THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 24163/2007

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………… DATE ………………………… SIGNATURE

THE SHERIFF, JOHANNESBURG EAST	Applicant
And	
VALLY, MUHAMMED	Claimant

In re:

FORMESET PRINTERS (PTY) LTD	Plaintiff/ Claimant
And	
VALLY, REEDWAAN	Defendant

JUDGMENT

MODIBA J:

[1] This is an interpleader application in terms of Rule 58 of the Uniform Rules of Court. The applicant in his capacity as the Sheriff of Johannesburg East has issued an interpleader notice in terms of the aforesaid rule in respect of a writ of execution issued in this court against the defendant. The writ placed several assets under attachment to make good a judgment debt owed by the defendant to the plaintiff/claimant (the plaintiff) for an amount of R2, 010,382.06 plus interest and costs.

[2] Vally Muhamed (the claimant) alleges that one of the assets subject to the writ was wrongly attached because it does not belong to the defendant. He contends that the relevant asset is subject to a pledge issued by the judgment debtor's son, Zain Muhamed (Zain) to him.

[3] The plaintiff denies this claim. It alleges that the claimant is not the holder of a valid agreement of pledge in that Zain was not competent to enter into the said agreement because when the agreement was entered into, he was not the owner of the pledged asset. There is no agreement of pledge between the defendant, who was the owner of the asset when the agreement was entered into and the claimant. The plaintiff also alleges that in the event that I find that a valid agreement of pledge exists between the claimant and Zain, the said pledge does not preclude the sale in execution of the property. It merely has a bearing on how the execution proceeds are to be distributed by the applicant.

BACKGROUND

[4] The issue to be determined in this application can best be understood against the background set out below:

[4.1] The asset subject to the interpleader notice is a 10% member's interest in Cullinan Falls Trout Farm Registration number 1996/036876/23 (the corporation). According to the plaintiff, the defendant has at all material times been the registered owner of the asset as evidenced by copies of the Companies and Intellectual Properties Commission (CIPC) company reports dated 8 September 2014, 19 January 2015 and 26 May 2015.

[4.2] The corporation is a registered owner of Portion 4 (the remaining extent) of Farm 536 of the Farm Elandshoek, situate in Mpumalanga, held by title deed number T105527/1996 (the property). The corporation conducts business as the owner of the property and as a trout farm.

[4.3] On 29 July 2009 the plaintiff obtained judgment in this court against the defendant in an amount of R2, 010,386.06 plus interest calculated at 15% from date of judgment to date of payment. As at 31 May 2015, the amount due by the defendant to the plaintiff inclusive of interest was R3, 147,525.31. The defendant has failed to pay this amount.

[4.4] On 18 August 2009, the applicant issued a writ of execution against the defendant. On 8 September 2010, the plaintiff launched an application to have the defendant's half share in the property declared specially executable. This application is still pending. On 10 October 2014, the applicant served the writ on the defendant.

The return of service for the relevant writ of execution states that according to the defendant, the 'shares' were apparently sold and an amount of approximately R450.00 was paid.

[4.5] According to the defendant, on 1 February 2012 he transferred his members' interest in the corporation to his son Zain Vally (Zain). On the same date, Zain pledged the member's interest to his uncle, the claimant. To give effect to the pledge, Zain and the claimant entered into a written agreement of pledge as security for payment of a loan taken for the payment of Zain's school fees.

[4.6] Approximately a month after the members' interest in the corporation was attached, on 12 November 2014, the claimant informed the applicant in writing that the members' interest was wrongly attached as it does not belong to the defendant. He further informed the applicant that there was a delay in transferring the members' interest to Zain apparently due to the death of two members of the corporation. As a result the requisite resolution authorizing the transfer of the members' interest from the defendant to Zain could not be obtained. The transfer could only be effected once the winding up of the estates of the deceased members of the corporation has been finalized.

