IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: MTHATHA

CASE NO. 2427/2017

PEACE NOMPEPHO NTLOKO	**Applicant**
and	
SHAKESPEARE MBONISI SIGABA &	**1ST Respondent**
MASHACK MKHULULI MKHUNYANA	**2ND Respondent**
CWAYITA PROPERTIES CC (Registration No 1997/062792/23)	**3RD Respondent**
FIRST RAND BANK LIMITED	**4TH Respondent**
STANDARD BANK OF SA LIMITED	**5TH Respondent**

JUDGMENT

BROOKS J

[1] The applicant, the first respondent and the second respondent are all members of CWAYITA PROPERTIES CC, a close corporation registered in accordance with the laws of this country and cited as the third respondent in the proceedings.

[2] When this matter first appeared on the opposed motion court roll it was apparent from the perusal of the affidavits placed in the court file that the matter should be capable of settlement. To this end the parties were engaged through

their legal representatives and, to the credit of all concerned, agreement was reached on all aspects of the matter save that relating to liability for payment of the costs of the application. The parties were in agreement that costs should be reserved and that supplementary heads of argument should be filed to assist the court in reaching a decision on this outstanding issue. This has now occurred.

[3] A brief summary of facts which constitute the background to this application is called for. Upon its registration, a bank account with Standard Bank of South Africa Limited, cited as the fifth respondent, was opened in the name of the third respondent. During July 2016 the applicant became aware that this bank account was being operated by the first respondent without transactions thereon being authorised by a second signatory nominated on the account. By then, all three members of the third respondent had reached an advanced age and each gave authority to a family member to represent them on a newly formed management committee. Some meetings were then held by the management committee.

[4] In due course it became apparent that the first respondent had unilaterally opened a second bank account in the name of the third respondent. This account was placed with First National Bank Limited, cited as the fourth respondent. A number of other issues relating to the operation of the business of the third respondent also emerged. Some of these were addressed at a subsequent meeting of the third respondent’s management committee and further agreements were reached. One of these was that a third meeting of the management committee should occur on a specified date.

[5] The further meeting of the management committee did not occur. The applicant alleges that the relationship between the members of the third respondent soured. She stated in her founding affidavit that "the first respondent stopped co-operating". Letters written to him, seeking information and supporting documentation, went unanswered. The applicant resorted to the issue of this application.

[6] Active opposition to the application by the first respondent revealed that little factual dispute existed between the parties. The first respondent contended that the application was unnecessary as he was at all times prepared to agree to the relief being sought. It was also contended that it was unnecessary for the applicant to pursue the application after receiving the first respondent's answering affidavit.

[7] An analysis of the affidavits exchanged by the parties reveals that there is merit in the concerns raised by the applicant. Indeed, the first respondent did open a new account with the fourth respondent. He did so unilaterally. As part of his reason for doing so he complained that the applicant did not show sufficient interest in the third respondent's affairs for a period of approximately thirty years. This is disputed by the applicant.

[8] In my view, the first respondent is to be criticised for his management style reflected in the facts pertaining to the management of the third respondent's affairs. Even if the applicant showed insufficient interest in the third respondent's affairs, the first respondent should have called a meeting of its members to discuss a resolution of the problem. This was not done. Instead,

the first respondent conducted the affairs of the third respondent unilaterally and in apparent contravention of earlier resolutions taken at a time when the third respondent's members were communicating more effectively. This is not the way to manage lawfully the business affairs of a close corporation. The first respondent was never authorised by the third respondent, acting through its members, to conduct the business of the third respondent in the manner which is admitted in the answering affidavit.

[9] Moreover, the various offers at co-operation made by the first respondent in his answering affidavit had dictatorial conditions attached to them. Given the history between the parties and the qualified nature of the concessions and co-operation offered by the first respondent, it is understandable that the applicant saw no alternative but to pursue the application.

[10] The criticism of the applicant for instituting these proceedings in the first place must also be evaluated in the light of breakdown in the relationship between the applicant, the first respondent and the second respondent. Whilst, technically, it was open to the applicant to call for a meeting of members of the third respondent in an attempt to avoid the need to approach the court, from a practical perspective this seems to be a step which would have been unlikely to produce a positive result which would have avoided litigation. In evaluating her position the applicant had the experience of the failure of the management committee meetings to guide her. This failure would have been sufficient reason not to bother to call a members' meeting before approaching the court. In this the applicant's circumstances are distinguishable from those in which the first respondent found himself some years ago. He offered no explanation for his failure to call a members' meeting in order to resolve a way forward for the

business affairs of the third respondent. No management committee had yet been formed. On either version, no adequate explanation is given by the first respondent for the unlawful manner in which he single-handedly elected to proceed.

[11] It follows that in my view there has been no valid reason identified or advanced by the first respondent to justify an order for costs which does not follow the result of his agreement to the substantive relief claimed by the applicant. In contrast, the applicant has established good reasons for both approaching the court and pursuing the application to finality.

[12] The following order will issue:

> "The first respondent is directed to pay the costs of this application on an opposed basis and on the scale as between party and party."

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv LM Mills

Instructed by: Gcolotela & Peter Inc

c/o Jolwana Mgidlana Inc

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Mthatha

For the first respondent:	Adv DC Botma
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Date heard:	08 February 2018
Date delivered:	08 May 2018