REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 44518/18

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

27/1/2020
DATE

SIGNATURE

In the matter between:-

ELANA LABUSCHAGNE	First Applicant
BAREND JOHANNES VAN DER MERWE N.O	
In his capacity as a Trustee of the Bo-Kloof Trust	Second Applicant
ANDREA MAGRIETA VAN DER MERWE N.O	
In her capacity as a Trustee of the Bo-Kloof Trust	Third Applicant
PIETER SCHALK NEL N.O	
In his capacity as a Trustee of the Bo-Kloof Trust	Fourth Applicant

and

MENLYN BRAKE AND CLUTCH CC	
(CK NO. 1997/003274/23)	First Respondent

PAUL LABUSCHAGNE Second Respondent

THE MASTER OF THE HIGH COURT, PRETORIA Third Respondent

RECEIVER OF REVENUE, PRETORIA Fourth Respondent

MOTOR INDUSTRY BARGAINING COUNCIL Fifth Respondent

JUDGMENT

RANCHOD, J

Introduction

[1] The applicants seek an order, *inter alia,* declaring that the first applicant is the beneficial owner of a 23% member's interest in the first respondent; that the Bo-Kloof Trust (the Trust) (represented by the second, third and fourth applicants) is the beneficial owner of a 36% member's interest in the first respondent; the appointment of an accountant to do a business valuation of the first respondent; an order requiring the first and/or the second respondent to purchase the applicants' members interest in the first respondent; alternatively an order winding up the first respondent.

[2] The second respondent denies that the applicants are owners of any interest in the first respondent. He alleges that the monies allegedly invested in the first respondent by the applicants were in fact a loan to him personally by the applicants for him to purchase the first respondent as a going business concern.

[3] Henceforth, where I refer to the first and second respondents together, I will simply refer to them as 'the respondents' as the third, fourth and fifth respondents have been cited only for any interest they may have in the matter and they have not entered an appearance. The second applicant is referred to interchangeably as the second applicant or as Van der Merwe.

[4] The second respondent's main contentions are, firstly, that the first applicant does not have *locus standi* to bring this application; secondly, that it is not competent for the applicants to seek relief in relation to a different close corporation (CC) to that cited in the Notice of Motion; thirdly, that there is a material dispute of fact on the papers, and fourthly, that no case has been made out for the alternative relief sought, i.e placing the first respondent under final winding up.

<u>Brief background facts</u>

[5] The first applicant is the widow of the late Christiaan Rudolf Labuschagne (the deceased) and was appointed by him in his Will as his sole heiress. The second, third and fourth applicants are the trustees for the time being of the Bo-Kloof Trust which was established in August 1999.

[6] The applicants allege that:

6.1 During 2009, the second applicant, the deceased and the second respondent concluded an oral agreement in terms whereof they undertook to invest in the purchase of the first respondent.

6.2 In December 2009 and January 2010, the parties decided to implement the terms of their oral agreement to purchase the first respondent. The agreement was that each of them would contribute to the purchase price of the first respondent and according to the amount of their contributions would acquire a pro-rata member's interest in the first respondent.

6.3 On 04 February 2010, Van der Merwe sent a written offer to purchase to the then owner of the first respondent, after the deceased and the second respondent had given their input on it.

6.4 On 03 March 2010, the purchase price of R500,000 was paid over to the seller. Van der Merwe contributed R200,000; the deceased paid R95,438 and the second respondent the balance. It was agreed that the purchase of the business would be through a close corporation named Blue Marlint Trading 142 CC represented by the second respondent. It was also agreed that their respective member's interest in the first respondent would be 36% (the Bo-Kloof Trust), 23% (the deceased) and 41% (the second respondent) (apparently notwithstanding that the respective monetary contributions were not in exactly the same proportions).

6.5 The name of the purchaser – Blue Marlint Trading 142 CC was subsequently changed to Menlyn Brake and Clutch CC (the first respondent).

6.6 It was agreed that neither Van der Merwe, nor the deceased would be included in the daily activities of the business but would be available to render assistance if and when the second respondent required it.

6.7 Meetings were held between the members of the CC in subsequent years to discuss the affairs of the business.

6.8 In the latter half of 2017, at a meeting between the deceased and the second respondent, the latter produced a CIPC (Companies and Intellectual Property Commission) document providing for both Van der Merwe and the deceased to sign off their respective member's interest in the first respondent and to transfer them to the second respondent. They refused to sign the document.

6.9 After the meeting second respondent simply ignored his co-members of the first respondent and no financial statements were provided to either of them even though they were entitled to them.

6.10 In a letter dated 02 November 2017 from second respondent's attorneys to Van Der Merwe, the second respondent for the first time alleges that the member's interest of Van Der Merwe and the deceased were provided by second respondent as a 'security interest' for loans they had provided to the second respondent. The loans had been repaid hence the 'security interest' (member's interest in the first respondent) has been cancelled with retrospective effect to the date that the loans were fully paid up.

6.11 Van Der Merwe responded through his attorneys and denied that the funds advanced by him and the deceased were loans and asked second respondent to provide the loan agreement. It was pointed out that both Van Der Merwe and the deceased had purchased member's interests in the first respondent with their concomitant benefits.

