REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

**CASE NO: 35439/2015**

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

DATE SIGNATURE

In the matter between:

| | |
|---|---|
| **THOBILE MALANIA MFEKA** | **APPLICANT** |
| And | |
| **MAXANGU COLLET MAKONDO** | **1ST RESPONDENT** |
| **RHANDANIE GIZZLA MAKONDO** | **2ND RESPONDENT** |
| **COMPANIES AND INTELLECTUAL PROPERTY COMMISSION** | **3RD RESPONDENT** |
| **FIRSTRAND BANK LIMITED** | **4TH RESPONDENT** |
| **MELCO COMSULTING AND PROJECTS CC** | **5TH RESPONDENT** |

**JUDGMENT**

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**MSIMEKI J:**

## INTRODUCTION

[1] The applicant who was the second respondent in matter number 52: Case number 35399/2015, brought this application seeking an order in the following terms:

"1. The forms and service provided for in the Uniform rules of conduct are dispensed with and the application is enrolled and heard as an urgent application.

2. The amended founding statement filed on behalf of the fifth respondent and registered by the third respondent on the 30th of April 2015 is declared to be of no force and effect.

3. The third respondent is ordered to cancel the registration of the amended founding statement that has been declared void by the order in paragraph [2] above.

4. The registration of the amended founding statement that preceded the founding statement declared void above, and that was registered by the third respondent on 23 October 2012, is restored.

5. The third respondent is to amend its records to reflect the applicant and the second respondent as members of the fifth respondent each owning a one-third interest in the fifth respondent.

6. The fifth respondent may make no payment from the business bank accounts in any form or manner unless all the members have consented thereto in writing.

***Alternatively***

The fifth respondent's founding statement, registered on 23 October 2012, is amended to include a provision that no payment may be made from the business bank accounts in any form or manner unless all the fifth respondent's members consent thereto in writing.

***Further alternatively***

The applicant, first and second respondent is (sic) ordered to conclude an association agreement within 10 days of the granting of this order, which agreement must contain a term that no payment may be made by the fifth respondent from the business bank accounts unless all the members have consented thereto in writing.

7. The fourth respondent is ordered to refuse to execute any instruction in terms whereof a payment is made from the fifth respondent's business account held under account number [.....] at its Carlswald branch (hereafter *"the account"*) unless all of the fifth respondent's members jointly instructs (sic) it in writing or through any electronic means to make a payment from this account.

8. The first respondent is ordered to immediately restore to the applicant access to the fourth respondent's Internet banking facility that allows her to view and transact on the account.

9. Unless all of the fifth respondent's members consent thereto in writing or through any electronic means provided for by the fourth respondent's Internet banking facility, no member may change the

access details of the Internet banking facility that gives access to the account.

10. The first and second and fifth respondent (sic) is (sic) ordered to produce for the applicant's inspection, and to allow the applicant to make copies of, the following documents within 30 days of the granting of this order:

a. The registration documents for the fifth respondent;

b. The fifth respondent's full accounting records including the latest financial statements certified by the Accounting Officer;

c. Details of all bank accounts operated in the name of the fifth respondent and details of all signatories on the accounts;

d. Detailed bank statements of each bank account in the name of the fifth respondent, since the bank account was opened;

e. Details of all contracts of employment for all staff;

f. Full details of salaries or drawings being paid to Rhandani Mokondo and Collet Mokondo month by month since the inception of the fifth responded;

g. Details and confirmation of the registration of the fifth respondent with SARS for VAT, PAYE, UIF, SDL and Income Tax;

h. Copies of all returns submitted to SARS since the fifth respondent commenced trading;

i. Copies of all loan agreements entered into by the fifth respondent with any parties and the necessary resolutions authorizing such loans. This should include both loans receivable and loans payable;

j. Copies of all contracts with subcontractors or consultants;

k. Copies of all vouchers for payments to consultants since inception that exceed R10 000;

l. Copies of any tender documents submitted and awarded;

m. Copies of sales contracts and all sales invoices for the past 18 months.

