

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

CASE NO: 24926/2018

REPORTABLE: /NO

OF INTEREST TO OTHER JUDGES: /NO

REVISED: /NO

DATE: 13/5/2021

In the matter between:

SANDRA BRYAN

Applicant

and

MARCELLE PROPS 118 CC

First Respondent

WILLIAM JACK CAMPBELL MITCHELL

Second Respondent

BRAVO ZULU PROPERTIES (PTY) LTD

Third Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 13 May 2021*

SENYATSI J:

[1] This is an application to order that the second respondent cease to be a member of the first respondent and that the applicant acquires 75% of interest owned by him be determined in terms of the unsolicited value determined by an independent valuer, one Mr Errol Ansara ("Ansara") and confirmed by the second respondent on 23 February 2018.

[2] The application is opposed and the respondents brought a counter-application in terms of which they seek the court to order that the second respondent acquires 25% of the interest of the applicant in the main application in the first respondent. For convenience sake, the parties will be referred to as in the main application.

[3] The main application which brought in terms of ss49 and 36 of the Close Corporation Act of 1984 ("the Act). Section 49 (1) of the Act provides as follows:

"49 Unfairly prejudicial conduct

(1) Any member of a close corporation who alleges that any particular act or omission of the corporation or of one or other members is unfairly prejudicial, unjust or inequitable to him, or some members including him, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him, or to some members including him, may make an application to a court for an order under this section."

(2) If on any such application it appears to a 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, the alteration or

addition or replacement shall have the effect as if it were duly made by agreement of the members.

(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.”

[4] Section 36 of the Act provides as follows:

“36 Cessation of membership by order of the Court.

(1) On application by any member of a corporation, a Court may on any of the following grounds order that any member of the corporation:

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(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 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 order as it deems fit in regard to

(a) the acquisition of the member's interest concerned by the corporation or by the 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 the 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.

[5] As already stated, the respondents by way of a counter application seek relief against the applicant as follows:-

(a) the first respondent Marcelle Props, be allowed to sell to Bravo Zulu Properties, the third respondent the immovable property known as Portion 9 of the F[....] Lake L[....] No [....], Registration Division FS Province of KwaZulu Natal ("the property") together with movables thereon for an amount of R2.3 million in accordance with the terms of the notice of meeting and offer to purchase, attached to the applicant's founding affidavit marked "FA11" and "FA12" respectively

(b) the applicant be ordered to pay the costs of the counter-application including costs of two counsel.

[6] In the alternative, the respondents seek that in terms of section 36(1) (2)(a) ; (b) and (c) of the Act and on the further terms set out in the notice of the counter application, the applicant ceases to be a member of the first respondent and that she

transfers her 25% member's interest in the first respondent into the name of the second respondent for which 25% members interest the second respondent is to pay the amount of R575 000.00. The counter application is opposed in the third alternative, the respondents seek that the first respondent be placed under final winding and that the costs of the counter application, including the costs of two counsel, be costs in the winding up.

[7] The first respondent consists of two members, namely the applicant with 25% interest and the second respondent with 75% interest. The latter acquired his interest having purchased the initial 25% from Trevor Townsend ("Townsend") and 25% from Annabelle Conyngham ("Conyngham") who were also part of the original four-member team in the first respondent.

[8] The first respondent does not trade and is purely a property holding entity, being the owner of an immovable property, as described in [6] above, which is used as a holiday home. Neither the applicant nor the second respondent live at the property.

[9] It is apparent from the papers that the second respondent wishes to dispose of the property of the first respondent against the wishes of the applicant. It is also apparent from the papers that the second respondent wishes to dispose of the property and acquire the applicant's interest at a value that has been determined by the second respondent.

[10] The property was acquired by the first respondent on 19 July 2005. A cottage was erected on the property and it was designed by the applicant's husband, Llew Bryans. The latter acquired the right to 25% of the member's interest in the first respondent and the interest was registered in the name of the applicant. The second respondent acquired the additional 50% from Conyngham and Townsend in 2007 to become a 75% member in the first respondent.

