IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH **CASE NO: 966/2010**
DATE HEARD: 13-05-2010
DATE REASONS HANDED DOWN: 11-06-2010

"REPORTABLE"

In the matter between

PACKAGING AND STAPLING CC **APPLICANT**

And

FROMM SYSTEMS AFRICA (PTY) LTD **FIRST RESPONDENT**

GLENN JACOBY **SECOND RESPONDENT**

ANDRE STONE **THIRD RESPONDENT**

REASONS FOR JUDGMENT

Summary – Close Corporation –

Members – Proceedings by and against – Proceedings by member(s) on behalf of corporation against member, Close Corporations Act 69 of 1984, sections 42, 50.

In terms of the above sections a member is entitled to institute proceedings on behalf of corporation against fellow member when fellow member breaches fiduciary duty to corporation in terms of section 42 of Act. Lack of formal resolution from corporation authorising proceedings not affecting *locus standi* of member to institute proceedings. Section 50(1)(b) of Close Corporations Act does not require a member who institutes legal proceedings against errant member to inform such member of intention to do so. Section requires that only other fellow members should be informed. Even so, giving such notice is no jurisdictional requirement for institution of such proceedings.

Applicant herein, a Close Corporation, instituted interdict proceedings against respondents. Authority of applicant's attorneys to institute such proceedings on behalf of Close Corporation challenged on grounds of lack of authority in terms of Rule 7(1) of High Court Rules. Court

held that as against second respondent no need for a resolution and that the proceedings were instituted in terms of sections 42 and 50 of the Act. Point *in limine* was dismised with costs.

TSHIKI J:-

A) **Introduction**

[1] This judgment relates to a point *in limine* taken by respondents in terms of Rule 7(1) of the Rules of this Court, challenging the applicant's attorneys' authority to act, for and on behalf of the Applicant.

[2] In the main application, applicant has instituted urgent interdict proceedings against all the respondents. The applicant's main complaint against the respondents is that they are conducting themselves in a manner which is contrary to the terms of the restraint of trade agreements entered into between the applicant and the second as well as third respondents and the conduct complained of is said to be in the interests and/or benefit of the first respondent. At the time of the institution of the application for interdict the second and third respondents had recently resigned from the employment of the applicant, and their resignations were effective from 4 January and 26 February 2010 respectively.

[3] I may mention that the respondents have also opposed the merits of the main application. This judgment though, is only confined to the objection in terms of Rule 7(1) mentioned *supra.*

[4] For the sake of convenience I shall refer to the parties as they are referred to in the main application.

[5] During argument of the point *in limine* Mr Van Der Linde SC appeared for the applicant, Mr M. Basslian appeared for the first respondent, Mr A Beyleveld SC appeared for the second respondent and Mr N.J Mullins for the third respondent.

B) **Issues**

[6] On 13 May 2010 when the point *in limine* was argued I indicated to the parties' representatives that I would give an order on the following day [14 May 2010] and in doing so, if I find in favour of the applicant, I would consider whether or not to grant an interim interdict order. In view of the respondents' opposition to the granting of the interim order on grounds, *inter alia*, that the respondents have not prepared for argument on the merits, I decided to refrain from considering the granting or otherwise of the interim interdict.

[7] I therefore granted the following order;

7.1 That the respondents' point *in limine* relating to Rule 7(1) is hereby dismissed with costs.

7.1.1 Such costs shall be paid by the respondents jointly and severally the one paying the others to be absolved.

7.2 That the main application is postponed *sine die*.

7.3 Reasons for judgment will be furnished at a later stage.

[8] What next follows are the reasons I have promised.

[9] As I indicated to the parties before granting the order on the 14 May 2010, the arguments before me have raised interesting points for consideration and decision. There is paucity of authority in the form of decided cases on the points raised, and understandably so, because the Close Corporations Act[1] (therein after referred to as the Act) is relatively new. In addition, the reason that it was introduced was to cater for the needs of the small businesses and its cases are mostly tried by the magistrate's Courts rather than the High Courts.

[10] For the sake of clarity and convenience it would be apposite for me to quote *verbatim* the provisions of Rule 7(1) as follows:

> ' **Power of Attorney**
>
> (1) Subject to the provisions of sub rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application'.

[11] In the present case the applicant is a Close Corporation registered in terms of the provisions of the Act.[2]

[12] Like any other juristic person a Close Corporation acts through its members who can only be natural persons. On receipt of the respondents' challenge of authority

[1] Act 69 of 1984
[2] Sections 12-14 of the Close Corporation Act 69 of 1984.

to act on the part of the applicant's attorneys, applicant filed a Special Power to sue and defend which was signed by Mr Anthony Alexandria Jacoby (hereafter referred to as Anthony) and dated 21 April 2010. Applicant's attorneys subsequently sent to the respondents' attorneys a letter dated 26 April 2010 in which a resolution [annexure AJP 16] was annexed.

