IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 23819/2009

In the matter between:

MOHAMMED AZEEM GAFFOOR N.O.	First Applicant
AYESHA- BI PARKER N.O.	Second Applicant
and	
VANGATES INVESTMENTS (PTY) LTD	First Respondent
ABDUL AZIZ BANDERKER	Second Respondent
GOOLAM MUSTAPHA BREY	Third Respondent
MOHAMMED ALLIE DHANSAY	Fourth Respondent
ABDULLAH ESHACK GANGRAKER	Fifth Respondent
ABDUL WAHAB BARDAY N.O.	Sixth Respondent
MOHAMED YOUSIF MOHAMED	Seventh Respondent
NISHAAD MURUDKER	Eight Respondent
LIAKAT ALI SONDAY	Ninth Respondent
MAHMOOD KHATIB N.O.	Tenth Respondent
UTHMAN BREY N.O.	Eleventh Respondent
MOHAMED ALLIE DHANSAY N.O.	Twelfth Respondent
AMINA DHANSAY N.O.	Thirteenth Respondent
AZGARI BEGUM HOOSAIN N.O.	Fourteenth Respondent
ABDULLAH ESHACK GANGRAKER N.O.	Fifteenth Respondent
FATIMA GANGRAKER N.O.	Sixteenth Respondent

RAUF KHAN N.O.	Seventeenth Respondent
HASEENA BEGUM KHAN N.O.	Eighteenth Respondent
AKBAR ALLIE LOGDAY N.O.	Nineteenth Respondent
MOHAMED YOUSIF MOHAMED N.O.	Twentieth Respondent
ZOHRA MOHAMED N.O.	Twenty First Respondent
MOOSA MOHAMED N.O.	Twenty Second Respondent
NAZEEM MOHAMED N.O.	Twenty Third Respondent
EBRAHIM ALLIE ENOS MURUDKER N.O.	Twenty Fourth Respondent
GOOLAM MUSTAPHA BREY N.O.	Twenty Fifth Respondent
UTHMAN BREY N.O.	Twenty Sixth Respondent
MAHMOOD KHATIB N.O.	Twenty Seventh Respondent
VANGATE PROPERTY (PTY) LTD	Twenty Eight Respondent
ONE VISION INVESTMENTS 52 (PTY) LTD	Twenty Ninth Respondent
MAHMOOD KHATIB	Thirtieth Respondent

JUDGMENT DELIVERED THIS 17TH DAY OF FEBRUARY 2011

KOEN, AJ

1. The applicants are the executors of the deceased estate of the late Cassiem Ebrahim Gaffoor (to whom I shall henceforth refer as "the deceased"). The second applicant is also an heir in the deceased estate. The applicants apply for the rectification of the register of members of the first respondent,

Vangates Investments (Pty) Ltd ("the company"). They also seek an order declaring them, in their representative capacity, to be the shareholders of certain shares in the company, and for relief ancillary to such orders. They contend that the deceased was the owner of the shares in question and that the shares were unlawfully and invalidly transferred to the other shareholders after his death.

2. The application is made in terms of the provisions of section 115 of the Companies Act. The section provides as follows:

"(1) If-

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.

(2) The application may be made in accordance with the rules of Court or in such other manner as the Court may direct, and the Court may either refuse it or may order rectification of the register and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register."

3. It is well established that in exercising the wide and equitable discretion vested in it by the section the Court is obliged to consider all the relevant facts and circumstances of the case[1]. In determining what the facts are it is necessary to bear in mind that these are motion proceedings. In motion proceedings *"...a respondent's version can be rejected ... only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."*[2] There is nothing contained in the respondents' version which can be described in those terms and thus, where conflicts exist, I have accepted the version given by the respondents. Without further ado it is thus to the facts that I turn.

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[1] Bauermeister v C C Bauermeister and Another 1981 (1) SA 274 (WLD) at 277 G to 278 C.

[2] Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at paragraph 56.

4. During the 1990's a group of persons, including the deceased, identified potential for the development of a shopping mall on what was then the Athlone Golf Course. The group came to be known as the Athlone Business Syndicate. In late 1999 the City of Cape Town invited interested parties to submit proposals for the development of the land. The group decided to submit a proposal and formed the company for this purpose. The deceased, and the second to ninth respondents[3], were the founding members of the company.