[11] The third respondent Bravo Zulu Properties has, as its sole director the second respondent. It was incorporated in 1999 by the second respondent for the purpose of acquiring other portions of the F[...] Lake L[...]. Over the years, it has

acquired and owns nine portions of the F[....] Lake L[....], namely, Portion 18, 26, 31, 32, 33, 34, 14, 15, and 21 which are significantly larger in comparison to the property which is the subject of this litigation.

[12] The sole shareholder the third respondent is a trust known as the M. A Mitchell Trust Nr2 which has four trustees. The second respondent is one of the trustees, as it can be established from the papers, other trustees are the unnamed two children of the second respondent and the independent trustee.¹

[13] It is also apparent from the papers that, although the second respondent denies it, it was himself who caused the third respondent to be incorporated and he is its sole director. It is evident from the papers that the second respondent was instrumental as the sole director of the third respondent, for the acquisition of other portions of the F[....] L[....] by it.

[14] The second respondent argues that he is associated with the third respondent. In my respectful view, the second respondent is the main reason the third respondent exists and he is directly related to it. The third respondent registered address and its chosen *domicilium* in terms of the offer to purchase is the residential address of the second respondent.² The offer to purchase, which was presented to the first respondent speaks of the appointed conveyancing attorneys who are the second respondents' attorneys.³ It follows, in my view, that the third respondent is the alter ego of the second respondent.

[15] In June 2017, the second respondent caused the property of the first respondent to be valued by a professional valuer, who valued the property at R1.2 million.⁴ Following this valuation, the second respondent offered through a notice of a meeting during February 2018 to be bought out by the applicant. The applicant accepted to buy 75% member's interest in the first respondent from the second

¹ See Answering Affidavit in the main application/Founding Affidavit in the counter-application, para 105, 154, 164, and 175. Replying Affidavit in the counter application para 27 p 335 and para 116 p.35

² See Founding Affidavit in the time main application annexure "FA10"p59 (Clause 4.1) and Founding Affidavit in the main application annexure "FA12"p66 (Annexure A to the offer.)

³ See Founding affidavit in the main application para 41.4.4 p.18 referring to the letter dated 20/6/2018

⁴ See Founding Affidavit in the main application or founding affidavit in the counter-application para 162 p174

respondent. The second respondent, however changed his mind and intimated during May 2018 that he would be willing to be bought out as the value of the property of the first respondent was R2.3 million. He contended that he had received an offer for that amount from the third respondent. This was rejected by the applicant on the basis that the new value had not been determined by an independent valuer.

[16] In seeking to have the applicant's membership to be terminated in the first respondent, one of the main contentions by the second respondent is that the conduct of the applicant in late payment of her contributions to the first respondent's costs justifies that she should exit the first respondent. This may well be the case, however, is not disputed that the applicant meets her monthly contribution to the first respondents. I am not persuaded that it is appropriate for her to exit the first respondent as the arrear dated back to November 2013 and December 2013.⁵ There is no evidence that the applicant continues to fail to meet her financial obligations towards the expenses of the first respondent. On the contrary, the evidence before this court points out that the financial obligations are being met by the applicant.

[17] There are two contentious offers in this litigation. The first is the unsolicited one in terms of which the second respondent caused the property to be evaluated in 2017. In terms of the value determined by Ansara, the sum of R1.2 million for both immovable and movable was determine. The second is the offer from the third respondent to acquire the property at the sum of R2.3 million for immovable and movable assets.

[18] The deadlock between the applicant and the second respondent has been about who should exit the first respondent. The relationship between the two members- in the first respondent has not been ideal. It worsened when the current litigation ensued.

[19] Although the first respondent contends that the applicant was initially prepared to sell her membership interest in the first respondent, this was disputed by

⁵ See Answering Affidavit in the main application, Founding Affidavit in the counter-application, annexure "WM3" p182, Also See Answering Affidavit in the main application founding affidavit in counter-application annexure "WM8" WM16" pp 188-196.

the applicant who contended that she did not wish for the property to be sold by the first respondent. She wishes to remain a member of the first respondents and continue to use the property for holiday purposes. She contends that if the property were to be sold, she would incur significant costs of purchase or hire of an alternative holiday home at a greater cost to her in the long term.

