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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 11908/2017

In the matter between:

HALALISIWE BAGCINILE MNCWANGO N.O.

Applicant

and

ZABA LINCOLN NGCOBO

First Respondent

MAMI'S CONSTRUCTION CC

Second Respondent

FIRST NATIONAL BANK LTD

Third Respondent

**COMMISSIONER OF COMPANIES AND
INTELLECTUAL PROPERTY COMMISSION**

Fourth Respondent

THE MASTER OF THE HIGH COURT, DURBAN

Fifth Respondent

TINY PHUMEZA NONTULO

Sixth respondent

Coram: Koen J

Heard: 15 March 2019.

Delivered: 1 April 2019.

ORDER

1. The issue whether an agreement was concluded between the first and/or second respondents with the deceased in terms whereof the first and/or second respondents would be entitled to the continued possession and use of:
 - (a) the 2012 Toyota Hilux 2.0 VVTI pickup single cab vehicle; and
 - (b) the Volkswagen Polo vehicle with the registration [...];as a trade-off for the deceased having been given possession of a Toyota Hilux 4x4 vehicle and a Subaru sedan, is referred for the hearing of oral evidence on a date to be arranged with the Registrar.
2. The evidence relating to the issue in paragraph 1 above shall be that of witnesses who have deposed to affidavits and any further witnesses the parties may wish to call provided that a summary of such witnesses' evidence has been delivered to the opposing party 15 days prior to the oral evidence, unless the witness has to be subpoenaed.
3. The provisions of Rule 35, 36, 37 and 38 shall apply to the hearing of the oral evidence.
4. The costs relating to the relief claimed in paragraphs 1(a) and (b) of the Notice of Motion are reserved and shall be determined by the court hearing the oral evidence.
5. An order is granted in terms of paragraphs 1(c) and (d), 2, 3 and 5 of the Notice of Motion.
6. The relief claimed in paragraph 4 of the Notice of Motion is dismissed.
7. The first and second respondents jointly and severally are directed to pay two-thirds of the applicant's costs to date but excluding the costs relating to the relief claimed in paragraphs 1(a) and (b) of the Notice of Motion reserved in paragraph 4 above.

JUDGMENT

Koen J

[1] The applicant is the duly appointed executrix of the estate of her late husband, Hamilton Velenkosini Mncwango (hereinafter referred to as 'the deceased'). The deceased was during his lifetime the holder of a 50% registered members' interest in Mami's Construction CC, the second respondent. The other 50% member's interest is that of the first respondent. It is also not in dispute that the deceased was, during his lifetime, the registered owner of a VW Polo motor vehicle bearing registration numbers and letters [...] (hereinafter referred to as 'the Polo'). He was also the purchaser and hence entitled to the possession of a 2012 Toyota Hilux 2.0 VVTI pick-up single cab motor vehicle (hereinafter referred to as 'the Hilux') pursuant to a credit agreement, with the ownership in the Hilux being reserved to the credit grantor, the fifth respondent.

[2] The deceased died intestate on 7 November 2016 leaving behind the applicant and four children, three children from his marriage with the applicant and one child from a previous relationship, as his intestate heirs. The solvency or otherwise of his estate has not been dealt with and is yet to be determined.

[3] On 1 December 2016 the applicant, in her personal capacity, was registered in the records of the Commissioner of Companies and Intellectual Property, the fourth respondent in this application, as a 50% registered member of the second respondent, in the place of the deceased. It is common cause that this was done in error and that she should not be a member of the second respondent, in her personal capacity. It is not necessary to analyse any further the various factual disputes relating to and giving rise to such registration or to determine who is responsible for that error.

[4] The applicant, with reliance on s 26 of the Administration of Estates Act 66 of 1965, has from time to time as she is entitled to do, demanded delivery of *inter alia*:

- (a) The Polo;
- (b) The Hilux;

- (c) Copies of all financial records of the second respondent;
- (d) Copies of all joint venture contracts concluded between the second respondent and any other entity, for the period September 2016 to date, including but not limited to copies of contracts concluded between the second respondent and Uzmile Trading CC;
- (e) That the deceased's 50% membership of the second respondent be transferred to her in her capacity as executrix of the estate of the deceased.

