REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 35399/2015

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

……………………. …………………….

DATE SIGNATURE

In the matter between:

RHANDANI GIZZLA MAKONDO	**APPLICANT**
And	
MAXANGU COLLET MAKONDO	**1ST RESPONDENT**
THOBILE MELANIA MFEKA	**2ND RESPONDENT**
MELCO CONSULTING & PROJECT CC	**3RD RESPONDENT**
THE REGISTRAR OF COMPANIES AND CLOSE CORPORATIONS	**4TH REPONDENT**

FIRST RAND BANK LIMITED t/a inter alia FIRST NATIONAL BANK BUSINESS BANKING (FORMALLY FIRST NATIONAL BANK OF SOUTHERN AFRICA — **5TH RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant brought this application seeking an order as follows:

“1. Dispensing with the forms and time periods stipulated in the Rules for the Conduct of proceedings in the above Honorable Court, and disposing of this application as an urgent application in accordance with the provisions of Rule 6 (12).

2. Interdicting and prohibiting the first respondent from making any further transaction on the business banking account of Melco Consulting & Projects CC, account number [.....] held with First National Bank, Carlswald Branch;

3. Suspending the aforesaid bank account, on a temporary basis, and permitting only transactions necessary for paying the administrative expenses and payment of salaries;

4. Ordering the first respondent to provide a full and comprehensive account of all of the activities and transactions done on the aforesaid banking account from 30 April 2015 to date;

5. Declaring that the removal of the applicant and the second respondent as members of Melco Consulting & Projects CC from the Register of Companies and Close Corporations is unlawful and is set aside;

6. Ordering that the names of the applicant and the second respondent be reinstated to the Register of Companies and Close Corporations within 48 hours of the granting of this order;

7. Further and/or alternative relief as this court may deem necessary."

[2] It will be noted that the Notice of Motion does not seek an order for costs. This aspect is dealt with later.

[3] The matter was on the roll on 26 May 2015, 27 May 2015 and 29 May 2015. Advocate B.L Manetsa (Mr. Manetsa) and Advocate R.S Willis (Mr. Willis) appeared for the applicant and the first respondent respectively.

[4] This matter was on the roll simultaneously with matter number 34.

[5] The parties, in the meantime, after the filing of the replying affidavit, filed the supplementary affidavit; the supplementary opposing affidavit; the second supplementary opposing affidavit and the second bis supplementary opposing affidavit. Mr. Manetsa opposed the filing of the opposing affidavits. The parties addressed the court on whether these documents were to be allowed. In the interest of justice, I allowed and accepted the documents.

BRIEF FACTS

[6] In 2013, the applicant, the first respondent and the second respondent started a business and, using a close corporation which was formed by the second respondent provided project management and audit verification services for their biggest client, the Department of Human Settlement. The close

corporation also did construction work for the Department. The applicant provided and advanced a loan to the close corporation to enable it to start operating. This amount that the applicant provided and advanced, according to her, was the sum of R497 000.00. The first respondent, however, seems to allege that the amount was R297 000.00. The difference in the amount, for the purpose of this application, is of no moment. The amount would be repaid to the applicant once the close corporation started generating income. An amount of R297 000.00 has been repaid. The applicant contends that she assumed the roles of a financial and marketing director while the first respondent became CEO of the close corporation. The parties agree that the second respondent was a sleeping partner who was not involved in the running of the close corporation. The first respondent contends that when the close corporation was set up the understanding was that she would be the managing member while the applicant would be responsible for the administrative and secretarial part of the business. Again, the difference in their respective positions, is neither here nor there. The first respondent further contends that the applicant would be a salaried employee of the corporation earning a monthly salary of R22 500.00 per month. This too, in my view, has no bearing on the issues to be determined in this application. It appears to be common cause that the business started to generate substantial income in early 2014. The parties then started to have grave disagreements and feuding between them during the second half of 2014. Money was the central problem. It is noteworthy that the membership of the applicant, the first respondent and the second respondent in the third respondent was equal. They each held ⅓ membership interest in the close corporation. This is evidenced by annexure FA 37 to the applicant's founding affidavit. They each had access to the business banking account of the third respondent, account number [.....], Calswald Branch held with the fifth respondent. It is also worth noting that the first respondent is a businesswoman who is a duly qualified quantity surveyor. The applicant and the first respondent are sisters. The grave differences and the feuding between the parties resulted in this application which is opposed by the first respondent. In the main, the applicant contends that the first respondent unlawfully removed her and the second respondent as members of the third respondent from the Register of Companies and Close Corporations and barred them from accessing the third respondent's account with the fifth respondent.