[13] I must state at this stage that the members of the applicant are family members whose members' interest differ. The deponent to the applicant's founding affidavit, Anthony, is holding 60%, Mrs Lynn Jacoby, the wife of Anthony, holds 20% and Glen Jacoby, (the second respondent) their son, holds 20% of members interest. Before the institution of the present application, applicant had instituted a claim for damages (annexure GJ2) against the second respondent for breach of contract amounting to R 367 694-68. Those damages are a sequel to the second respondent's resignation as an employee of the applicant. In terms of that agreement the second respondent was to, *inter alia*, sell his 20% membership interest in applicant to Anthony and pay to him certain amounts of money, a loan given to the second respondent by Anthony.

C) Grounds of Objection

[14] The crux of the respondents' objections is that applicant's attorneys' authority to institute the application proceedings against the respondents was lacking for the following reasons;

14.1 The second respondent who is still a member of the applicant did not authorise the institution of the said proceedings. He was never informed by the other two members of their intention to hold a meeting of members with a view to proceed with legal action against him, did not attend such meeting and therefore, his consent, legal or otherwise, is lacking.

14.2 No proceedings could be validly instituted by the applicant, a Close Corporation, without having complied with section 48 of the Corporations Act, which provides for the manner in which resolutions are passed.

14.3 That reliance on section 54 of the Act by applicant and its remaining members is misplaced because such provisions are irrelevant to the issues at hand.

14.4 That section 50 (1)(b) of the Act requires that before any proceedings can be instituted against any member or former member it is obligatory for the errant member to be informed of the intended proceedings. This will also give him or her an opportunity to explain his or her conduct and may persuade the other members not to institute the proceedings against him or her.

[15] Mr Van De Linde’s contention is that the applicant’s attorneys have been authorised in terms of sections 50(1)(b) read with section 42(1), (2)(a)(b) of the Act and that neither the above sections and nor other section of the Act creates an obligation on the members of the Corporation to afford the guilty member an opportunity of explaining himself before the Close Corporation takes action against such member.

Ratio Decidendi

[16] In so far as it is relevant herein Section 50(1) of the Act provides as follows:

‘ Proceedings AGAINST fellow-members on behalf of Corporation

> (1) Where a member or a former member of a corporation is liable to the corporation –
>
> (a) to make an initial contribution or any additional contribution contemplated in section (1) and (2)(a) respectively, of section 24; or
>
> (b) on account of -
>
> (i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or
>
> (ii) negligence in terms of section 43;
>
> any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so'.

[17] It is common cause that the second respondent was not present at the meeting in which the resolution to institute legal proceedings against himself and his fellow respondents was taken.

[18] The interpretation of the last portion of section 50 (1)(b) by the respondents' counsel as suggested in 14.4 supra cannot be countenanced. The argument seeks to suggest that no such proceedings brought in terms thereof could be valid unless the member, whose conduct is complained of, has been notified. If one inputs such interpretation it would make a nuisance of such provisions because the intended proceedings can be held to ransom by the errant member should he or she be opposed to the proceedings being instituted. In my view, the well founded and only judicious interpretation of the relevant portion of the section couched in the words
' *after notifying all other members of the corporation* of his intention to do so' refers only to the other members of the corporation other than the errant member. If it would be obligatory to inform the errant member, or to seek his or her consent before action is

taken, that would simply mean that upon refusal to comply his or her decision would close the matter *cadit quaestio* and that would result in the provisions being nugatory. Such interpretation could never have been intended by the legislature.

[19] Section 42 of the Act provides as follows:

> ' **Fiduciary Position of members**
>
> (1) Each member of a corporation shall stand in a fiduciary relationship to the corporation;
>
> (2) Without prejudice to the generality of the expression "fiduciary relationship" the provisions of subsection (1) imply that a member—
>
> (a) shall in relation to the corporation act honestly and in good faith, and in particular -
>
> (i) shall exercise such powers as he or she may have to manage or represent the corporation in the interest and for the benefit of the corporation; and
>
> (ii) shall not act without or exceeded the powers aforesaid; and
>
> (b) shall avoid any material conflict between his own interests and those of the corporation; and in particular -
>
> (i) shall not derive any personal and economic benefit to which he or she is not entitled by reason of his or her membership of or service to the corporation, from the corporation or from any other person in circumstances where that benefit is obtained in conflict with the interests of the corporation;
>
> (ii) shall notify every other member, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the corporation; and
>
> (iii) shall not compete in any way with the corporation in its business activities.

(3) A member of a corporation whose act or omission has breached any duty arising from his or her fiduciary relationship shall be liable to the corporation for ---

(i) any loss suffered as a result thereof by the corporation; or

(ii) any economic benefit derived by the member by reason thereof.'