11. The relief sought in prayer [13] below is postponed sine die to allow the applicant an opportunity to employ an auditor and/or accountant and/or any person with the necessary expertise to determine the value of a one-third interest in the fifth respondent.

12. The applicant may supplement this application by filing an affidavit or affidavits that deal with the market value of the one-third members' interest.

13. The first and second respondent is (sic) ordered to purchase the applicant's one-third members' (sic) interest in the fifth respondent at the determined market value thereof.

14. The first respondent and fifth respondent is (sic) ordered to pay the costs of the application jointly and severally.

15. Further and/or alternative relief.

[2] Mr. J J Louw, Mr. R S Willis and Adv B Manetsa represented the applicant, the first respondent and the second respondent respectively. The second respondent did not oppose the application.

## BRIEF FACTS

[3] On 1 September 2010 the applicant as a sole member registered the fifth respondent as Khatini Catering with registration number 2010/122880/23. The

first and the second respondents joined the applicant and the name of the fifth respondent was changed from Khatini Catering to Melco Consulting and Projects CC. The applicant disposed of her two-thirds interest in Khatini Catering to the first and second respondents in equal parts. The first and the second respondents, resultantly, acquired a one-third member's interest in the fifth respondent. Their membership was recorded by the third respondent on 23 October 2012. While the principal business of the fifth respondent, according to CIPC is "general trading in all aspects" the main business objective of the fifth respondent was, and according to the applicant still is, "to provide civil and construction consulting services to state institutions." The fifth respondent, according to the applicant, started trading since October 2012 and generated its first income during or about January 2013. The applicant was a "sleeping partner". The applicant, however, together with the first and second respondents, had access to the bank account of the fifth respondent and could check the fifth respondent's bank statements. And just like the others, she could transact on the bank account. The applicant contends that she, during November 2014, while perusing the bank statements, noticed that deposits were made into the account of the fifth respondent but that SARS did not appear to be paid. She alleges that she transferred R599 000.00 into her own bank account to ensure that SARS was paid. The first and second respondents demanded that the money be repaid. She has done so. She contends that the first and second respondents failed to furnish her with details relating to the fifth respondent's financial affairs. During the week of 11 to 15 May 2015, after the second respondent informed her that her access to the account had been blocked, she discovered that she too no longer had the access. She also discovered that her and the second respondents' names had been removed from the third respondent's register. The search by her attorney revealed that the first respondent owned 100% of the members interest in the fifth respondent since 30 April 2015 and that the two of them had allegedly resigned as members. Annexure "A" which is the CIPC search reveals this. The applicant contends that she never disposed of her member's interest in the fifth respondent to the first respondent. She denies that she signed an amended founding statement (a CK 2 form) giving notice that she was disposing of her member's interest. She also denies that she resigned as a member of the fifth respondent. She instructed no one to sign on her behalf. She contends that someone must have fabricated the amended founding statement and resignation form. This, in the main, means that the signatures wherever they appear cannot be hers. She alleges that the relief that she seeks ought to be granted because she seems to have picked up financial irregularities which are indicative of the fact that something wrong must be happening to the money that the fifth respondent receives. There are withdrawals and transactions which, according to the applicant, are in contravention of Section 52 (1) (a) of the Close Corporations Act 69 of 1984 as she neither consented nor gave consent to the giving of any loans to her fellow members. She further contends that the first respondent seems to be making payments to herself. The first respondent admits that she transferred money from the fifth respondents account to an investment account. The bank statements before her access to the account was blocked did not show that unemployment insurance fund contributions were made or that any payment was made to SARS. The bank statements, according to her, reveal dubious transactions. This, according to her, is to her detriment. Certain of the amounts that were paid from the bank account, according to her, do not seem to be loan repayments. Because the amounts involved are large, the applicant contends that she requested the first and second respondents to allow her to have sight of the financial records of the fifth respondent. This did not happen. Her request for a meeting of members to have the issues discussed and resolved also fell on deaf ears. She alleges that her attorney's formal request for documents which could allay her concerns remains unanswered. The applicant contends that the conduct that she complains of together with what she perceives to be financial irregularities constitute unfair, prejudicial, unjust and/or inequitable conduct to her. The application therefore seems to be based on Section 49 (1) of the Close Corporations Act 69 of 1984.

