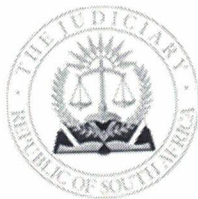


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 1134/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE: 21/09/18 SIGNATURE: <i>[Signature]</i>	

In the matter between:

SEDIBA ELECTRICAL CC & 02 OTHERS

APPLICANTS

And

THATHANE EDWARD LETSWALO & 3 OTHERS

RESPONDENTS

JUDGEMENT

KGANYAGO J

- [1] The first applicant Sediba Electrical CC is a Close Corporation. The second applicant Martha Hermina Elizabeth Pieterse, third applicant Gerhardus Van Deventer and first respondent Thathane Edward Letswalo are all members of the first applicant. The second applicant is holding 39% membership interest in the first applicant, third applicant holding 10% membership interest in the first applicant and first respondent holding 51% membership interest in the first applicant.
- [2] Second Respondent Thuso Le Kgwerano Projects (Pty) Ltd is a registered company. Its directors are the third respondent Mmampopo Precious Anna Letswalo and fourth respondent Tshelahale Julia Letswalo. The third respondent is the daughter to the first respondent, whilst the fourth respondent is the wife to the first respondent.
- [3] The first applicant is rendering electrical services and products of an electrical nature. The second applicant is responsible for the day to day management of the first applicant's finances, human resources and client policies. The third applicant, first respondent and employees of the first applicant are responsible to attend to the provision of electrical services to the first applicant's clients.
- [4] On the 6th March 2018 the applicants brought an urgent application against the respondents seeking an order that the first respondent be interdicted and restrained from alienating, sharing or disposing certain information or documents relating to the trading of the first applicant to the second up to the fourth respondents; that the first respondent's

membership interest in the first applicant be transferred to the first applicant; that the first applicant be directed to purchase the first respondent's 51% membership in the first applicant; that the first applicant pay a market value of the first respondent's members interest and per the procedure they have stipulated in that prayer; that in the event the first respondent unwilling to accept the determination of the person appointed, proceedings to obtain a judicial substitute valuation may be instituted by the dissatisfied party or both parties, failing which the independent determination in terms of this order shall be final and binding on parties; and that the first respondent shall be paid the purchase price of his member's interest within 15 days of receipt of the valuation of his member's interest in the first applicant.

- [5] On the 6th March 2018 the applicants' obtained an order in terms of prayer 2 of their notice of motion wherein the first respondent was interdicted and prohibited from alienating, disposing of or sharing any information, documentation, trade secrets or pricing scales, being property of the first applicant with the second to fourth respondents. The remainder of the prayers were postponed sine die. When the matter was heard on the 1st August 2018 in relation to the reminder of the prayers, counsel for the applicants' informed the court that the first applicant has ceased its trading operations with effect from the 31st May 2018, and that they are no longer pursuing prayer 2 which was granted on the 6th March 2018, but are proceeding with the reminder of the prayers in order to establish

a protocol and procedure of how they are going to divide or pay the first respondent's 51% members interest.

- [6] The facts leading to this application are briefly as follows: On the 15th December 2017, the first respondent through his attorneys addressed a letter to the applicants stating that he had no knowledge of how the Quickbus 101 CC was either funded or managed; he was requesting access to financial statements, association agreements and a list of assets of the Quickbus 101 CC,
- [7] According to the applicants, on 8th January 2018 they together with first respondent attended a management meeting. At that meeting they enquired from the first respondent's about his unhappiness and he told them to speak to his attorneys. The applicants were hurt by his response and they asked him whether he still wished to proceed with the business and he told them that he wanted to proceed.
- [8] On the 30th January 2018 the applicants realised that there was too much animosity on the part of the first respondent towards them. As a result of that they decided to go and consult with their attorneys regarding the letters they received from the first respondent. Their attorneys advised them to furnish the first respondent with the documentation he was requesting.
- [9] The attorneys of both parties arranged a meeting for the 9th February 2018 to be held at 9h30 in Pretoria at the chambers of the first respondent's counsel. On the 9th February 2018 the applicants and their attorney drove from Lephalale to Pretoria and arrival were informed that the meeting has been cancelled and

that an e-mail was sent the previous day to notify them about the cancellation. That e-mail did not come to their attention.