[5] Section 26 of the Administration of Estates Act provides:

'(1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.'

[6] These requests have variously resulted in invitations by the first respondent (mainly represented by his son) in correspondence to meet with the applicant and her attorneys to try and resolve the various issues relating to the deceased, his membership in the second respondent, the second respondent, the Polo, the Hilux and other matters. My attention has been drawn to these offers to meet as indicative of a reasonable attitude being adopted by the first respondent and second respondent to cooperate in the matter. All such invitations have however been declined. The applicant has referred to these invitations all being devoid of any specific defences being raised by the first and/ second respondent to the delivery of any of the estate property to the applicant. Regardless of whether these invitations to meet suggest a reasonable attitude or not, the reality is that nothing has been resolved thus resulting in a stale mate situation in the administration of the deceased's estate.

[7] Eventually the applicant launched the present application in which she claims the following relief:

- '1. The First Respondent alternatively the Second Respondent alternatively both the First and Second Respondents be and are hereby directed to deliver to the Applicant:
 - a. one 2012 Toyota Hilux 2.0 VVTI pick up single cab motor vehicle which is still financed with the Fifth Respondent under account number [...];
 - b. one Volkswagen Polo motor vehicle bearing registration numbers and letters [...]

- c. copies of all financial records of the Second Respondent;
- d. copies of all joint venture contracts concluded between the Second Respondent and any other entity from the period September 2016 to date including but not limited to copies of all contracts concluded between the Second Respondent and Uzamile Trading CC.

2. The First Respondent be and is hereby directed to sign all documents necessary which are attached hereto marked "A1-A4" hereto and to do all things necessary to cause the applicant in her capacity as Executrix of Estate Late Hamilton Velenkosini Mncwango to be registered as a fifty percent member of the Second Respondent, upon service of this order.

3. In the event that the First Respondent fails to comply with paragraph 2 above, the Sheriff of this Court is hereby authorised and directed to sign the documents referred to in paragraph 2 above.

4. The First Respondent alternatively the Second Respondent alternatively both the First and Second Respondents jointly be directed to pay all arrears owed to the Fifth Respondent in respect of the Toyota motor vehicle upon presentation of a Statement of Account issued by the Fifth Respondent and upon delivery thereof by the Applicant on the First Respondent.

5. The Third Respondent be and is hereby directed to link the Applicant's cellphone number: [...] to its inContact service associated with the Second Respondent's bank account held with the Third Respondent under account number: [....].

6. The First Respondent be and is hereby directed to pay the costs of this application on an attorney and client scale,

Alternatively and only in the event that any other Respondent opposes the relief sought herein;

7. Then, such Respondent or Respondents be directed to pay the costs of this application with the First Respondent on an attorney and client scale jointly and severally, the one paying the other to be absolved.'

[8] The relief in paragraphs 1(a) and (b) of the notice of motion is opposed in the answering affidavit of the first respondent on the basis that the first respondent maintains that although he admits that the Hilux is being used in the business of the second respondent which trades as a construction company and that the Polo is in the possession of the second respondent, an agreement was concluded with the deceased which entitles him to retain these vehicles in exchange for two of the second respondent's vehicles namely a Toyota Hilux 4x4 vehicle ('the 4x4') and a Subaru sedan having been provided to the deceased as a trade-off (it seems that the

Subaru might since have been used by the deceased's sister). The first and second respondents indicate that they have no objection to the return of the Polo to the deceased's estate if the second respondent's vehicles being the 4x4 and Subaru are simultaneously returned to the second respondent. No tender is made by the first and second respondents in respect of the Hilux, on the basis that it is claimed that it is the fifth respondent that is entitled to that vehicle.

[9] The issue thus becomes one as to whether there was such an agreement in terms of which the first and/or second respondents would be entitled to retain the Hilux and the Polo under any contract, right of retention, or attachment.

[10] The fact that the Polo and the Hilux are in the possession of the second respondent and are used by the second respondent and that the Subaru is in the possession of the deceased's sister, apparently in Nongoma, are objective facts which, prima facie, give some support to the first and second respondent's version that such an agreement as contended for him was concluded and implemented.