[20] Comparing a Close Corporation with a Company in **Northview Shipping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and Another.**[3] Lewis JA stated at para 25 as follows:

"Moreover, a close corporation is intended to be a simple entity, akin to a partnership, but with limited liability. The structure of the close corporation is designed for individual entrepreneurs or for a limited number of people (10) to conduct business. There is no board of directors and each member has the power to bind the close corporation as discussed above. The complex requirements of company law are not intended to apply to them".

It follows from the above that the Court, when interpreting the provisions of the Act, has to bear in mind that the legislature was creating a small business juristic person whose provisions should make it easy for the parties to enforce and protect the rights, obligations and interests of the Close Corporation even against its own members.

[21] In Volume 3 of **Henochsberg** [4]**, Meskin** states:

"The intention of the Legislature in enacting these provisions [sec 42] is to provide a statutory cause of action for a corporation in respect of breach of fiduciary duty by a member thereof. The section should be read with section 50(1)(b)(i) in terms of which any other member of the

[3] See Northview Shipping Centre (Pty) LTD v Revelas Properties Johannesburg CC and Another 2010 JOL 25189 (SCA). See also Espag and Another v Hattingh 2010 (3) SA 22 SCA at 26 para 11

[4] Henochsberg on the Close Corporation Act 69 of 1984 Vol (3) Com - 100

corporation may enforce such cause of action by legal proceedings on behalf of the latter. The two sections together constitute a legislative prescription of that which obtains in the case of a company at common law".

I agree with the views expressed by Meskin *supra.* On reading the provisions of section 42 read with section 50(1)(b) of the Act, it is difficult for me to comprehend the basis of the respondents' argument that the applicant could not have instituted the interdict proceedings against the second respondent without inviting him, for either his presence and/or his consent. **Cilliers et AL**[5] state as follows:

> 'The duties of members of a close corporation are defined in wide terms and it seems as if these duties may even apply to persons who are not members of the Close Corporation but who manipulate the actual members'.

In the present case the conduct complained of by the applicant against the second and the third respondents, is that they are soliciting business for the first respondent and to the prejudice of the applicant. Such conduct clearly invites the remaining members of the applicant to take any appropriate action even against the other respondents who are not members but could have, by conduct, manipulated the second respondent to the prejudice of the applicant.

[22] As against the other two respondents, a decision by them was made at a meeting in which Anthony and his wife resolved to ratify the institution of the legal proceedings against the first and third respondents. Section 48 of the Act allows the majority members present at a meeting to make a resolution which, in this case, was sent to the respondents' attorneys under cover of a letter dated 26 April 2010. There is nothing in section 48 to suggest that a resolution cannot be made with a view to validate or ratify steps or action already taken by the members of the corporation. In terms of section

[5] On Close Corporations Services, issue no.26- pages 4-5 para 404 –
See also Lessing 1989 S.A Mercantile Law Journal 242, 245 – 247.

48(2)(b) of the Act matters are decided at meetings of the corporation by majority vote, each member having the number of votes that corresponds with the percentage of his or her member's interest in the corporation. The two members of the Corporation who signed the resolution both constitute 80% of the members' interest and therefore meet the requirements of the Act[6]. The whole purpose of the enactment was to protect the interests of the Close Corporation against its members who, due to their internal knowledge of the activities of the corporation, could take advantage of the Close Corporation to the latter's prejudice.

[23] In my view, whatever criticism by the respondents of the applicant's resolution has no merit. They do not dispute that Anthony and his wife had signed the resolution or that the two members had no right to sign it. The latter are the members of the applicant who, in exercising their majority vote as aforesaid, could resolve to take action against all the respondents herein. In any event where, as in the present case, the respondents have offered no valid evidence at all to suggest that the applicant's attorneys have no authority to act for the applicant, only the minimum of evidence is required to prove the required authority to act[7]. *Prima facie* the resolution appears to have been concluded and signed by Anthony and his wife and I find no reason not to accept it as constituting the required authority to instruct attorneys to institute proceedings against the respondents.

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[6] See Cilliers et al, commentary on Close Corporations Service, Part I issue no 26 pages 4 – 19
See also section 48(2)(b) of the Close Corporations Act 69 of 1984.

[7] Dowson & Dobson Ltd v Evans & Kerns (Pty) Ltd 1973 (4) SA 136 (E), Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957(2) SA 347 (C).

[24] A similar argument was raised in **Cuyler and Another v Shiers and Another, Cuyler v C & S Marketing and others**[8] where at page 123 E-F **Shakenovsky AJ** responded as follows to such argument:

> "It is common cause that Cuyler, being a member of C and S, did not notify Shiers pursuant to the provisions of section 50(1) as above stated. However, Mr Brett in my view correctly and properly conceded that the giving of such notice was not a jurisdictional requirement and, consequently, he did not contend that there has been non-compliance by Cuyler with the provisions of the section in this regard".