5. The preparation of the bid involved investment by the members of the company. In all an amount of R 1.4 million was invested by them. The deceased's financial contribution at that time was subsequently calculated to be R 18 990.00 and 444 shares in the company of R1 each. The balance was contributed by the other members of the company. Had the bid not been successful the investment could have been lost.

6. In the event the bid was accepted by the City. In terms of the bid proposal the company was required to purchase the land, and pay the costs of transferring the land into its name. Each member was obliged to pay an amount of R 67 000.00. The deceased did not contribute. Other problems beset the

[3] The sixth respondent passed away after this application was launched. The executor of his estate is now the cited sixth respondent.

development. The development scheme which had been devised was defective. There were difficulties with the technical team. It is not necessary to enumerate these problems save to say that by the end of 2002 the company was technically insolvent. To use the words employed in the answering affidavit filed on behalf of the respondents *"the project we envisaged was to all intents and purposes dead in the water."*

7. At about this time, on 21 October 2002, the deceased passed away. The first set of executors to his deceased estate (as will appear from what follows there have been others) was appointed by the Master on 14 February 2003. They were the wife and brother of the deceased.

8. The winding up of the deceased's estate did not progress smoothly. There was disagreement among the executors amongst other difficulties. In late 2003 and early 2004 letters were written to them by their agent, an attorney, about the lack of progress in winding up the estate and their disagreements. It is evident from the tone of the letters that the attorney was exasperated about the disagreement and his resultant inability to progress the winding up of the estate.

9. In the meanwhile the company had not abandoned its plans to pursue the development. It had devised a new scheme and had employed a new technical team to get the project under way. The new scheme came to fruition

in 2004 when a financier called Zenprop, which had expertise in property development and management, came onto the scene.

10. On 7 April 2004 a meeting was held between two members of the company, on the one hand, and the second applicant and one of the executors on the other. (At that stage the second applicant was not an executor of the deceased estate. She was appointed as an executor later). The purpose of the meeting was to discuss the involvement of the estate in the new project and the contributions which would be required of it. The meeting was subsequently confirmed in a letter sent to the second applicant to which I shall now turn.

11. The letter in question was dated 6 May 2004. It refers to the 7 April 2004 meeting. It requests the second applicant to pay the amount of R760 000 for the purchase of the property to be developed and to pay R 216 000 in respect of the deceased's loan account deficit. How the amount of R 760 000 was computed, or why a deficit of R 216 000 existed, is not explained. The letter went on to say that if these amounts were not paid by 30 May 2004 then the deceased's loan account in the amount of R 19 000 would be repaid. Why there should be a credit balance of R 19 000 in respect of the loan account, and at the same time a deficit, or debit, of R 216 000, is not explained and difficult to understand.

12. In the meanwhile the Master had decided to remove the first set of executors of the deceased's estate. He did so on 4 June 2004, on account of their failure to lodge a liquidation and distribution account.

13. On 23 June 2004 a further letter was addressed to the second applicant. This letter recorded that the second applicant had undertaken to clarify her position in regard to the deceased's shareholding in the company. She was given until 29 June 2004 to say whether the estate intended to retain the shares of the deceased, in which event it was expected to contribute its portion of the purchase price of the land and pay such other amounts as were owing, or whether it wished to be paid the credit balance on the deceased's loan account. The clear implication of the letter was that in the latter event the deceased estate would forego any claim to the shares. It must be mentioned that the first set of executors had not been replaced at this stage, and that the second applicant had no authority in law to make the decision she was asked to make.

14. The letter of 23 June 2004 was followed up by a further letter dated 25 June 2004, in which the deadline by which a decision was to be taken by the second applicant was extended to 2 July 2004. There was no response from the second applicant to either of the letters.

15. The task of progressing the development continued. Zenprop required the deceased estate to participate fully in the development scheme. The Master had not yet replaced the first set of executors. An impasse had been reached. The remaining members of the company sought and obtained advice to the effect that they were entitled to take up the deceased's shares. They did so and on 16 August 2004 the deceased's shares were transferred out of his name and into the names of the second to ninth respondents.

16. This event was followed up on 16 September 2004 when a resolution was adopted by the remaining members of the company in terms of which they "took up" the deceased's shares. A resolution was taken by the directors of the company on 20 September 2004 purporting to authorise the company secretary to sign the share transfer documents on behalf of the deceased estate. On the same day the attorneys representing the company wrote to an attorney representing the second applicant to say that an amount of R 19 434 in respect of the loan account owing to the deceased and the value of his shares was held in trust by them. They asked whether an executor had been appointed and for details of the estate banking account so that payment could be made.