6.12 The deceased died on 02 January 2015 and his wife, the first applicant, inherited his member's interest in the first respondent.

[7] The second respondent's version is that:

7.1 When the business became available for purchase by him, he only had about R240,000.00, hence he approached his father (the deceased) for a loan of about R300,000.00 as the purchase price was R500,000.00. The deceased could only lend him R100,000.00 and it was then that his father said he would approach Van Der Merwe.

7.2 Van Der Merwe was well known as a successful businessman.

7.3 He (second respondent) had informed the seller of the business that he would get about R300,000.00 in loans from his family. (However, no confirmatory affidavit has been obtained from the seller.)

7.4 Van Der Merwe had agreed to lend him R200,000.00 but he had said that he did not simply want to lend him the money because 'What will happen if the business was not successful?'[1]

Discussion

[8] The second respondent has not produced any documentary evidence that Van Der Merwe and the deceased provided the monies as a loan for him to purchase the member's interests in the first respondent.

[9] If Van Der Merwe loaned the monies in his personal capacity and his registration in the close corporation was simply a temporary security interest then the second respondent has failed to establish that Van Der Merwe received a temporary security interest in his personal name. The registration of the member's interest in the name of the Trust does not support his contention. If the member's interest granted to the applicants was simply a temporary security interest, no statement has been made in the financial statements, nor has there been any qualification in the CIPC registration to this effect. One would have expected a borrower to have made clear either in formal registration papers or by way of a separate loan agreement between the parties that the monies advanced by the trust and the deceased were in fact simply loans to the second respondent.

[1] Answering affidavit: p209, para 13.

[10] It is evident that from the inception of their business relationship Van Der Merwe was reluctant to lend the money to the second respondent without knowing that the business would be managed successfully. On the second respondent's own version, it follows that a security interest would have been no protection for Van Der Merwe, or, for that matter, for the deceased.

[11] It is common cause that both the deceased and Van Der Merwe have been repaid their loans to the first respondent by it. Second respondent avers that if the deceased and Van Der Merwe had sought an interest or ownership in the first respondent he would certainly not have agreed to it because, he says, the business is nothing but a small motor vehicle repair facility and the idea that three families could live off the income of the business 'is simply wrong'.[2] However, by second respondent's own admission, Van Der Merwe is a successful businessman so he could hardly be considered as wanting to live off the income of the business. More importantly, why would second respondent agree to registration of members' interests in favour of the deceased and Van Der Merwe if the monies advanced were merely loans? In this regard, two documents, in my view gainsay the second respondent's version.

[12] The first is an email dated 19 January 2010[3] from Van Der Merwe to his accountant requesting him to peruse a draft purchase agreement relating to the purchase of the business Menlyn Brake and Clutch. He states that a CC is to be set up in which he, the deceased and second respondent will invest in a defined relationship in the new business.[4] He states further that the name 'Menlyn Break (*sic*) and Clutch' is the name under which they are going to conduct the business.[5]

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2 Answering affidavit: p210, para 16.
3 Annexure 'FA5' to the founding affidavit at p52.
4 Stigting van BK waarin ons (Paul, Ben Tiaan) in 'n bepaalde verhouding in die nuwe besigheid gaan bele.
5 'Die naam "Menlyn Brake and Clutch" is die naam waaronder as die besigheid gaan dryf.'

[13] The second document is the sale of business agreement.[6] It provides for the sale by Menlyn Brake and Clutch BK (with registration number CK 1997/003274/23) to Blue Marlint Trading 142 BK (BK 2010/000864/23) represented by the second respondent of the business known as Menlyn Brake and Clutch. As I said, Blue Marlint Trading 142 CC later underwent a name change to Menlyn Brake and Clutch CC. A Disclosure Certificate issued by the CIPC (dated 6 November 2017) reflects that the deceased held 23%, the Bo-Kloof Trust 31% and the second respondent 41% member's interest in the first respondent.

[14] Furthermore, the second respondent admits that Van Der Merwe did not want to lend the money to him. This admission lends credence to Van Der Merwe's assertion that he and the deceased had provided funding as an investment in the first respondent and not as a loan to the second respondent personally. The allegation by the second respondent that the member's interest held by the deceased and Van Der Merwe was 'security interest' is, in the circumstances far-fetched and must be rejected.

[15] It is also to be noted that in the financial statements for the year end 28 February 2011, the financial statements of the first respondent were signed by the deceased and Van Der Merwe together with second respondent as members of the first respondent and the names of these same three persons are mentioned as being members of the first respondent. The same position presents itself in the subsequent financial statements for the years 2012 up to and including 2016. If what was agreed upon was a loan, then what would have been expected to happen was that the second respondent would have owned the full 100% member's interest in the purchaser (Blue Marlint Trading 142 CC) and then, he would have provided some type of security by way of a pledge in the applicants' favour over the member's interest and possibly the stock.

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6 'Verkoping van 'n sake-onderneming.'

[16] The second respondent has raised several points which, he avers, renders the application fatally flawed or, the matter must be referred to oral evidence.