In this case Cuyler had instituted interdict proceedings in terms of section 50(1) read with section 42 of the Act, interdicting the respondent member from competing unlawfully against the Close Corporation of which he was a member. The Court held that section 50(1) read with section 42 of the Act authorises the institution of such proceedings by a member without the requirement of a resolution. Equally in our case, in terms of the Act, it is not a jurisdictional requirement for the complaining member(s) to notify the other members before instituting the legal proceedings against the errant member.

[25] It, therefore, follows that although the applicant has indicated his reliance on section 54 of the Act for instituting the proceedings against the second respondent, there are sufficient facts which justify the argument by Mr Van De Linde that the actions of the applicant and/or its deponent are derived from the provisions of section 50(1) read with section 42(1) (a) and (b) of the Act. Anthony and his wifes' claim to have been authorised by section 54 of the Act is misplaced and cannot be justified but

[8] 1999 (3) SA 118 (WLD) at 123 E-F [Cuyler in this case had instituted interdict legal proceedings on behalf of a Close Corporation against another member of the Corporation, interdicting him from competing unlawfully and trading against the applicant Close Corporation.]

their actions are perfectly correct and are protected by the provisions of section 50 (1) read with section 42(1) (a) and (b) of the Act.

[26] Counsel for all respondents sought to rely on a number of decisions [9] including the judgment of this Division[10] in support of their submissions that the applicant's attorneys had no authority to act for the applicant. Upon close scrutiny it becomes clear that the decisions relied upon by respondents are distinguishable from the case under discussion. This is evinced by, *inter alia*, the contents of the extract from the judgment of **Nepgen J** in the case quoted in footnote no8 where at 890 F-I the leaned judge stated as follows:

> "It is indeed so that section 50 of the Act relates to situations where a close corporation's own rights are at issue but this has nothing to do with proceedings such as the present. It is quite clear that what is provided for in Section 50 of the Act is that a member of the Close Corporation may institute proceedings on behalf of the close corporation in respect of another member's or a former member's liability to the Close Corporation where such liability arises on account of a breach of the duty flowing from the fiduciary relationship that exists or existed. Without going into any great detail in this regard, there can be little doubt that the comment by Cilliers and others, Close Corporation Service para 4.2 section 50 of the Act is to enable proceedings to be instituted on behalf of the Close Corporation against fellow members was devised in order to provide for simple and effective means to protect the interests of the Close Corporation thus avoiding "the uncertainty inherent in Common Law derivative action and the time consuming and risky procedure envisaged in section 266 of the Companies Act".

[27] It follows from the above extract that the facts of the **De Franca** judgment supra are clearly distinguishable and no reliance can be placed on that judgment to persuade me to decide in favour of the respondents herein.

[9] See Mall (Cape) (PTY) Ltd v Merino Ko-operasie BPK 1957(2) SA 347(C)
[10] De Franca v Exhaust Pro CC (De Franca Intervening) 1997(3) SA 878 (SE) also reported at ([1996] 4 ALL SA 503.

[28] The decision in **Mall's case** supra relates to a situation where a company, being an artificial person unlike an individual, institutes proceedings in Court through its agents. Where such authority to institute the proceedings is disputed the person who instituted the proceedings on behalf of the company must prove his authority for doing so. This can be in the form of a resolution made by the company. The distinction between Mall's case and the case in issue, with respect to the second respondent, is that the institution of the proceedings in the present case is based on the provisions of the Close Corporations Act and not on common law.

[29] On the question of deposing to an affidavit in motion proceedings the deponent need not be authorised to do so. It is only the institution of the proceedings and the prosecution thereof which must be authorised.[11]

[30] The allegations against the second respondent by applicant, if established, fall within the prohibition in section 42 of the Act. As against all the respondents, applicant is entitled to protect its own business interests and therefore can only do so in the manner it has proceeded herein. There is, therefore, no merit in the respondents' objection to the applicant's attorneys to act for the latter in these proceedings.

[31] It is for the above reasons that the point *in limine* was dismissed with costs.

[11] See Ganes v Telcom Namibia LTD 2004(3) SA 615 (SCA) also reported at [2004] 2 ALL SA 609 (SCA). See also Plettenberg Bay Country Club v Bitou Municipality [2006] 4 ALL SA 395 (C) at 398 para 5 & 6.

P.W TSHIKI
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Van De Linde SC instructed by Nelson Attorneys – Port Elizabeth

For the first Respondents: Adv Basslian instructed by Myers inc. % Boqwana Loon & Connellan-Port Elizabeth

For the second Respondent: Adv Beyleveld instructed by Michael Randell Attorneys-Port Elizabeth

For the third Respondents: Adv Mullins instructed by Booysen & Rossouw Attorneys – Port Elizabeth