[11] The applicant was however critical of the first second respondent's version that there was such an agreement, pointing to the following:

- (a) That the first respondent made no mention of this version in any of the correspondence exchanged between the parties prior to deposing to his answering affidavit;
- (b) That the first respondent does not deny the Polo log book, nor any of the content thereof, and therefore admits that the deceased is listed as the registered owner of the Polo;
- (c) That the first respondent does not take this court into his confidence by alleging when the deceased concluded this agreement to swop vehicles, or who represented the parties, or where such an agreement was concluded;
- (d) That the first respondent has not attached any form of proof of ownership (or licensing document) pertaining to the Subaru and the 4x4;
- (e) The first respondent has not bothered to file any counter application for the return of the motor vehicles he claims the deceased swopped in support of his version;
- (f) The first respondent acknowledges that the second respondent would institute proceedings for the return of the second respondent's motor vehicles.

[12] In motion proceedings the affidavits contain both the pleadings and the evidence. The criticisms expressed by the applicant, in relation to the agreement for the swap of the vehicle, do have some substance. However, on probability, when weighed against the objective factors referred to in paragraph 10 above, which are consistent with such a possible agreement being implemented, I do not consider them individually or collectively to negate the first respondent's allegations under oath of the agreement contended for by the first respondent, even with the lack of particularity with which it is raised in the answering affidavit, to conclude on the affidavits alone that the first respondent's version falls to be rejected.

[13] Motion proceedings are not suited to resolving material disputes of fact. Where there is a material dispute of fact, then the respondent's version must prevail – see *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints Limited*.¹

[14] The applicant requested that if this Court was not prepared to reject the first and second respondent's version regarding such an agreement, to refer that issue for the hearing of oral evidence.

[15] The interests of justice require that such an order be granted. A suitable order referring this dispute to oral evidence is made below in respect of the claims of paragraphs 1(a) and (b) of the applicant's notice of motion.

[16] Regarding the relief claimed in paragraphs 1(c) and (d), 2, 3 and 5 the position in my view is as follows.

[17] It is not disputed that the deceased was a 50% registered member in the second respondent.

[18] On his death, the provisions of *inter alia* s 29 and s 35 of the Close Corporations Act 69 of 1994 would find application.

[19] The relevant parts of s 29(2) and (3) are as follows:

'(2) The following persons shall qualify for membership of a corporation;

(a) ...

(b) ...

(c) a natural or juristic person, *nomine officii*, who, in the case of a member who is insolvent, deceased, ... is a ... executor or curator in respect of such member or is otherwise a person who is his or her duly appointed or authorized legal representative.

(3) (a) The membership of any person qualified therefor in terms of subsection (2) shall commence on the date of the registration of a founding statement of the corporation

¹ 1984 (3) SA 623 (A).

containing the particulars required by section 12 in regard to such person and his or her member's interest.

(b) Where any person is to become a member of a registered corporation the existing member or members of the corporation shall ensure that the requirements of section 15 (1) regarding the lodging of an amended founding statement with the Registrar are complied with.

(c) A ... executor ... referred to in subsection (2) (c), in respect of any member of a corporation, who is not obliged or who does not intend to transfer the interest of the member in the corporation in accordance with the provisions of this Act within 28 days of his or her assuming office to any other person, shall within that period, or any extended period allowed by the Registrar on application by him or her, request the existing member or members of the corporation to lodge with the Registrar in accordance with section 15 (1) an amended founding statement designating him or her, *nomine officii*, as representative of the member of the corporation in question.

(d) ...

(e) The provisions of paragraphs (c) and (d) shall not affect the power of such representative, as from the date of his or her assuming office, and whether or not any such amended founding statement has been lodged, to represent the member concerned in all matters in which he or she himself or herself as a member could have acted, until the interest of that member in the corporation has in accordance with the provisions of this Act been transferred to any other qualified person.'