- [10] According to the second applicant, on the 6th February 2018 whilst trying to locate the financial statements requested by the first respondent on the applicant's server, she came across certain documents and printed them. When she went to collect them at the printer, she came across an invoice in the name of the second respondent. The invoice was made to Trioflex for rendering of electrical services. The contact person according to the invoice was the first respondent. The cell phone numbers that appears on that invoice was that of the first respondent. She found that the invoice originated from the first respondent's e-mail address.
- [11] Upon searching of the applicant's server she found an e-mail dated 14th May 2017. That e-mail related to a workshop that was held during May 2017. This e-mail was sent from the applicant's server to the second respondent's e-mail address. She also found a second and third e-mail which were a request for an Eskom contract. Both e-mails were dated 2nd March 2017 and addressed to the second respondent's e-mail address. She also found further e-mails which were sent to the applicant for the applicant to tender for various electrical contracts, and those e-mails were forwarded to the second respondent. The applicant's risk assessment report in microsoft excel format was sent from the applicant's e-mail server to the second respondent on the 30th January 2018. She also found a number of reports like a completed application for registration in the supplier's database for Limpopo Government completed in the name of the second respondent. According to the applicants the first applicant's pricelist of

charges for costing for a tender done in respect of contracts which the first applicant tendered were forwarded to the second respondent. She also found the second respondent's business profile which was sent to the second respondent from the applicants e-mail address.

- [12] Based on what has been mentioned in paragraph 11 above, the applicants are of the view that the first respondent is acting in breach of his fiduciary duty to the first applicant. They are further of the view that he is not acting in the best interest of the first applicant and further that he is having a material conflict of interest between the first applicant and second respondent which is run by members of his own family.
- [13] The first respondent deposed his answering affidavit in his personal capacity and also on behalf of the second, third and fourth respondents. According to the first respondent, he and the second and third applicants registered the first applicant for the purpose of qualifying for tenders in terms of the relevant BEE requirements and that is the reason he had the majority interest. He is a qualified electrician and did not have the real experience of running a business. He was never involved in the running of the business nor was he invited to attend to any management meetings. On occasions he was requested to sign cheques mostly for petty cash when the second applicant was not available. He had trusted other members to attend to the financial side of the business and he will just sign financial statement when requested. He did not have the knowledge to really understand financial statements, but was made to understand that they are done by financial people in order to comply with tax laws.

- [14] He started to be concerned in the manner in which the business was run and when he seek clarity he was met with hostility and evasive answers. He then engaged the services of his attorney and that is when his problems with the applicants started. The reason for engaging his attorney was to bring other members of the closed corporation to the table so that full disclosure could be obtained, and also that all issues that were unclear to him could be addressed. In his opinion the applicant has launched this application with the sole purpose of preventing him from obtaining information of the two closed corporations and to prevent a possible investigation on the closed corporations.
- [15] According to the first respondent, the second respondent is a small business run by third and fourth respondents and has no capacity. He contends that his personal computer was hacked and documents were falsified in an attempt for the applicants to obtain the relief they are seeking. The second respondent has no employees and also does not qualify for tenders that the first applicant was tendering for. He further stated that the documents found in his computer were either falsified or innocent, and has no reference to the first applicant nor is it prejudicial to the first applicant. He was assisting the third respondent as a father will assist a daughter with general advice and generic material to motivate and teach her. None of the material was of a secret nature or was it material that could be used by second respondent to the prejudice of the first applicant. As a majority member of the first applicant he would never act contrary to his fiduciary obligations to the first applicant. The first applicant was his only source of income, and acting to its detriment would also be acting to his own detriment.

