1) SA 276 (A) at 289A-B). I can see no reason to differ from this view with regard to a close corporation (I stress, assuming that nominee membership is legally permissible in a case such as the current one).
- [12] The **Ocean Commodities** principle was recently affirmed by the Supreme Court of Appeal in **Smyth v Investec Bank Ltd** (674/2016) [2017] ZASCA 147 (26 October 2017). In that case, the so-called beneficial owners of shares sought relief under section 252 of the **1973 Act**, relief for oppressive or unfairly prejudicial conduct, available to members. The court held in para 55 that the remedy is only available to the registered members and not to the beneficial members of the company.
- [13] The same reasoning would apply in this case. Until the applicant has obtained registration as a member of the third respondent, its management and control falls to be conducted by the first and second respondents. The applicant has made out no case for a right to exercise membership rights, not as a clear right (in as far as the relief claimed is final relief), or as a prima facie right even open to some doubt.
- [14] The applicant faced difficulties in respect of several of the further issues debated before me. Due to the findings that I have reached, I do not address (a) the remainder of the tests to be applied where an applicant seeks an interim interdict versus final relief on motion proceedings, (b) the whether the *ex turpi causa* maxim and/or *in par delicto* rule should have been applied in this case on their own or (c) as part as any judicial discretion that I would have had to exercise, and (d) the impact of the

substantial delay in bringing this application and/or the effect of the failure by the applicant to have issued a summons to date..

[15] I accordingly make the following order:

1. The application is dismissed with costs.


DP de Villiers AJ

On behalf of the Applicant:	Adv C J Moreno (who did not prepare the heads of argument)
Instructed by:	Rossouws, Leslie Inc
On behalf of the Respondents:	Adv R Pottas
Instructed by:	Mark Anthony Beyl Attorneys