[20] The applicant furthermore contends that she has an affinity for the property and states that she loves the cottage which was designed by her architect husband as well as the unspoilt surrounds. According to her, it is not about the money, but the sheer beauty, peace, and uniqueness of the place. In support of her contention, she attached a photograph to her founding affidavit.

[21] The applicant submits that she wishes to purchase the second respondent's 75% interest for R937 000, which is 75% of R1 250 000 which is the amount of value determined by an independent value Ansara and referred to in the notice of a meeting of members of the first respondent to be held on 2 March 2018. She states that she is in a position to make payment of the sum of R937 500 in cash and willing to adjust the value of the property by an upward of R40 000.

[22] On the 28 February 2018, the second respondent states in an email as follows:

"6 So before we go to the route which ends in the meeting on Friday to liquidate the CC, which obviously financially hurts all members it would be opportune to consider the alternative route of Marcelle Props being owned by one member. As you know, I have extensive property holdings in the area and could build a house elsewhere. The price you mention in your email is given as the 'lowest price' we could consider selling at. What would be your price for buying us out?"

[23] From that email, it is quite evident that the second respondent was prepared as of 23 February 2018 to exit the first respondent by selling his member's interest in the first respondent as, in his own words, he had extensive property holdings in the area and could build a house elsewhere. This admission, in my view, is an important

consideration on whether or not it is just and equitable for the second respondent to exit the first respondent by selling his member's interest to the applicant.

[24] I find it difficult to understand that the basis for changing the second respondent's position as per the letter of the second respondent's attorneys dated 7 May 2018.⁶ In that letter, the second respondent stated that he was no longer prepared to sell his member's interest. He also stated that he had procured through the third respondent, an offer to purchase the property for R2.3 million. This contention by the second respondent is without merit. The offer which suggests double the market value as opposed to the offer made in terms of the Ansara valuation is without merit. No evidence has been presented that the valuation was independently done. Furthermore, as the third respondent is directly related to the second respondent it is doubtful that the offer was made on an arm's length basis. The second respondent, as already stated, is the third respondent's sole director. I am of the view that the value is contrived and designed to frustrate the efforts of the applicant to purchase the 75% member's interest in the first respondent.

[25] Our courts have made pronouncement on the meaning of a market value of the property being sold. In *Camps Bay RatePayers of Residents Association v Harrison*⁷ the Constitutional Court had an opportunity to consider the market value. The Court held as follows:

"[38] at 59 that "Traditionally, market value is said to be the price that an informed buyer will pay an informed seller both of them having regard to all the potential risks-both realised and unrealised- pertaining to the subject property"

Applying the principle as set out by the Constitutional Court, I am of the view that the offer made by the third respondent to acquire the property of the first respondent is not at arms.

⁶ See Founding Affidavit in the main application annexure "FA10" pp 52-55 and annexure "FA11" pp 56, 57 notice of meeting members to be held on 12 July 2018

⁷ 2011 (4) SA 42 (CC)

[26] Although it appears that there is a dispute between the offers made to acquire the property, that is R 1 250 000 as opposed to R2 300 000 this dispute is not genuine. The so-called dispute is contrived by the conduct of the second respondent through the third respondent to make the offer genuine in circumstances not justified, fair and reasonable to the applicant.

[27] The respondents have argued that the value of the property has changed since the valuation by Ansara. I have not seen evidence before this court on to what extent has such change in the value taken place. There has been an independent valuation done on the property. It follows therefore that such contention must fail.

[28] In *Gatenby v Gatenby and Others*⁸ the court had an opportunity to interpret and apply s 49 of the Act and held as follows:

"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 wide discretion. It may make such order as it thinks fit, with 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."

[29] In *De Franca v Exhaust Pro CC (De Franca Intervening)*⁹ the court held as follows:

"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 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 an application to the court for an order, that will have an effect of 'settling the dispute'(s 252 of Act 61 of 1973

⁸ 1996 (3) SA 118 (E) at 112 D-F

⁹ 1997(3) SA 878(SE) at 893 C-J

provides for an order having the effect of bringing to an end the matters complained of). As to what the applicant must establish, see Gatenby's case (supra at 124 B-G). The Court has a wide discretion with regard to the order that it decides to make to bring about the required result (cf Gatenby's case supra at 122F-123J). Such order can, however, only be made if the Court considered it just and equitable to do so.