17. Just over a week later, on 28 September 2004, the Master replaced the first set of executors. The new executors were Messrs Holt and Kajee. Mr Holt

sprang into action and the same day wrote to the attorney acting for the company to inform him of his appointment, together with Mr Kajee, as executors of the deceased's estate, and to request that a meeting be held. The invitation was accepted, but for reasons which do not appear in the papers it did not take place. Instead, a meeting was held between the other members of the company and Mr Holt during which he was told about the transfer of the deceased's shares to the other members of the company, and the resolutions which had been taken on 16 and 20 September 2004.

18. Then, on 20 October 2004, Mr Holt wrote to the attorney acting for the company to state that the estate wanted to retain the shares in the company, and asked for copies of the deceased's share certificates. Mr Holt's letter was answered on 25 October 2004 by way of a letter which informed him that the deceased was not a shareholder in the company.

19. The second set of executors did nothing to pursue the deceased's shares. This in spite of the fact that Mr Holt, at least, had been apprised of the transfers and that the heirs, who included the second applicant, had instructed him to take such steps. The cheque in respect of the deceased's loan account and the value of his shares was sent to the second set of executors on 4 March 2005. It was returned on 22 April 2005 under cover of a letter stating that the executors had received instructions *"to pursue the matter"*.

20. In the meanwhile the property development came to fruition and in September 2005 the Vangate Mall shopping centre in Athlone was opened. It operated unprofitably during 2005, 2006, 2007 and 2008.

21. During 2007 Messrs Holt and Kajee submitted a liquidation and distribution account in which the deceased's shares in the company were not reflected. On 22 January 2008 the heirs of the deceased's estate, including the present applicants, wrote to the Master complaining, inter alia, about the lack of progress in recovering the shares. Their letter records that Messrs Holt and Kajee had requested cover in respect of counsel's fees to be incurred in regard to the obtaining of advice concerning the issue of the shares. It is evident that the payment had not been forthcoming. Although it is not apparent when this happened the letter also records that its authors had sought advice about the shares, and had been advised that their claim *"may have prescribed"*.

22. Mr Holt resigned as executor on 3 June 2008. He was followed by Mr Kajee who resigned on 10 November 2008. The present applicants were appointed as executors of the deceased's estate by the Master on 12 December 2008.

23. During February 2009 the company sold Vangate Mall shopping centre to the Public Investment Corporation. The sale resulted in a profit and the members of the company shared half of it among themselves. On 30 July 2009 the

applicants' present attorneys were instructed in this matter. Letters of demand in which return of the shares was claimed were addressed by them to the respondents on 6 October 2009 and on 12 November 2009 this application was launched.

24. Those, then, are the relevant facts. All that needs to be added is that it is common cause that the shares were invalidly transferred from the name of the deceased into the names of the other shareholders during August 2004, at least on the basis that the share transfer documents were not signed in the manner prescribed in the articles of the company.

25. It was argued on behalf of the respondents that the applicants' claim, properly construed, was, firstly, one for the return of the shares, and secondly, one for the rectification of the members register so that it correctly reflected that the applicants were the owners of the shares. The respondents oppose the application on what are essentially two grounds. Firstly, they contend that the applicants' right to claim rectification of the members register has prescribed under the Prescription Act, 68 of 1969. Secondly, and in any event, they contend that the delay in bringing this application is such that, in the exercise of the discretion vested in it by section 115, the Court would be justified in refusing the relief sought.

26. In regard to the first point advanced by counsel for the respondents it was submitted that the claim for the return of the shares was a "debt" which had become prescribed in terms of the provisions of the Prescription Act, 68 of 1969 ("the Prescription Act"). It followed, so the argument went, that the claim for rectification of the members register would not be permitted because the applicants could not claim return of the shares.

27. I do not think that there is merit in this argument. I prefer the view expressed in Henochsberg to the effect that section 115 of the Act creates a statutory right which does not prescribe[4]. But, for reasons which follow, this issue is not decisive of the matter and need not be dealt with further.