[17] It is alleged that the incorrect CC has been joined in these proceedings. It is so that the headings of the Notice of Motion and the Founding Affidavit refer to the registration number of the first respondent as 1997/00327/23. However it is important to note that the body of the Founding Affidavit refers to the Certificate issued by the CIPC dated 06 November 2016 and it is attached as annexure 'FA4' to the Founding Affidavit with the correct registration number.

[18] The cited first respondent is the correct first respondent. The only mistake is in the heading to both the notice of motion and the founding affidavit which refers to the first respondent as having a CK number 1997/003274/23 whereas it should have referred to the first respondent as having a CK No 2010/00864/23 as is evident from annexure 'FA4' attached to the founding affidavit.

[19] It is common cause that the close corporation Blue Marlint Trading 142 CC purchased the business from Du Preez who was trading as Menlyn Brake and Clutch CC under CK No. 1997/003274/23, as appears from the sale agreement attached as annexure '1'. The close corporation Blue Marlint Trading 142 CC, subsequently changed its name to Menlyn Brake and Clutch CC, but retained the same registration number. This is evident from the Blue Marlint Trading 142 CC registration number which is the same number that has been cited in paragraph 10 of the founding affidavit.

[20] If one analyses the sale and purchase agreement attached as annexure '1' to the answering affidavit, it is obvious that the second respondent was representing the purchaser, namely Blue Marlint Trading 142 CC in which the deceased, the Trust and the second respondent were members according to the ratios agreed between them.

[21] The second respondent suggests that the contract is not fair. This is, unfortunately for him, legally irrelevant. Contracts must be abided by even if they pan out as unfair.[7]

[22] The second respondent contends that the first applicant does not have *locus standi* in this application. The first applicant is the widow of the deceased and has been appointed by his last Will and Testament as his sole heiress. Absa Trust Ltd was nominated as the executor in the estate. However, it has agreed to renounce its nomination in favour of first applicant's attorneys. No evidence has been led about whether an executor has in fact been appointed. In any event, the first applicant founds her *locus standi* as the sole heiress to the deceased estate and in her capacity as the beneficial owner of the deceased's member's interest in the first respondent. In my view she is entitled to protect her interests and therefore has *locus standi.*

[23] The second respondent also takes issue with the relief sought in the Notice of Motion to the effect that the first and/or the second respondents are to be directed to purchase the applicants' member's interest in the first respondent from the applicants.

[24] A member may only be forced to purchase the member's interest of another member pursuant to an order granted in terms of section 49 of the Close Corporations Act, 1984.

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[7] *Burger v Central South African Railways* 1903 TS 571 at 576; *Rashid v Durban City Council* 1975 3 SA 920 (D) 927 B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) 673 D-E; *Artprint Ltd v Gerber Goldschmidt Group SA Ltd* 1983 1 SA 25 (A) 263; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 4 SA 615 (T) 627-630.

[25] A party who wishes to rely upon a statutory provision as a cause of action must formulate the relevant pleading in clear terms with reference to that provision.[8]

[26] The applicants do not plead reliance upon section 49 of the Close Corporations Act, nor do the applicants make any of the allegations necessary to sustain a cause of action based upon section 49. In particular, there is no allegation that: *'any particular act or omission of the corporation or of one or more other members is* *unfairly prejudicial, unjust or inequitable* *to him...*[9]*'*

[27] In my view no case has been made out for a forced buy-out. In the circumstances the relief sought on prayers 5, 6, 7, 8, 9, 10 and 11 cannot be granted. An appropriate order would be to grant prayers 1, 2, 3 and 4 of the Notice of Motion. The estate of the deceased or the first applicant and Bo-Kloof Trust would then be entitled to pursue claims for their share of any profits earned by the first respondent.

[28] In the circumstances the following order is made:

1. It is declared that the first applicant is the beneficial owner of a 23% member's interest in the first respondent.
2. It is declared that the Bo-Kloof Trust is the beneficial owner of a 36% member's interest in the first respondent.
3. The first respondent is directed, insofar as may be necessary, to rectify alternatively to amend its register of members to reflect the first applicant and the Bo-Kloof Trust as the holders of their respective member's interest in the first respondent.

[8] *Yannakou v Apollo Club* 1974 (1) SA 614 (A); *Naude v Fraser* 1998 (4) SA 539 (SCA).
[9] This is an essential allegation to found a cause of action based upon section 49 of the Close Corporations Act.

4. The first respondent is further directed forthwith to issue the first applicant and the Bo-Kloof Trust with appropriate certificates in respect of their respective member's interests.
5. The second respondent to pay the costs of the application.

RANCHOD, J
JUDGE OF THE HIGH COURT

Appearances:

Appearance for the Applicant:	Adv JK Berlowits Instructed by Eastes Inc c/o Verster/ Roos Inc Attorneys 76 Skilpad Avenue Suite 3, Monpark Building Pretoria
Appearance for the Respondents:	Adv Bruwer Instructed by Abacks Attorneys c/o Macintosh Cross & Farquharson 834 Pretorius Street Arcadia, Pretoria