[4.7] According to emails filed in support of the claimant's particulars of claim, the defendant only addressed an email to the secretary of the corporation and to his co-members on 8 February 2012, informing them of his decision to transfer his members' interest in the corporation to Zain. The email reads as follows:

> *'I have decided to transfer my 10% of the farm to my son Zain. I will however, still responsible for all levies and responsibilities on the farm.*
>
> *Please let me know if you have any objection to this.'*

[4.8] The transfer of the member's interest from the defendant to Zain was only registered in the CIPC on 22 December 2015.

[5] It is trite that only the owner of a movable asset may pledge it to another.[1] Furthermore, the constitutive act of delivery is required for a valid pledge to take place. That being said, Zain may only pledge the 10% member's interest in the corporation if he is the owner thereof and upon delivery of the pledged asset to the claimant.

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[1] LAWSA Vol 17(2) - Grotius Inleidinge 2 48 1; *Smith v Farrelly's Trustee* 1904 TS 949 955; *Oertel v Brink* 1972 3 All SA 469 (W); 1972 3 SA 669 (W) 674-675; *Vasco Dry Cleaners V Twycross* 1979 1 All SA 321 (A); 1979 1 SA 603 (A) 611E.

LEGAL ISSUE FOR DETERMINATION

[6] The legal issue to be determined between the parties is whether transfer of ownership of the defendant's member's interest in the corporation passed to Zain on 1 February 2012 when his father purportedly donated or sold it to him or when the amended founding statement bearing the particulars of Zain's membership in the corporation was registered at the CIPC on 22 December 2015. In the event that I find that ownership of the members' interest was only transferred to Zain upon registration of the amended founders' statement at the CIPC, I ought to also determine whether the purported transfer is valid given that when it took place, the members' interest had been attached by the applicant.

[7] It is the plaintiff's contention that ownership of the defendant's members' interest in the corporation was only transferred to Zain upon registration of the amended founding statement at the CIPC. Therefore Zain could not validly pledge the members' interest to the claimant. The claimant denies this. He contends that despite the fact that the founding statement reflecting a change in ownership of the member's interest from the defendant to Zain was only registered at the CIPC on 22 December 2015, ownership of this asset was transferred to Zain when the defendant donated it to him on 1 February 2012. Therefore it was wrongly attached.

[8] The plaintiff has premises it's case on the definition of a *'member'* and that of a *'founding statement'* set out in section 1 of the Close Corporation Act 69 of 1984. The relevant definitions intimate that registration of a founding statement designating a person qualified in terms of section 29 of the Close Corporation Act as a member of a corporation is necessary to transfer ownership of a member's interest in a corporation. The plaintiff enjoins the court to accept an interpretation of these definitions in Close Corporations Act (Volume 3 Service Issue 29 - August 2015) where Henochsberg states that *de facto* membership is not membership in terms of the Close Corporation Act unless the context otherwise dictates. The registration of a founding statement is central to the registration of a close corporation.[2] The member of the corporation is either a registered member or a legal representative of the corporation.[3] Prior to 10 October 2014, Zain was neither. Unless there is compliance with these provisions, any intended change to the membership of the close corporation is ineffectual. Furthermore section 15(2) states that if there is any change to a founding

[2] According to Henochsberg a Close Corporation is formed when the prescribed document (form CK1), known as the founding statement, duly completed is lodged with the Registrar of the CIPC (together with proof of payment of the prescribed fee) and registered in his registers. See Vol 1 (Chapter 2) on his discussion on Close Corporations.

[3] Section 29(2) (c).

statement, such change shall only take effect when such statement has been so registered in the relevant registers. See *Geany v Portion 117 Kalkheuwel Properties CC and Others* 1998 (1) SA 622 (T) where the Kirk-Cohen J found that:

> *'... if a member resigns, such resignation will only takes place when an amended founding statement is registered. This provision is repeated boldly on the relevant CK2 form.'*[4]

[9] Counsel for the claimant referred me to several authorities in an attempt to sustain the claimant's contentions. I do not find the cases applicable to this case and for that reason do not deem it necessary to deal with them in this judgement.