[4] The first respondent contends that the applicant and the second respondent, in her absence, and when she was away in Umtata running a project which the fifth respondent had got, acted in concert against her and planned their assault on her. This, because she contends that they brought their applications against her at almost the same time and gave her very limited time within which to attend to the matters. Her version is that, as a qualified surveyor, she worked for different companies before deciding to set up her own project management and audit verification services business. She took the second respondent on board so that, as she puts it, she (the second respondent) would use her administerial strengths to administer the office and business affairs. The second respondent introduced her to the applicant who was a member of a dormant Close Corporation. The applicant tendered the Close Corporation which they decided to use "as a vehicle in which to mount an all women business". The applicant, according to her, alleged that she was in a position to procure business which could be in line with what the first

respondent was doing. She confirms that the dormant close corporation was revived. Its name was changed to Melco Consulting and Projects CC which is the fifth respondent. She further confirms that the three of them had equal member interest in the fifth respondent and that the applicant was "a sleeping partner". Her version is further that she would be employed as the managing member of the fifth respondent while the second respondent would be responsible for the administrative and secretarial part of the business which would include managing the bank account. The first respondent would manage the project and attend to site work. The applicant, according to her, would only participate in business profits as a member and would also procure business for the fifth respondent. The second respondent, according to her version, would receive a salary of R22 500.00 per month as a salaried employee. The first respondent would draw an aggregate salary of R100 000.00 per month as soon as the business was in a position to afford that.

[5] The first respondent confirms that all three members had access to the fifth respondent's bank account. She further confirms that the business which was run from her home picked up and the fifth respondent's income started flowing in in early 2014. The first respondent contends that the Umtata Project generated substantial income for the fifth respondent and that she is "the sole professional resource that generates the actual income" for the fifth respondent.

[6] The first respondent explains that she drew no salary at all for approximately the first 20 months. She then explains when she made her drawings giving

the amounts that she drew some of which are substantial amounts. She, however, does not say that the applicant was involved when the amounts were so withdrawn. She also does not tell the court that the second respondent approved the withdrawals. She only tells the court that the second respondent was aware of the withdrawals that she made. Because the three members had access to the fifth respondent's bank account with the fourth respondent they all started withdrawing money from the account and various reasons were offered for such withdrawals or transfers. This appears to have resulted in the disagreements and the feuding between the members that I referred to above.

[7] The first respondent contends that she had contact with the applicant and the second respondent who agreed to move out of the fifth respondent leaving her with 100% member's interest. She further contends that the two, applicant and the second respondent, signed documents which enabled her to achieve this. The first respondent has been challenged to produce these documents but has failed to do so notwithstanding her undertaking "to attempt to obtain from the Commission copies of the registration documentation which Mfeka and Rhandani signed". This, because she "did not retain a copy of same". The first respondent undertook to place the documentation before the court in the event that she obtained the copies from the Commission before or during argument. This appears in paragraphs 4.39 of her opposing affidavit, paragraphs 5 and 6 of her supplementary opposing affidavit and paragraph 3 of her second supplementary opposing affidavit.