28. As stated above section 115 vests in Court a wide discretion which is to be exercised according to the circumstances of each case. In Bauermeister it was held that the Court is not *"obliged to rectify the register wherever it is shown that the name of a person has, without sufficient cause, entered therein."*[5] In Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd and Others 1973 (4) SA 1 (CPD) Corbett J., as he then was, made the point that *"an*

[4] See Henochsberg on the Companies Act Vol. 1 5th ed at 222 where it is stated *"It is respectfully submitted that s 115 creates a statutory right to apply to the Court for the exercise by it of a statutory discretionary power, such right is not a "debt" within the meaning of that expression in Chapter III of the Prescription Act 68 of 1969 and there can be no extinction of such right by prescription".*

[5] *Supra*, at 277 F-G

applicant under the section is not entitled to an order ex debito justitiae"[6]. It follows, and it was not contended otherwise, that the illegality of the share transfers in this case does not automatically lead to an order in the applicants' favour.

29. In Botha v Fick 1995 (2) SA 750 (A) Howie J had the following to say of section 115: *"Die hof het 'n wye diskresie by 'n aansoek ingevolge hierdie artikel om toe te sien dat billikheid and geregtigheid geskied."*[7] As is apparent from the authorities I have already referred to all of the circumstances of each case must be considered in the exercise of this discretion. I propose now to highlight those circumstances which I consider to be the most relevant.

30. Undue delay is one of the factors a Court will take into account in the exercise of its discretion under the section. In Pretorius and Another v Natal South Sea Investment Trust Ltd (Under Judicial Management) 1965 (3) SA 410 (WLD) Vieyra J. said *"In matters of this sort our Courts, no less than the English Courts, have said that a shareholder should come at the earliest possible opportunity to have his name removed as a member".*[8] In Verrin Trust & Finance Corbett J. said that *"the English Courts have held that an application for rectification must be made promptly and that undue delay may deprive an*

[6] At 10 C; *ex debito justitiae* loosely translated means 'due as a matter of law'.

[7] At 780 C

[8] At 420 A

applicant of his remedy."[9] The learned judge accepted, with apparent approval, that the rule had been correctly applied in Pretorius.

31. In this case the first set of executors of the estate of the deceased knew, by 20 October 2004 at the latest, that the deceased's shares had been transferred to the remaining members. They also knew how this had come about. Before the removal of the first set of executors by the Master they had been involved in discussions with other members of the company about the role the estate intended to play in the development. It is so that one cannot discern from the papers why they were requested to make the financial contribution sought of them at that stage. But there is no evidence to suggest that any active steps were taken by them to obtain clarity about this. What is evident is that they did not meaningfully engage with the other members of company after the death of the deceased in order to resolve the issue of the role to be played by the estate in the business of the company.

32. The second set of executors took steps to address the issue of the deceased's shares immediately upon being appointed. They called meetings with the other members of the company. But their initial energy soon evaporated. After the first round of activity during October 2004, nothing happened until a threat to *"pursue the matter"* was made in April 2005. And this came only

[9] At 10 H.

after a cheque in respect of the deceased's loan account and shares had been tendered.

33. The facts show that no effective steps were taken by the executors to seek rectification of the members register, or to obtain advice about this for a considerable time. Nothing was done to *"pursue the matter"*.

34. In fact, the issue was not pursued with anything like the sort of energy one would expect until after the sale of the property to the Public Investment Corporation about four years later, in early 2009. Even then it took nine months for the application to be launched in November 2009.

35. During this time the remaining members conceived a new development, obtained a financier, incurred liabilities on behalf of the company, entered into suretyships and brought the development to fruition. They did so without any contribution, financial or otherwise, from the deceased's estate. They had invited the estate to participate without receiving an answer; they had disclosed to the executors what they had done with the deceased's shares; and had been threatened that matters would be pursued.

36. More than five years passed without any steps being taken to alter the membership of the company by the deceased estate. The development was initially not a financial success, and only after the sale to the Public Investment

Corporation, when a return on their investment had been obtained, were the members of company faced with this claim.

37. Do these circumstances establish an equitable, or fair and just, entitlement on the part of the applicants to the relief they seek? I do not think so. In exercising the discretion vested in the Court I do not think that fairness and justice demand that I should grant the order sought by the applicants.

38. Both sides contended that any costs award should include the costs of two counsel. I agree.

39. I therefore make the following order:

The application is dismissed with costs, such costs to include the costs of two counsel.

KOEN, AJ