[20] Section 35 provides for the disposal of the interest of a deceased member, the relevant portions thereof reading as follows:

'Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties-

(a) cause the deceased member's interest in the corporation to be transferred to a person who qualifies for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person; or

(b) if any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member's interest-

(i) to the corporation, if there is any other member or members than the deceased member;

(ii) to any other remaining member or members of the corporation in proportion to the interests of those members in the corporation or as they may otherwise agree upon; or

(iii) to any other person who qualifies for membership of a corporation in terms of section 29, in which case the provisions of subsection (2) of section 34 shall *mutatis mutandis* apply in respect of any such sale.'

[21] It has been said, and this is no doubt correct, that sections 29 and 35 must be read together.

[22] The first respondent has indicated that he will not consent to any of the intestate heirs (which would in any event also depend on the solvency of the deceased estate, a matter yet to be determined after the lodging of all the claims) being substituted as members of the second respondent in the place of the deceased. No transfer as contemplated in s 35(8) would therefore follow. Ultimately the deceased's members interest in the second respondent will have to be sold by the applicant as contemplated in terms of s 35(b).

[23] The first and second respondents have however been critical of the applicant's claims in this regard referring *inter alia* to the decision in *Business Partners Limited v World Focus* 754 CC 2015 (5) SA 525 (KZD) at para 8 that the affidavits in motion proceedings contain both the pleadings in evidence. Specifically attention was drawn to the absence of any reference in the founding papers to the provisions of the Close Corporations Act. Applicants' counsel conceded that the Close Corporation's Act was only referred to in the replying affidavit.

[24] It is however also a principle of our law that although ideal, the relevant statutory provision upon which a party relies need not be specifically pleaded, provided that a factual basis for its application is laid. An expressed reference to the applicable statutory provision is certainly of assistance and incorporating same in affidavits constitutes a salutary practice. But the absence thereof is not necessarily fatal.

[25] The first and second respondents could not have been in any doubt that the transfer of the deceased's member's interest to the applicant was being claimed pursuant to the provisions of s 29 of the Act. There is no other legal provision which could possibly justify such a claim.

[26] The first and second respondents have resisted such a claim for transfer of the deceased's members interest to the applicant in her representative capacity on the basis that:

(a) The transfer was not claimed within 28 days as provided for in s 29(3)(c) and that no extended period allowed by the Registrar and application by 'him or her' had been requested;

(b) That as the issue in due course would be one of a proper valuation of the deceased's members interest in the second respondent, that I should model a practical and expeditious remedy to bring an end to the protracted litigation, along the lines of what was granted by Roelofse AJ in *Electronic Mining Supplies CC v Mabelane N.O. and Another*.²

[27] As regards the latter, at a practical level there is certainly much to commend it. However in *Electronic Mining Supplies* specific relief was claimed pursuant to s 37 of the Close Corporation's Act, including that the value of the shares be determined and that the procedure for establishing the value of the shares be provided. The parties counsel in that matter had no objection to the granting of an order with reference to s 35 of the Act.

[28] As in that matter, the present matter relating to the transfer of the deceased's membership interest has delayed for too long and the matter should have been put to rest much sooner. The failure to have engaged on the valuation of the deceased's members interest, however, appears to have stemmed largely from the attitude adopted by the first and second respondents to the registration of the deceased's membership interest in the applicant, and the exercise of her rights whether pursuant to s 29(3)(c), or otherwise. The implications of the provisions of s 29(3)(e) appear to have been disregarded. An order as was granted in *Electronic Mining Supplies* would certainly provide a practical resolution of the matter. However, where this has not been the subject of specific relief, claimed in this application, I am of the view that absent consent between the parties that I make such an order (which the applicant did not agree to) it would be improper to do so without first allowing the parties, with full realisation of their respective rights, pursuant to s 29 (in the case of the applicant), to determine and hopefully compromise on a value for the deceased's members' interest.

[29] The kind of order granted in *Electronic Mining Supplies* will no doubt act as a convenient guide to the parties and hopefully sense will prevail, a limited time should

² [2018] ZAGPPHC 648 at page 14.

be permitted to see whether the parties might not compromise on the value and reach agreement, and that failing agreement, consideration then being given to commence proceedings for such kind of relief or some variation thereof.