[8] Paragraph 6 of the supplementary opposing affidavit relates to the affidavit of Mr. Naidoo of her attorney's office. Mr. Naidoo, in his confirmatory affidavit, discloses that the Commission was unable to provide him with the necessary and required documents because "the file for Melco Consulting has first to be retrieved from the commission's storage facility in Midrand". This is hearsay evidence as same is not supported by an affidavit by a member of the Commission. The documents, notwithstanding the applicant's and the second respondent's averments that they did not resign as members of the fifth respondent and that they signed no documents which would have enabled the third respondent to remove their names from the records relating to the fifth respondent, have to date, not been produced and furnished.

[9] The issue to be resolved is whether the applicant and the second respondent, indeed, intended to resign as members of the fifth respondent and whether they, indeed, signed the documents which enabled the third respondent to remove their names from the list of members of the fifth respondent and leaving the first respondent as the sole member.

[10] The applicant and the second respondent denied that they resigned. They further deny that they signed any document or authorized any person to sign the documents on their behalf.

[11] It is strange that the first respondent could submit the documents to the third respondent without retaining copies thereof. It is further strange that it would be difficult to retrieve the documents when the amendments were recently made. The failure by the first respondent to obtain an affidavit from someone

from the Commission's office is inexplicable. This then strengthens the applicant's version that she neither resigned nor signed documents which enabled the third respondent to remove the names of the applicant and the second respondent from the list of names of the members of the fifth respondent.

[12] It was argued on behalf of the first respondent that a dispute of fact had arisen which could not be resolved on the papers. The argument, on behalf of the applicant, is that no serious or genuine dispute of fact has arisen. The first respondent, it was further argued, merely produced a version which is far-fetched and untenable warranting its rejection merely on the papers. There seems to be merit in the submission.

[13] Courts, in a number of cases, have from time to time said that where a court is satisfied that there is no real and genuine dispute on the fact 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 probabilities appearing from the affidavits, decisions of fact can properly be founded on a consideration of the probabilities. It has also been said that where a respondent intends to raise as serious matter such matter must be based on fact not rumour, innuendo or inference based only on speculation. **(See Plascon-Evans Paints (Pty) Ltd v Van Reibeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C and Peterson v Cuthbert Co Ltd 1945 AD 420 at 429; Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**

**2008 (3) SA 371 (SCA) at 375 paragraphs [12] and [13] and Erasmus: Superior Court Practice at B1-48D and B1-49.)**

[14] It has also been said that 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 the 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 869 (W) at 698H-I and Rosen v Ekon 2001 (1) SA 199 (W) at 215B-D).**

[15] Having regard to the facts of the case and applying the principles and rules referred to in the cases referred to above, it becomes clear that the first respondent's version that the applicant and the second respondent resigned as members of the fifth respondent and that they, accordingly, signed the documents which enabled the third respondent to remove their names from the list of names of the members of the fifth respondent cannot be regarded as a version which raises a genuine and a serious dispute of fact. If that were so, the documents that have been called for, would by now, have been produced and furnished.

[16] I have allowed the supplementary and the second supplementary opposing affidavits in the interest of justice. As shown above, the affidavits do not advance the first respondent's case and they further do not change the fact

that the dispute of fact which is said to have been raised can simply be rejected on the papers.

[17] The applicant, by virtue of her membership in the fifth respondent, and based on section 49 of the Close Corporations Act 69 of 1984, has established a clear right which entitles her to bring this application. Money has been transferred in circumstances which are questionable and dubious. The applicant, in my view, has demonstrated that there is injury that has actually been committed and that is reasonably apprehended. It must also be borne in mind that the applicant contends that she has to date received nothing from the fifth respondent. There appears to be no similar adequate alternative remedy available to the applicant than the remedy which in certain respects is covered by the order that the applicant seeks. The conduct of the first respondent, it appears to me, has been prejudicial, unjust, inequitable to the applicant who needs protection by way of an order.

[18] The application, which I have already found to be urgent, should, in certain respects, in my view, succeed as evidenced by the order below.

## COSTS

[19] It will not, in my view, be just and equitable to order the fifth respondent to pay the costs of this application which the first respondent alone should bear.