[7] The court, on 26 May 2015, ruled that this matter together with matter number 34 were urgent. This resulted in the postponement of the two matters and the exchange of the documents that I referred to in paragraph 5 above.

THE ISSUE TO BE RESOLVED

[8] This is whether the applicant has made up a case to be entitled to the relief that she seeks.

[9] The applicant contends that she, indeed, is entitled to the relief while the first respondent contends otherwise.

[10] It will be remembered that these are motion proceedings. Resolution of factual disputes in motion proceedings is governed by well known rules and principles. These principles and rules have been dealt with in various cases

some of which I shall refer to. It has been said that where it is clear that disputes will arise in motion proceedings a party will be well advised to proceed by way of an action and not motion proceedings. **(See Room Hire Co (Pty) Ltd v Jeppe Street Mansions (below) at 1166 and 1168.)**

[11] In **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 155 (T) at 1163,** the court stated that a dispute of fact may arise

"(a) when the respondent denies all the material allegations made by the various deponents, on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed" whether the respondent is *bona fide* or not depends on the available evidence. The evidence may be such that the respondent's "contentions are insufficient, to render resort to a trial action compulsory." **(See Room Hire case at 1164)**.

[12] **In Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 at 375 paragraphs [12] and [13] Heher JA said:**

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, <u>accept the version set up by his opponent unless the latter's allegations are in the opinion of the court, not such as to raise a real genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers:</u> **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C**.(my emphasis)

[13] A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. Where the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[14] **In Stellenbosch Farmers' Winery v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 E-G, Corbbett JA said**:

"… where there is a dispute as to the facts a final interdict should be granted in notice of motion proceedings <u>if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order</u> …. <u>Where it is clear that facts, though not formally admitted, cannot be denied they must be regarded as admitted</u>". (my emphasis)

This is the general rule that has been followed over the years which has been very helpful where disputes of fact arose necessitating their resolution.

[15] The first respondent contends that she lawfully took transfer of the applicant's membership and that she never unlawfully 'misappropriated' same as alleged by the applicant or at all. The first respondent contends that a real and genuine dispute of fact has arisen in respect of this aspect while the applicant contends that the first respondent's version, in this regard, is far-fetched and deserves to be rejected having regard to the objective facts.

[16] Erasmus: Superior Court Practice at B1- 48D and the authorities therein cited holds the view that, the court in every case "must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence". This is done to obviate a respondent's intention to "raise fictitious issues of fact" and thereby delay the hearing of the matter to the prejudice of the applicant. **(See Plascon- Evans Paints case (supra) at 634I; Peterson v Cuthbert & Co Ltd 1945 AD 420 at 429 and Wightman t/a JW Constructions v Headfour case (supra) at 375E).** At B1-49, Erasmus (supra), it has been stated that

vague and insubstantial allegations are not adequate to raise the kind of disputes of fact that should be referred for oral evidence. Where a respondent intends to raise a serious matter, "the matter must be based on fact not *rumour, innuendo* or inference based only on speculation". A bare denial of the applicant's allegations in his or her affidavits does not generally suffice to generate a genuine or real dispute of fact. Courts have to take 'a robust, common-sense approach' to disputes on motion and not avoid or hesitate to decide issues on affidavit merely because it may be difficult to do so**. (See Sofiantini v Mould 1956 (4) SA 150 (E) at 154G-H; Truth Verification Testing Centre v PSE Truth Detection CC 1998 (2) SA 689 (W) at 698H-I; Tecmed (Pty) Ltd v Hunter 2008 (6) SA 210 (W) at 217I-218B and Rosen v Ekon 2001 (1) SA 199 (W) at 215B-D.)** Where the court is satisfied that there is no real and genuine dispute on the facts in question, or where a party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers or where *viva voce* evidence would not disturb the balance of improbabilities appearing from the affidavits, decisions of fact can properly be founded on a consideration of the probabilities. This rule can be employed where disputes of fact have arisen and where an applicant seeks to obtain final relief on the basis of the undisputed facts together with the facts contained in the respondent's affidavits **(See Plascon-Evans case (supra) at 634H-635C; Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430H-431A; Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at 392 C-G and Yunnan Engineering CC v Charter 2006 (5) SA 571 (T) at 580E-J.)**

COMMON CAUSE FACTS

[17] These are that:

1. The applicant, the first and second respondents held an equal membership interest of ⅓ in the third respondent
2. The applicant provided capital to start the business of the third respondent.
3. The business started to generate substantial income in early 2014.
4. Grave disagreements and feuding between the members surfaced because of the substantial income that was generated
5. Members, because of the access that they had to the business account with the fifth respondent, started withdrawing money from the account.
6. Names of the applicant and the second respondent were removed from the register of the close corporations held by the fourth respondent.
7. Their membership of the third respondent, as a result, ceased.
8. They, as a result, also could not access the account.
9. There was an attempt, by the first respondent, to stop the membership of the applicant and the second respondent which was blocked by the applicant. (The first respondent does not deal with the assertion.)
10. The first respondent redirects the funds of the third respondent to an investment account to which only she has access.
11. The second respondent was an inactive member of the third respondent.
12. The R297 000.00 which is allegedly part of the amount that was advanced by the applicant to the third respondent to start the business of the third respondent has been paid back to the applicant.

