

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – EAST LONDON)**

Case no: EL: 169/2012
ECD: 469/2012
Date Heard: 15/05/2012
Date Delivered:

18/05/2012

In the matter between:

ANTHONY JOHN KRIEL **1ST PLAINTIFF**

EDEN BRUCE KRIEL **2ND PLAINTIFF**

And

GEOFFREY COLIN KRIEL **1ST DEFENDANT**

COLIN GRAHAM KRIEL **2ND DEFENDANT**

ROGER CHARLES KRIEL **3RD DEFENDANT**

MRS ERLEEN ERNA KRIEL **4TH DEFENDANT**

GLEN EDEN HOLIDAY RESORT CC **5TH DEFENDANT**

JUDGMENT

SMITH J:

[1] The Plaintiffs instituted action against the Defendants for an order, *inter alia*, in the following terms:

- a) That the First Defendant be directed to provide to the Plaintiffs

full financial statements, records and accounts (including management accounts, and verifying and supporting documentation and vouchers) in respect of the business of the Fifth Defendant for all relevant years of its operation while he was manager thereof;

b) Debatement of such accounts;

(c) That, after debatement of such accounts, the First Defendant pay to the Plaintiffs (and to the Second and Third Defendants) such sum as is determined to be the value of the parties' respective 20% interest in the Fifth Defendant, in respect of accrued funds that should have been distributed to members.

[2] The Plaintiffs, together with the First, Second and Third Defendants are all members of a close corporation, namely Glen Eden Resorts CC (the Fifth Defendant) and each hold 20% financial interest therein.

[3] The substantive relief is sought against the First Defendant only and the other Defendants have been cited as interested parties only.

[4] The First, Second and Third Defendants have excepted to the Plaintiff's particulars of claim on the basis that they do not disclose a cause of action. The Defendant's exception is founded on the assertion that members of a close corporation have no entitlement in law to enforce obligations owed by an employee of a close corporation to that entity and that such obligations

may only be enforced by the employer, being the close corporation. The First Defendant, as employee of the Fifth Defendant, is therefore by law not liable to account to the Plaintiffs or any other members of the close corporation other than in accordance with the provision of s.49 or s.50 of the Close Corporations Act, no 69 of 1984 ("the Close Corporations Act").

[5] The Plaintiffs seek the relief against First Defendant on the basis of the following factual averments:

- (a) At all material times since 2004 the First Defendant had been employed by the Fifth Defendant as manager thereof and that he in this capacity (together with his wife) controlled the daily business affairs of the Fifth Defendant, including receipting of income from its various business sites;
- (b) The First Defendant and his wife had been paid a monthly salary by Fifth Defendant in respect of the aforesaid services;
- (c) In his aforesaid capacity the First Defendant and his wife had full and sole control of the records of income generated by the Fifth Defendant and expenses incurred by Fifth Defendant with regard to, amongst others, maintenance and salaries. The First Defendant also had full control of the books of accounts of the Fifth Defendant;
- (d) The members of the Fifth Defendant had agreed, during December 2008, to scale down and eventually cease the Fifth

Defendant's business at the end of February 2009;

- (e) The Plaintiffs have on various occasions after the termination of the Fifth Defendant's commercial activities, during 2010 and 2011, requested the First Defendant to provide full and proper accounting in respect of his management of the Fifth Defendant. This was required in order to enable Plaintiffs to assess the veracity of accounting and to determine the value of their members' interest and payments to be made to them;
- (f) During 2011 the Plaintiffs were informed by a chartered accountant, one Mr Van Wyk, that the accounting records of the Fifth Defendant (which have been provided to him by the First Defendant) were inappropriate and incomplete and that it appeared there were accounting anomalies, including invalid expenses which may have been deducted from the Fifth Defendant's account. Mr Van Wyk also advised that a more extensive examination of the books and records was required in order to determine the Fifth Defendant's true financial position during the period of First Defendant's management thereof;
- (g) The Plaintiffs subsequently called upon First Defendant to provide a full and comprehensive account of the financial activities of the Fifth Defendant and to provide management accounts, financial statements and other appropriate financial data and bookkeeping information to enable the Plaintiffs to verify the profit generated by the Fifth Defendant for the financial years ending in February 2005, 2006, 2007, 2008 and 2009 and to enable them to verify the amounts due to them and the other members of the Fifth Defendant; and

- (h) Notwithstanding due demand the First Defendant has failed and/or refused to provide the Plaintiffs with the required information and documentation.

[6] A plaintiff is required, in terms of Rule 18(4) of the Uniform Rules of Court, to provide a "*clear and concise statement of the material facts*" upon which he or she relies for his or her claim. Additionally in terms of Rule 20(2) a plaintiff is required to state in the declaration:

"the nature of the claim, the conclusions of law which the Plaintiff shall be entitled to deduce from the facts therein, and a prayer for the relief claimed."

[7] A plaintiff is therefore required to clearly and concisely state the material facts, or *facta probanda*, which he or she will have to prove in due course in order to succeed with his or her claim. Where a plaintiff relies on a particular statute it is not necessary to refer to that statute in the particulars of claim but he or she must aver such facts as may be necessary to justify a conclusion that the provisions of the statute apply. (**Fundstrust (Pty) Ltd (In liquidation) v Van Deventer 1997 (1) SA 710 (A) at 725H-I.**)

[8] A plaintiff seeking an order for the rendering of accounts, debatement thereof and payment of monies found to be owing and payable, must provide a factual basis for the conclusion that the right to such accounting exists either on the basis of a fiduciary relationship or a contractual obligation. (**Philips v Fieldstone Africa 2004 (3) SA 465 (SCA)** and

Doyle and another v Fleet Motors PE (Pty) Ltd 1971 (3) SA 760 at 762B-763D.)