Section 36 of the Act also deals with an application to Court by a member of the close corporation, but such member is not required to establish the nature of the conduct referred to above when discussing S 49 of the Act namely conduct affecting him. It is the carrying of the business of the close corporation that must be effected 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 members 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."

[30] A member of a close corporation who seeks relief in terms of ss 36 and 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 disposal and any other ancillary relief that may be claimed.¹⁰

¹⁰ See *Feni v Gxothiwe and Another* 2014 (1) SA 594 (ECG) at para [27] at 601; *Smith and Another v Mew* 2010 (6) SA 537 (SCA) para [25] at 543; *Geaney... v Portion 117 Kalkheuwel Properties CC and Others* 1998 (1) SA 622 (T) at 631 G-632A, *Kanabia v Ritzshelf* 1004 CC 200 (3)(2) SA 39 (D) at

[31] In *Feri v Gxothwe and Another* it was held as follows:

“[26] On the facts of this matter either s36 or s49 could be applied. That said, it seems to me that s49 is the must opposite 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 s49 is on the effect of conduct of either the close corporation or a member or members on another member. The applicant’s complaint in this matter is ultimately, that the first respondent’s conduct-his acts and omissions-the 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 same result would follow from the application of s 36, and that the cases dealing with s 36 are, by and large, applicable to s 49 as well.”

That said, it seems to me that s 49 is the most opposite 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 s49 is on the effect of the conduct of either the close corporation or a member or members on another member. The applicant’s complaint in this matter is ultimately, that the first respondent’s conduct is- his acts or omission- are unfairly prejudicial, unjust and inequitable to her, I shall, accordingly deal with the matter in terms of s 49, although I am of the view that the same result would follow from the application of s 36, and that the cases dealing with s36 are by and large applicable to s 49 as well.”

[32] In *Kanakia v Ritshef 1004 CC t/a Passage to India*¹¹ it was held as follows:

“It is clear that s 36 and s 49 provide members of a close corporation with almost this same protection where the one member acts in a prejudicial manner to other members or to the business of the close corporation. However, the powers of the court under s 49 are wider than those which are given to the Court under s 36. The Court under s 49 can make any order, other than the one envisaged in s 36(2), including an order regulating the official conduct of the affairs of the corporation (see s49 (2)).”

¹¹ supra

[33] In *De Sousa v Technology Corporate Management (Pty) Ltd*¹² the Court held as follows:

[34] *Section 252 (of the Companies Act) (my own emphasis) provides a member, [3] or part of the company, with the means of obtaining relief from unfairly prejudicial, unjust, and inequitable acts or omissions if the company or conduct of its affairs. The emphasis is upon the unfairness of the conduct complained of. A member seeking relief must show that the conduct is unfairly prejudicial, unjust, or inequitable to that member or to some part of the members. The conduct must not only be prejudicial but unfairly so [4]. Fairness is thus the criterion by which a court must decide whether it has jurisdiction to grant relief.*

[35] *The test of unfairness must, I think, be an objective one. Our Courts have generally followed what is referred to as the reasonable bystander test'. This was articulated by Nourse J in RA Noble of Sons (clothing) Limited [1983] BCLC 273 AT 290291 as:*

"The test of unfairness must I think, be objective not a subjective one. In other words, it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith, the test is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests.'

[36] Fairness is an elastic concept. What is unfair will depend upon the context in which it is being used. In *Re: a Company* (No 00709 of 1992) [1999] 1 UULR 1092 (HL) [1999] 2 ALL ER 961 at 966-967e, Lord Hoffman put that:

'Although fairness is a notion which can be applied to all kinds of activities, its content will depend on the context in which it is being used. Conduct which is

¹² 2017 (5) SA 577

perfectly fair between competing businessmen will not be fair between members of the family. In some sports it may require at best, observance of the rules, in others (it's not cricket) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

In the case of s 459, the background has the following two features:

First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of associations and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, the company has developed simply from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. The traditional role of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it was considered that this will be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules in a manner which equity would regard as contrary to good faith.'