- [16] He stated that the invoice that was found on his computer was sent by the third respondent for him to print as she was attending a course and did not have time or opportunity to print it. He printed it and gave it to her after work. He had previously given her his template to use it as an invoice, and that was innocent with nothing underhand.
- [17] The first respondent stated that the invitation to the workshop which he had forwarded to the third respondent was to notify her about the workshop so that she can decide whether to attend or not, and there was no conflict of interest with the first applicant.
- [18] With regard to the invitations to tender, the first respondent states that he could have been naïve but never thought that he was acting incorrectly or contrary to his fiduciary duty towards the first applicant. What he did was to motivate the third respondent to continue with the business, to expand and grow it. If the applicants did not have any hidden agenda, they could have had a discussion with him and he would have stopped if they felt uncomfortable.
- [19] With regard to the application for registration in the suppliers' database of Limpopo Provincial Government the first respondent states that it relates to catering services. With regard to the email of the 8th February 2018 it relates to documents explaining the standard conditions of Eskom tendering and related documents. Any person can obtain those documents and he was merely assisting the third respondent. With regard to the other document dated 8th February 2018, it is a tender for R4 000 000-00 to R6 500 000-00. The second respondent could tender up to approximately R250 000-00 and he was just motivating her.

- [20] According to the first respondent, the risk assessment report was a template which has no private or confidential information on it regarding the first applicant. The nature of the risk assessment document is largely generic in nature and wanted to show the third respondent how it looks. He had no malice in sending her the document. The quotation relates to catering services which in no way conflict with the first applicant's business.
- [21] The first respondent has stated that the price list is a generic template which was drafted to compile a quotation. The price would fluctuate depending on the condition and work entailed and it is not a price list of the first applicant. It has no reference to any specific company or work and was merely forwarded as an example.
- [22] With regard to the costing for a tender done in respect of contract which applicant tendered, according to first respondent it has been falsified. He would never have forwarded that document to any person without due authorisation as he indeed regard it to be private and confidential. The applicants have used a covering page of the email of the 30/01/2018 which was for a catering quote and attached it to the costing tender as if it was sent by him.
- [23] The first respondent contends that with regard to the business profile of the second respondent, there is nothing sinister about it. The third respondent merely forwarded it to him to study it, and where applicable make recommendations as to amendments or improvements. The only interest he had in the second respondent was that as a father and husband, he wanted to assist by way of guidance and advice. He shall not in future assist the third respondent with advice or documentation that could possibly be construed as acting contrary to the interest of the first applicant.

[24] The applicant's application for the first respondent cessation of his member's interest in the first applicant has been brought in terms of section 36 of the Close Corporation Act 69 of 1984 ("the CCA") read with the provisions of section 42 and 49 of the CCA. The applicants were initially seeking an interdict against the first, second and third respondent. However, since the first applicant is no longer in trading, they are no longer seeking that order as it has now become moot. Since that applicants have conceded that the interdict order is now moot, I will not take the matter any further.

[25] Section 36 of the CCA provides that:

"(1) On application by a member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

- (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 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 in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on business of the corporation with him; or*
- (d) That circumstances has 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*

(b) 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 orders as it deems fit in regard to-

(a) The acquisition of the member's interest concerned by the corporation or by members other than the member concerned, or

(b) The amounts (if any) to be paid in respect of the member's interest concerned or claims against the corporation of that 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."

[26] Section 42 of the CCA provides:

"(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 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 exceed the powers aforesaid; and

(b) Shall avoid any material conflict between his own interest and those of the corporation, and in particular –

(i) Shall not derive any personal economic benefit to which he is not entitled by reason of his 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 interest 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 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) A member of a corporation whose act or omission has breached any duty arising from his 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.

(b) Where a member fails to comply with the provisions of subparagraph (ii) of paragraph (b) of subsection (2) and it becomes known to the corporation that the member has an interest referred to in that subparagraph in any contract of the corporation, the contract in question shall at the option of the corporation, be voidable: Provided that where the corporation chooses not to be bound a Court may on application by any interested person, if the court is of the opinion that in the circumstances it is fair to order such contract shall nevertheless be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

(4) Except as regard his duty referred to in subsection (2) (a) (i), any particular conduct of a member shall not constitute a breach of a duty arising from his fiduciary relationship to the corporation, if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.”

[27] Section 49(1) and (2) of CCA provides:

(1) Any member of the corporation who alleges that any particular act or omission of the corporation or of one or more 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, may make an application to court for an order under this section.

(2) If on any such application to the 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 by other members thereof or by the corporation.”