[10] Section 29(3) (a) states unequivocally that membership of any person who qualifies for membership of a close corporation commences on the date of registration of a founding statement of the corporation containing the particulars required in terms of section 12 in regard to such person and his members' interest.

[11] In light of the foregoing, plaintiff's intention to transfer his member's interest to Zain on 1 February 2012 is ineffective. Therefore, Zain was incompetent to pledge the member's interest to the claimant when he purported to do so on 1 February 2012. When the applicant attached the members' interest on 10 October 2014 to satisfy the judgment debt, the defendant was the owner of this asset. Therefore the attachment was validly made. Any purported transfer of this asset subsequent to it being attached is of no force or effect.

[12] I am concerned that when the sheriff served the writ of execution on the defendant on 10 October 2014, the defendant allegedly informed the sheriff that the 'shares' were sold and that an amount of approximately R450.00 was paid. This is reflected on the sheriff's return of service. Yet in his affidavit in these proceedings, confirmed in confirmatory affidavits by Zain and the defendant, the claimant alleges that this asset was 'given' to Zain by the defendant. He makes no mention of a sale. The emails exchanged between the defendant, the secretary of the corporation and other members of the corporation also refer to a donation rather than a sale. There can never be a sale and donation of the same asset by the same seller and donor to the same purchaser and recipient. The defendant, the claimant and Zain seem to be misleading the court regarding the basis for the alleged transfer of the shares to the claimant. In the circumstances, the purported invalid

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[4] At 625A. See also *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (AD) at 330-331.

registration of the member's interest in Zain's name at the CIPC on 22 December 2015 warrants an investigation by the relevant authorities because it was effected in contravention of section 46 (a), (b) and (c) of the Superior Courts Act 10 of 2013 which sets out numerous offences relating to execution. I strongly frown upon the conduct of the claimant in this regard. He is a practicing attorney and an officer of this court. He has the professional duty not to be party to any act of dishonesty and not to mislead this court.

[13] In the circumstances, it is appropriate that I refer the claimant, the defendant and Zain to the South African Police Service for investigation. It is also appropriate that I refer the claimant to the Law Society of the Northern Provinces for investigation.

ORDER

[14] In the premises, I make the following order:

1. The interpleader notice is dismissed with costs, including the charges and costs of the applicant.
2. The registration of 10% member's interest in Cullinan Falls Trout Farm Registration number 1996/036876/23 (the corporation) from Reedwaan Vally to Zain Vally is declared invalid and hereby set aside.
3. The 10% member's interest in Cullinan Falls Trout Farm Registration number 1996/036876/23 (the corporation) is declared to be validly attached to satisfy the judgment debt owed by Reedwaan Vally to Formeset Printers (Pty) Ltd.
4. The purported transfer of the member's interest from Reedwaan Vally to Zain Vally which was registered at the CIPC on 22 December 2015 in contravention of section 46 (a) (b) and (c) of the Superior Courts Act is referred to the South African Police Services for investigation.
5. The participation of Muhamed Vally in the transfer of the member's interest from Reedwaan Vally to Zain Vally as well as his conduct in these proceedings is also referred to the South African Police Services and to the Law Society of the Northern Provinces for investigation.
6. The Registrar is ordered to send a copy of this judgment to:
    (a) The Station Commander
    South African Police Service
    Johannesburg Central Police Station
    1 Commissioner Street, Johannesburg

(b) The Chairperson of the Law Society of the Northern Provinces
Procforum Building
123 Paul Kruger Street
Pretoria
0002

MODIBA J

Judge of the High Court of
South Africa

Gauteng Local Division

APPEARENCES

PLAINTIFF'S /CLAIMANT'S

Counsel: Advocate Amelia Rawhani

Instructed by: Martins Attorneys

DEFENDANT'S

Counsel: Yakoob Alli

Instructed by: MVIP Attorneys

Date of hearing: 29 February 2016

Date of Judgment: 24 March 2016