[37] What is evident from the above-quoted passage in O'Neill's is that the notion of unfairness transcends the strict legal rights of the shareholders; there may be cases where it would be unfair for the majority to exercise or take advantage of their rights or powers under the articles of association or agreements between them.

[38] In *Grancy Property (Pty) Ltd v Manala*¹³ it was held as follows

"[27] In concluding on this particular aspect of the case it bears mention that in determining whether the conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interest of Grancy, it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of a company (see e.g. Livanos v Swartzberg and Others 1962 (4) SA 395 (W) at 399)."

[39] The court jurisdiction to make an order doesn't arise until the statutory criteria have been satisfied. The plaintiff (or applicants) bears the onus of satisfying the court that the particular act or omission has been committed, or that the affairs of the company are being conducted in a manner he alleges; and that such act or omission is inequitable to him or to some part of the members of the company

[40] The following has been recognised as unfairly prejudicial conduct entitling a shareholder to relief; where there is an unfair abuse of power and an impairment in the probity with which the company's affairs are being conducted; where the majority voting power has been abused or unfairly used to the prejudice of the shareholders; and where the majority shareholders use their greater voting power in a manner which doesn't enable the majority to enjoy a fair participation in their affairs of the company.¹⁴ (*Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 139 F-G; *Aspek Pipe Co (Pty) Ltd and Another v Mauer-Berger and Another* 1965 (1) SA 517 (C) at 525; *Louw and Others v Nel* 2011 (2) SA 172 (SCA) ([2010] ZASCA161) para 23, see Blackman *et al*, Commentary on the Companies Act vol 2 at 9-44).

[41] Where there is an unfair abuse of power and an impairment in the probity with which the company's affairs are being conducted; where the majority voting power has been abused or unfairly used to the prejudice of the shareholders; and where the majority shareholders use their greater voting power in a manner which doesn't

¹³ 2015 (3) SA 313 (SCA)

¹⁴ *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 139 F-G; *Aspek Pipe Co (Pty) Ltd and Another v Mauer-Berger and Another* 1965 (1) SA 517 (C) at 525; *Louw and Others v Nel* 2011 (2) SA 172 (SCA) ([2010] ZASCA161) para 23, see Blackman *et al*, Commentary on the Companies Act vol 2 at 9-44

enable the majority to enjoy a fair participation in their affairs of the company, these examples are some of the key features that have been recognised in our law as unfairly prejudicial conduct entitling a shareholder to relief. Consequently, our law has always afforded minority protection against abuse of voting power of majority shareholders. This is also a key feature in s 49 and S 36 of the Act.¹⁵

[42] Lack of harmony or confidence may also justify the granting of the remedy of winding up. Lack of confidence or harmony rested upon lack probity or on unfair dealing or conduct will justify removing or forcing the member to exist the company or close corporation.¹⁶ It is necessary to establish such lack of probity or unfair dealing or violation of the conditions of fair play. Although it is a well-known fact and undeniable that the majority shareholders have to manage the affairs of the company and to determine its policy with lack of probity and unfair dealings in the affairs of the company and that their will is likely to prevail, the minority shareholders, however, are entitled to complain if the majority voting power is being abused or unfairly used to their (minorities) prejudice as shareholders. I hold the view that the circumstances of this case warrant interference by this court.

[43] It is, in principle, correct that the second respondent may be entitled to invoke the provisions of s 46 (b) of the Act which provides as follows:

“s 46 Valuable rules regarding internal relations: -

The following rules in respect of internal relations in a close corporation shall apply in so far as this Act or an association agreement in respect of the corporation doesn't provide otherwise;

(a) *every member shall be entitled to participate in carrying on the business of the corporation;*

(b) *subject to the provision of s 47, members shall have equal rights in regards to the management of the business of the corporation and in regards to the power to represent the corporation in the carrying on of its business. Provided that the consent in writing of a member holding a*

¹⁵ See *Elder v Elder Watson Ltd* 1952 SC 49 at 55 and 60; *Aspek Pipe* (supra) at 528 D-H; *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd SA Mutual Life Insurance Society and Another v Intervening* 1979 (3) SA 713 (W); *Re: Elgindata Ltd* [1991] BCLC 959 at 984 and 1004).