[28] It is the applicants' contention that the first respondent has breached the fiduciary duty towards the first applicant by divulging certain information and documentation to the third respondent. The applicants further contends that the first respondent has a material conflict of interest between the second

respondents' business, run by members of his own family and in respect of which he is the relevant contact person, and the business of the first applicant. The first respondent on the other hand dispute that he had breached the fiduciary duty towards the first applicant and also that he had no conflict of interest between the second respondent and the first applicant. According to the first respondent, the applicants have launched this application to prevent him from obtaining information of the two closed corporations and also to prevent a possible forensic investigation of the closed corporations.

[29] A member of a close Corporation has a fiduciary duty to act in the best interest of the close corporation, to prevent a conflict of interest and to act in good faith. Any situation that might result with the member acting in conflict with the close corporation should be avoided. For a member of the close corporation to be held to be in breach of his fiduciary duty, it must be shown that he deliberately withheld or released information of confidential nature to outside people which information are material to the affairs of the close corporation.

[30] In **Gheri and Others v Tiber Developments (Pty) Ltd and Others 2007(4) SA 536 (SCA)** at para 9 the Court said:

"It does not follow that because a person is a director of a company which engages in property development, such person is automatically, in the absence of an agreement to the contrary, obliged to offer all property developments of whatever nature to the company, on pain of being held to have breached his or her fiduciary duty to the company and being required in consequence to hand over profits made from the developments not so offered. As Bristowe AJA held in Robinson v Randfontein Estates Gold Mining Co Ltd:

'To establish that the defendant's purchase in 1906 was covered by his fiduciary relation or his agency or an implied mandate (I do not think it makes much difference which term is employed) it would not be enough to show that the purchase was within the company's power or that the property might have been to it. *Burland v Earle* is against this. Besides it would be intolerable if a director, even though occupying the defendant's position, could be held accountable for any private purchase of property merely because his company might conceivably want it!

That the ambit of the duty can change from time to time, appears from the decision of this court in Bellairs v Hodnet. In summary, as this court held in Philips v Fieldstone Africa (Pty) Ltd:

'The existence of [a fiduciary duty] and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship.'

[31] The first applicant was established during 2002 for purposes of qualifying for tenders. The first respondent became a member of the closed corporation for the purpose of complying with the BEE requirement. For the past 15 years there is no evidence that the parties were encountering any problems. The problems started when the first respondent engaged his legal representative to communicate with the applicants. The whole issue was triggered by a letter dated 13th December 2017 from the first respondent's attorneys to the applicants. In that letter the first respondent wanted some information regarding Quickbus 101 Close Corporation and the first applicant.

[32] What thereafter aggravated the whole situation seems to be the aborted meeting of the 9th February 2018 in Pretoria which was called by the first respondent's attorney's as this application was launched immediately after that

trip. The applicants' and their attorney had to travel about 300km single trip and when they arrive in Pretoria were told that the meeting has been cancelled. From the applicants' founding affidavit it is clear that they did not take kind of that. After this failed meeting that is when the issues of alleged breach of fiduciary duty and alleged conflict of interest arose.

- [33] According to the first respondent, he was not involved in the day to day running of the business and has no experience in the running of the business. He wanted to be involved in the running of the business, but it seems the applicants wanted to side-line him hence as a last resort he had to engage his attorney.
- [34] Except for the costing for tender done in respect of contract which the first respondent had tendered, the first respondent admit the allegations against him but dispute that the documents were confidential in nature or that there was any conflict of interest. With regard to the costing tender, the first respondent has filed an affidavit by Trevor Boltan an expert who did an investigation in relation to that specific document. His conclusion was that the document seems to have been fraudulently sent. The applicants did not file any report by their own expert to counter this report and therefore the first respondent's version on his aspect remain unchallenged, and on this aspect the matter will be decided on the first respondent's version.
- [35] With regard to the remainder of the allegations levelled against the first respondent, since the first respondent is not disputing them, the question is whether they are so serious to justify the cessation of the first respondent's membership interest in the first applicant.