[9] Mr *De La Harpe*, who appeared on behalf of the Defendants, submitted that the Plaintiff has failed to provide a factual basis for such a conclusion and has failed to plead the necessary facts which, on a reasonable interpretation of the pleading, would place their claims within the ambit of either s.49 or s.50 of the Close Corporations Act.

[10] Mr *Cole*, who appeared for the Plaintiffs, conceded that the Plaintiffs' entitlement to the relief which they seek is limited to the remedies provided in the afore-mentioned statutory provisions.

[11] The crisp issue which falls for decision is therefore whether, on a reasonable interpretation of the factual averments contained therein, the Plaintiffs' particulars of claim can be brought within the ambit of either s. 49 or s. 50 of the Close Corporations Act. The answer to this question will determine whether or not the Plaintiffs have set out sufficient and relevant facts in their particulars of claim to sustain a cause of action.

[12] Section 49 of the Close Corporations Act provides as follows:

"49. Unfairly prejudicial conduct

(1) Any member of a 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 her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section.

(2) If on any such application it appears 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 or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.

[13] It is in my view significant that subsection 1 refers to "*an application to a Court*" whereas s. 50 provides that;

"A member may institute proceedings in respect of any such liability".

[14] The provisions of s.49 are therefore in my view not susceptible to an interpretation that the term "*application*" refers to all forms of legal proceedings. The fact that a more general term has been used in s. 50, can only mean that the legislature intended to limit legal proceedings in terms of s. 49 to motion proceedings only, in order to facilitate expeditious resolution of disputes between members. This in my view presents an insurmountable hurdle to the Plaintiffs' in their attempt to rely on this section.

[15] Even if I am wrong in this regard, I am of the view that the Plaintiffs have failed to plead the facts necessary to place themselves within the ambit of this section.

[16] The jurisdictional facts that must be pleaded to justify an order in terms of this section are:

- (a) that the impugned act is “*unfairly prejudicial, unjust or inequitable*” to the member; or that
- (b) the affairs of the corporation are conducted in a manner which is “*unfairly prejudicial, unjust or inequitable*” to the members seeking the order;
- (c) that the nature of the relief sought is to remedy the matters complained; and
- (d) it is just and equitable that such relief be granted.

[17] Although it would be unduly restrictive to insist on the exact wording of the statute to be used in pleadings, I am unable to find any factual averment even remotely suggesting that the Plaintiffs were relying on this statutory provision and that they were therefore entitled to deduce this conclusion of law from the facts stated in their particulars of claim.

[18] The relevant portions of s. 50 read as follows:

“50. Proceedings against fellow-members on behalf of corporation

- 1) Where a member or a former member of a corporation is liable to the corporation—
 - ... on account of—
 - i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of [section 42](#); or

- ii) negligence in terms of [section 43](#),

any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so.”

[19] A plaintiff relying on this provision has to plead:

- (a) a breach of a fiduciary duty owed to the corporation in terms of s. 42; or
- (b) negligence in terms of s. 43; and
- (c) that he or she has notified all other members of his or her intention to institute legal proceedings.

[20] I am similarly unable to find any factual averments in the Plaintiffs’ particulars of claim which can be construed to suggest that they were relying on an alleged breach of a fiduciary duty, and if so, what duty the First Defendant was alleged to have breached. They have also not averred that they have given due notice to other members of their intention to institute the proceedings in terms of s. 50, as is required by the said section. The factual averments all relate to the alleged conduct of the First Respondent in his capacity as employee and manager of the corporation.

[21] The Plaintiffs face another difficulty in their attempt to bring their claims within the ambit of this section. Section 50 envisages that the legal proceedings should be brought by a member “*on behalf of the corporation*”. The Plaintiffs do not purport to bring the proceedings on behalf of the corporation but in their individual capacities as members thereof. Nowhere is

it averred that the First Defendant is in breach of his fiduciary duties to the Fifth Defendant. The particulars of claim are in my view therefore also not susceptible to the interpretation that the claims are based on the provisions of s.50.

[22] Mr Cole's reliance on the judgment of Plasket J in the **Price v Van Zyl and Others** (unreported Case no 366/2004 delivered on 2 December 2004) is in my view misplaced. In that matter the plaintiff sought the relief on the basis of an allegation that the defendant's conduct constituted a breach of the terms of the shareholders' agreement. The issue which the learned judge was called upon to decide was therefore whether the shareholders' agreement created a fiduciary relationship between the parties, either expressly or impliedly through the operation of law. The issue which falls for decision in this matter is whether or not the Plaintiffs' particulars of claim contain the relevant factual averments required to bring them within the ambit of either of the abovementioned statutory provisions, it being common cause that these statutory provisions provide the only legal bases for the relief sought by the Plaintiffs.

[23] For these reasons I am of the view that the Plaintiffs have failed to set out sufficient factual averments in their particulars of claim to justify the conclusion that they have placed reliance on the provisions of either s. 49 or

s. 50, or both.

[24] I am therefore of the view that the Plaintiffs' particulars of claim do not contain sufficient factual averments to sustain a cause of action and that the exception must therefore succeed.

[25] In the result the exception is upheld and the Plaintiff's claims are dismissed with costs.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	:	Advocate Cole
Attorney for the Plaintiff	:	Russell Incorporated 10 Rochester Road Vincent EAST LONDON Ref: Mr B SPARGS/Jo-Ann
Counsel for the Defendant	:	Advocate De La Harpe
Attorney for the 1 st and 2 nd	:	Drake Flemmer and Osmond

Defendants

Tewkesbury House
22 James Road
SOUTHERNWOOD
EAST LONDON
Ref: AJ Pringle/vsk/K194

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