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

**1. The amended founding statement filed on behalf of the fifth respondent and registered by the third respondent on 30 April 2015 is declared to be of no force and effect.**

**2. The third respondent is ordered to cancel the registration of the amended founding statement that has been declared void by the order in paragraph [1] above.**

**3. The registration of the amended founding statement that preceded the founding statement declared void, and that was registered by the third respondent on 23 October 2012, is restored.**

**4. The third respondent is ordered to amend its records to reflect the applicant as a member of the fifth respondent owning a one-third interest in the fifth respondent.**

**5. The fifth respondent may make no payment from the business bank accounts of the fifth respondent in any form or manner unless all the members have consented thereto in writing.**

**6. The fourth respondent is ordered to refuse to execute any instruction in terms whereof payment is made from the fifth respondent's business bank account held under account number [.....] at its Carlswald branch (hereafter *"the account"*) unless all of the fifth respondent's members jointly instruct it in writing or through any electronic means to make payment from this account.**

**7. The first respondent is ordered to immediately restore to the applicant access to the fourth respondent's Internet banking facility that allows her to view and transact on the account.**

**8. Unless all of the fifth respondent's members consent thereto in writing or through any electronic means provided for by the fourth respondent's Internet banking facility, no member may change the access details of the Internet banking facility that gives access to the account.**

**9. The first, second and the fifth respondents are ordered to produce for the applicant's inspection, and to allow the applicant to make copies of, the following documents within 30 days of the granting of this order:**

**a. The registration documents for the fifth respondent;**

**b. The fifth respondent's full accounting records including the latest financial statements certified by the Accounting Officer;**

**c. Details of all bank accounts operated in the name of the fifth respondent and details of all signatories on the accounts;**

**d. Detailed bank statements of each bank account in the name of the fifth respondent, since the bank account was opened;**

**e. Details of all contracts of employment for all staff;**

**f. Full details of salaries or drawings being paid to Rhandani Makondo and Collet Makondo month by month since the inception of the fifth respondent;**

**g. Details and confirmation of the registration of the fifth respondent with SARS for VAT, PAYE, UIF, SDL and Income Tax;**

**h. Copies of all returns submitted to SARS since the fifth respondent commenced trading;**

**i. Copies of all loan agreements entered into by the fifth respondent with any parties and the necessary resolutions authorizing such loans. This should include both loans receivable and loans payable;**

**j. Copies of all contracts with subcontractors or consultants;**

**k. Copies of all vouchers for payments to consultants since inception that exceed R10 000;**

**l. Copies of any tender documents submitted and awarded;**

**m. Copies of sales contracts and all sales invoices for the past 18 months.**

**10. The remaining members of the fifth respondent and/or the fifth respondent, once the third respondent has amended its records to reflect the applicant as a member of the fifth respondent owning one-third interest in the fifth respondent, are ordered to purchase the applicant's one third member's interest in the fifth respondent at the determined market value thereof.**

**11. Before paragraph 10 (above) takes effect, the applicant must be allowed to employ an auditor and/or accountant and/or any person with the necessary expertise to determine the value of a one third interest in the fifth respondent.**

**12. The applicant may supplement this application by filing an affidavit or affidavits that deal with the market value of the one-third member's interest.**

**13. The first respondent is ordered to pay the costs of the application.**

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**M.W MSIMEKI**
**JUDGE OF THE GAUTENG DIVISION, PRETORIA**

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| **COUNSEL FOR THE APPLICANT:** | **ADVOCATE J J LOUW** |
| INSTRUCTED BY: | BAGRAIM SACHS INC |
| **COUNSEL FOR THE 1ST RESPONDENT:** | **ADV WILLIS** |
| INSTRUCTED BY: | MUTHRAY & ASS INC |
| COUNSEL FOR THE 2ND RESPONDENT | ADV B MANETSA |
| DATE OF HEARING: | 27/05/2015 |
| DATE OF JUDGMENT: | |