[36] In **Da Silva and Others v CH Chemicals (Pty) Ltd 2008 (6) SA 620 (SCA)** at para 19 the court said:

“...While any attempt at an all-embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was actively pursuing (Canadian Aero Service v O’ Malley(1973) 40 DLR (3d) 371 SCC at 382) or one which can be said to fall within the company’s existing or prospective business activities (Davies, Gower and Davies ‘Principles of Modern Company Law 7ed at 422) or which related to the operations of the Company within the scope of its business’(Bellars V Hodnett 1978 (1) SA 1109 (A) at 1132H) or which falls within its line of business (More Camera Company (Pty) Ltd v Van Wyk [2003] 2 All SA 291 CC) at 308 b; 313 d-e). Ultimately, the inquiry will involve in each case a close and careful examination of all the relevant circumstances, including in particular the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director’s own benefit or for that of another, gave rise to a conflict between the director’s personal interests and those of the company which the director was then duty bound to protect and advance.”

[37] Some of the emails sent from the first respondent’s email address to the second respondent relates to catering services. The first applicant was not in the business of catering, and catering does not fell within its scope of business. Registering on the government’s database, anybody is free to register of the government database as long as the requirements for registering are met. Sending that information to the second respondent as information which it can use to register on the government database can in no way constitute conflict of interest or amount to releasing documents of confidential in nature. Anybody

can access those documents from the government website. Forwarding to the second respondent a document about a workshop will not constitute a conflict of interest or breach of a fiduciary duty. For a father assisting her daughter in compiling a company profile in the circumstances of this matter in my view will not constitute a conflict of interest or breach of fiduciary duty.

[38] As I have already pointed out above, the applicants and the first respondents have been members of the first applicant for the past 15 years without problems. In my view 15 years in a relationship is a long time, and by then they knew each other very well. If a member had encountered problems with each other, the first thing they would have done was to confront the other party for an explanation. In this case the applicants did even try to find out from the first respondent as to what was happening, but they immediately launched an application without giving the first respondent an opportunity to explain himself. In my view, this gives credence to the first respondent's contention that he was not involved in the running of the business and that this application was launched to prevent him from obtaining information of the two closed corporations and to also prevent a possible forensic investigation of the closed corporations.

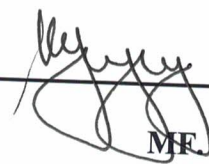
[39] It is undesirable that the first respondent use the resources of the first applicant in assisting the second respondent. However, in my view, even if the first respondent did that, the breach is so slight that it will not be just and equitable to order the first respondent's member's interest to be transferred to the first applicant. (See **Bellairs v Hodnett 1978 (1) SA 1109 (A)**). Taking into consideration the years of the relationship of the members of the first applicant have been, in my view, this issue of the applicants finding documents on the

first applicant's server could have resolved by confronting the first respondent to explain himself, unless the applicants had some ulterior motives which seems to be the case in this matter. The applicants' intention was to prevent the first respondent from obtaining information about the two closed corporations and how they were run. They were comfortable with the first respondent been a salaried director and not knowing how the closed corporation which he was the majority shareholder was run.

[40] Members of the closed corporation have a fiduciary duty to act in good faith and in the interest of the closed corporation. They are not allowed to place themselves in a position where their fiduciary duties conflict that of their personal interest. The only breach that I find that the first respondent has committed, is to print the invoice sent by the third respondent. He had used the first applicant's resources in assisting the third respondent without the consent of other members. However, that breach is so slight and does not justify the relief the applicants are seeking. With the remainder of the other complaints, I don't find any facts to conclude that the first respondent has breached his fiduciary duty or that he had a conflict of interest. If the main issue for the applicants is to determine a protocol and procedure of how they are going to divide or pay the first respondent's 51% members interest, since the first applicant is no longer trading but still have some assets, the proper remedy is to wind it up rather than follow the procedure which they have ventured into.

[41] In the result I make the following order:

41.1 The applicants' application is dismissed with costs.



MR. KGANYAGO J
JUDGE OF THE HIGH COURT POLOKWANE,
LIMPOPO DIVISION

APPEARANCE:

COUNSEL FOR THE APPLICANT	: Mr Lewies
INSTRUCTED BY	: Lewies & Associates
COUNSEL FOR DEFENDANT	: Adv PJ Coetsee
INSTRUCTED BY	: Phukubye Attorneys
DATE OF HEARING	: 1st August 2018
DATE OF JUDGEMENT	: 21st September 2018