¹⁶ See *Aspek Pipe* (supra) at 528 E-J.

member's interest of at least 75 %, or of members holding together at least that percentage of the member's interest in the corporation shall be required for:

- (i) a change in the principal business carried on by the corporation;*
- (ii) a disposal of the whole or substantially the whole, undertaking of the corporation;*
- (iii) a disposal of all, or the greater portion of the assets of the corporation; and*
- (iv) any acquisition or disposal of immovable property by the corporation;*
- (c) differences between members as to matters connected with a corporation's business shall be decided by majority vote at a meeting of members of the corporation;*
- (d) at any meeting of members of a corporation each member shall have the number of votes that corresponds with the percentage of his or her interest in the corporation;*
- (e) a corporation shall indemnify every member in respect of expenditure incurred or to be incurred by him or her-*
 - (i) the ordinary and proper conduct of the business of the corporation; and*
 - (ii) in regard to anything done or to be done for the preservation of the business or property of the corporation; and*
- (f) payments by a corporation to its members by reason only of their membership in terms of section 51 (1) shall be of such amongst and be effected at such times as the members may from time to time agree upon, and such payments shall be made to members in proportion to their respective interests in the corporation."*

I am of the view that this section is not applicable to the applicant based on the facts and the circumstances of this application.

[44] The conduct of the second respondent, as a 75% interest member in the first respondent falls foul of the acts envisaged in s 49. He has, without any solicitation

from the applicant, caused the value of the property of the first respondent to be determined by an independent valuer. Having received such valuation which amounted to R1 250 000, made an unsolicited offer to be brought out by the applicant in February 2018. Having received the acceptance of the offer to be bought, he waited and did about turn and in May 2018 intimated that there was a third party willing to pay R2 300 000 for the property. The third party happened to be the third respondent directly related to him.

[45] I have already determined that the second offer by the third respondent was not based on the market value and was contrived to frustrate the applicant. Consequently, there are no just and equitable grounds by the second respondent to frustrate the offer made by the applicant to acquire 75% member's interest from the second respondent.

[46] The conduct of the second respondent is therefore unfair, unjust and inequitable. The applicant be permitted to acquire the 75% member's interest in the first respondent. The second respondent has numerous portions of the L[....] F[....] next to the property of the first respondent through the third respondent and will not, by exiting the first respondent suffer any injustice and inequity.

[47] It follows in my respectful view that the applicant has discharged a burden of proof that the conduct complained of by the second respondent is unfair, unjust and inequitable to her and therefore prejudicial to her interest in the first respondent.

[48] For the reason stated above, I am of the view that the second respondent has failed to discharge the burden of proof that it would be in the best interest of all members that the property of the first respondent be sold at R 2.3 Million. I say so because firstly, the valuation has not been supported by an independent valuer. Secondly and most importantly the third respondent, who has made the offer is not an independent third party and has not proved that the offer is made at an arm's length. The counter-application must therefore fail.

[49] The first respondent is not a trading entity. As a consequence, no benefit would be derived by any creditor to wind it up. As a consequence, the alternative relief sort by the respondents must also fail.

ORDER

[50] It is ordered that:

- (a) The second respondent ceases to be a member of the first respondent;
- (b) The second respondent and failing the second respondent the sheriff of the Gauteng Local Division, Johannesburg is hereby authorised to sign all necessary documents and take all necessary steps to effect transfer into the name of the applicant, the second respondent's 75% members interest in the first respondent against payment by the applicant of R1 027 500.00 to be paid within 10 days of the date of this order;
- (c) The second and third respondent are ordered to pay the cost of this application.

SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 06 October 2020

Date of Judgment: 13 May 2021

Applicant's Counsel: Adv L Hollander

Instructed by: Jason Michael Smith Inc Attorneys

Respondent's Counsel: Adv PT Rood SC with Adv M T A Costa

Instructed by: Kern and Partners