[30] As regards the argument in para 26(a) above, the registration of the deceased's members interest was indeed sought shortly after his death, possibly not pursuant to s 29, but it resulted in the membership of the deceased being registered in the applicant's name, albeit erroneously in her personal capacity and not her representative capacity 'NO'.

[31] It seems to me that the reliance on the 28 days provision is probably misplaced. To the extent that it is not, the Registrar defined as the Commissioner, has been cited as the fourth respondent in this application. He has not raised any objection to the claim for the deceased's membership interest to be registered in the name of the applicant 'NO'. It would involve simply an unnecessary additional cost if the matter was to be adjourned to request such leave, if indeed it is required.

[32] The applicant in my view is entitled to the relief in paragraph 2 and the consequential relief in paragraph 3 of the notice of motion.

[33] Pursuant to the provisions of s 29(3)(e) of the *Close Corporations Act* the applicant would, even pending registration of the deceased's members interest in her name, be entitled 'to represent the member concerned in all matters in which he or she himself ... as a member could have acted, until the interest of that member in the corporation has in accordance with the provisions of this Act been transferred ... to her'. In that capacity, although not clearly alleged in the founding affidavit, she was entitled to copies of all financial records of the second respondent and to joint venture contracts and other documents as contemplated in paragraphs 1(c) and (d) of the notice of motion. She would be entitled to exercise her rights *qua* member to claim access to these records and any other records to which a member would normally be entitled. In that capacity she would also be entitled to exercise rights relating to any inContact service associated with the second respondent's bank account held with the third respondent.

[34] She is accordingly entitled to the relief claimed in paragraphs 1(c) and (d) and 5 of the notice of motion.

[35] No sustainable legal basis could be advanced for the claim in paragraph 4 of the notice of motion being granted in motion proceedings. The submissions advanced by the applicant vacillated between it being a contractual claim for

damages, or an enrichment claim. Neither can, and should be pursued by way of application procedure. If so advised, then it should be pursued by way of action. The instalments payable in terms of any credit agreement are not necessarily the measure of any actual enrichment. The relief claimed in paragraph 4 is accordingly dismissed.

[36] In the light of my aforesaid conclusions, the applicant has been partially successful in respect of the claim to registration of the deceased member's interest in her name, in her representative capacity, but unsuccessful in regard to the relief in paragraph 4 of the notice of motion. The costs relating to the referral to oral evidence of the relief in paragraphs 1(a) and (b) of the notice of motion must obviously be decided by the court hearing that evidence.

[37] In the exercise of my discretion on costs I direct that the first and second respondents jointly and severally pay 50% of the applicant's costs to date, such costs excluding those relating to the hearing of the issue referred for the hearing of oral evidence.

[38] The order I grant is therefore as follows:

1. The issue whether an agreement was concluded between the first and/or second respondents with the deceased in terms whereof the first and/or second respondents would be entitled to the continued possession and use of:
 - (a) the 2012 Toyota Hilux 2.0 VVTI pickup single cab vehicle; and
 - (b) the Volkswagen Polo vehicle with the registration [...];
 as a trade-off for the deceased having been given possession of a Toyota Hilux 4x4 vehicle and a Subaru sedan, is referred for the hearing of oral evidence on a date to be arranged with the Registrar.
2. The evidence relating to the issue in paragraph 1 above shall be that of witnesses who have deposed to affidavits and any further witnesses the parties may wish to call provided that a summary of such witnesses' evidence has been delivered to the opposing party 15 days prior to the oral evidence, unless the witness has to be subpoenaed.
3. The provisions of Rule 35, 36, 37 and 38 shall apply to the hearing of the oral evidence.

4. The costs relating to the relief claimed in paragraphs 1(a) and (b) of the Notice of Motion are reserved and shall be determined by the court hearing the oral evidence.
5. An order is granted in terms of paragraphs 1(c) and (d), 2, 3 and 5 of the Notice of Motion.
6. The relief claimed in paragraph 4 of the Notice of Motion is dismissed.
7. The first and second respondents jointly and severally are directed to pay two-thirds of the applicant's costs to date but excluding the costs relating to the relief claimed in paragraphs 1(a) and (b) of the Notice of Motion reserved in paragraph 4 above.

KOEN J

Appearances

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