13. The third respondent was formed in order to provide project management, audit verification and construction consulting services to the Department of Human Settlement.
14. The first respondent remains as the sole member of the third respondent after the details of the third respondent have been successfully amended by the removal of the applicant's and the second respondent's names as members of the third respondent. The first respondent now, has 100% interest in the third respondent.
15. No written proof that the applicant resigned her membership in the third respondent and thereby ceasing to be its member has been produced by the first respondent.
16. The second respondent has not opposed the application.

[18] As alluded to above, the issue for determination is whether the applicant, on her own version, has been unjustly dispossessed of her membership in the third respondent or whether she, on the first respondent's version, resigned her membership in the third respondent against the first respondent's undertaking to pay her the value of her membership and thereby lawfully becoming the rightful 100% member'-interest holder in the third respondent.

[19] The applicant contends that the first respondent introduced her version merely to raise a dispute of fact which, according to her, does not exist and is far-fetched.

[20] The first respondent alleges that she discussed about the third respondent with the second respondent and thereafter with the applicant. The agreement

reached was that they both would cease being members of the third respondent and the first respondent would pay them the values of their member's-interest and become the rightful 100% member's-interest holder in the third respondent. The applicant alleges that she stopped the first respondent's first attempt to unlawfully remove her as a member of the third respondent. The aspect, as alluded to above, is not dealt with by the first respondent.

[21] The applicant further contends that she never stopped being a member of the third respondent. She specifically denies that any agreement to the effect that she ceased to be a member of the third respondent was ever reached with the first respondent. It was argued, on her behalf, that she otherwise would not have stopped the first respondent from removing her name from the list of members of the third respondent with the fourth respondent when the first attempt to do so was made by the first respondent. I have already indicated that the first respondent does not deal with this aspect. The submission, in my view, seems to have merit.

[22] The applicant denies that she signed any document or form which would enable the first respondent to become the rightful 100% member's-interest holder in the third respondent. Effectively, this means that the applicant denies that the signature on the document is hers. She challenged the first respondent, in paragraph 26 of her founding affidavit, to provide the documentation that the first respondent submitted to the fourth respondent in order to have the amendment to the membership effected. That, according to

the applicant, would enable her to verify if, indeed, she signed the document(s).

[23] The first respondent in paragraph 4.39 of her answering affidavit states: 'I shall attempt to obtain copies of these documents signed by RHANDANI and MFEKA (The applicant and the second respondent) and hand same up to court at the hearing'. This did not happen.

[24] In paragraph 5 of her supplementary opposing affidavit, the first respondent confirms that she, indeed, in paragraph 4.39 of her opposing affidavit stated that she would attempt to obtain copies of the resignation documentation which the applicant and the second respondent signed. It immediately becomes clear that the first respondent, for the first time, says that she would obtain the documentation from the fourth respondent. She adds that she did not retain a copy of same. This indeed is strange. The first respondent further alleges that she could not get the documentation from the fourth respondent because the third respondent's file first had to be retrieved from the commission's storage facility in Midrand. Why the documents could not be easily retrieved is not readily understandable as the amendment to the documentation pertaining to the third respondent had recently been effected. Nevertheless, the documents, at that stage, could still not be produced.

[25] The first respondent in paragraph 5 of her second supplementary opposing affidavit refers to her accountant's letters marked "B" and "C". The most relevant is annexure "C" which relates to the third respondent's financial statements and VAT which had to be finalized. The document further states

that the applicant wanted to resign from the respondent but first wanted to know the third respondent's financial position. 'Wasted' is used instead of 'wanted' which, one presumes, ought to have been 'wanted'. This document, unfortunately, is not an affidavit and does not help the first respondent. It merely contains hearsay as it was correctly argued on behalf of the applicant.

[26] The first respondent in her second supplementary opposing affidavit , especially in paragraph 8 thereof, seeks to justify the non-production of the relevant documentation that she was challenged to produce by the applicant. Therein she states that Mr. Naidoo, a candidate attorney in the employ of the first respondent's attorneys of record, could not be assisted by Mr. Mogashoa of the CIPC call centre who advised him that it would take 2 to 3 months to obtain copies of the documents from the third respondent's file. Mr. Naidoo, according to her, also could not obtain 'soft copies if such are in fact available'. Again, it will be noted that Mogashoa's affidavit does not exist. This does not assist the first respondent. In any event, the documents, to date, have not been produced.

[27] It is strange that the first respondent, in the midst of such serious problems, did not keep copies of the necessary and required documents. One wonders if the first respondent's version is probable and convincing. It was argued, on behalf of the applicant, that the first respondent merely created disputes of fact which do not exist and are untenable. In view of what I say above, the submission and argument have merits.

[28] What is clear is that the two biological sisters and the second respondent formed the third respondent. The third respondent started generating good

income. This was followed by disputes, disagreements and feuds between them.

[29] The three of them had equal interest in the third respondent and the second respondent was their sleeping partner. The second respondent does not oppose this application. What is said by the first respondent about the second respondent in light of what I have said above becomes questionable. The required documents, to date, have still not been produced. The fact that the applicant's and the second respondent's names have been removed as members of the third respondent, in the absence of the necessary and required documents, remains a mystery. The version of the first respondent regarding the agreement in terms of which the applicant and the second respondent ceased to be members of the third respondent further complicates the matter for the first respondent in the absence of the required and necessary documents. This, in my view, further strengthens the submission, on behalf of the applicant, that the version of the first respondent seems to be contrived.

[30] It was argued, on behalf of the first respondent, that the applicant has shown no clear right to be entitled to the order she seeks. A proper conspectus of the facts of the case reveals that:

1. The three parties formed the third respondent as alluded to above.
2. Their interests in the third respondent were equal.
3. The names of the applicant and the second respondent have now been removed from the list of the members of the third respondent as evidenced by the fourth respondent's records.

4. The lawful removal of the names is disputed by the applicant.
5. To date, it has not been proved that the removal was done lawfully.
6. The members before the removal of their names, had access to the account of the third respondent. The applicant, before the removal of her name; fully participated in the business of the third respondent.
7. The members had problems which included financial problems but that has no bearing in the determination of the issue before the court.
8. The first respondent has not properly dealt with the issue of the removal of the names.
9. The first respondent has not sufficiently demonstrated that her version has substance and has raised real and genuine disputes of fact which cannot be resolved on the affidavits.
10. The applicant has a right to bring the application.
11. Money has been transferred in circumstances which are questionable. The applicant therefore has demonstrated the injury that actually has been committed and that is reasonably apprehended.
12. There is no similar adequate alternative remedy than the remedy covered by the order that the applicant seeks.
13. The applicant has, in my view, made out a case to be entitled to the order that she seeks.
14. Applying the rules and principles referred to in the cases referred to above, to the facts of the case, the application in certain respects should succeed.

COSTS

[31] On behalf of the applicant, an application under "further and/or alternative relief as this court may deem necessary", was brought to enable the applicant

to claim costs of the application. The application was initially opposed but such opposition was seemingly later abandoned. The application, in my view, and in certain respects, ought to be granted.

[32] The following order, in the result, is made:

1. **Subject to 2 and 6 below, the first respondent is interdicted and prohibited from making any further transactions on the business banking account of Melco Consulting & Projects CC, account number […………] held with First National Bank, Carlswald Branch.**
2. **The third respondent may make no payment from the business bank account in any form or manner unless all the members have consented thereto in writing.**
3. **The first respondent is ordered to provide a full and comprehensive account of all of the activities and transactions done on the aforesaid banking account from 30 April 2015 to date.**
4. **It is declared that the removal of the applicant as a member of Melco Consulting & Projects CC from the register of companies and close corporations is unlawful and set aside.**
5. **The fourth respondent is ordered to reinstate the name of the applicant to the Register of Companies and close corporations within 48 hours of the service of this order on the fourth respondent.**
6. **The fifth respondent is ordered to refuse to execute any instruction in terms whereof payment is made from the third respondents' business account referred to in 1 above unless all**

three members of the third respondent jointly instruct it in writing or through any electronic means to make payment from the account.

7. The first respondent is ordered to pay the costs of this application.

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M.W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

COUNSEL FOR THE APPLICANT:	**ADVOCATE B MANETSA**
INSTRUCTED BY:	KOIKANYANG INC
COUNSEL FOR THE 1ST RESPONDENT:	**ADV WILLIS**
INSTRUCTED BY:	MUTHRAY & ASS INC
DATE OF HEARING:	27/05/2015
DATE OF JUDGMENT:	