IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO.: EL 1604/12
ECD 3621

In the matter between:

LAWRENCE EDMUND JAMES	**Applicant**

And

TVR CONSTRUCTION CC	**1st Respondent**
GLYNIS BEVERLEY LARRETT	**2nd Respondent**
ANNESTACHOA LUCHARLE JACOBUS	**3rd Respondent**
IAN MACFARLANE SYMONS	**4th Respondent**
RYAN QUENTIN JAMES	**5th Respondent**

JUDGMENT

BESHE, J:

[1] Applicant approaches this court for an order in the following terms:

"1. 1.1 That the First Respondent is hereby ordered to pay to the Applicant the sum of R2 526 466.00 in full and final settlement of the Applicant's loan account in the First Respondent, within ten days of the date of this Order.

1.2 That the First Respondent pay interest at the legal rate on the amount due to the Applicant in respect of his loan account, *a tempore morae*, to date of payment.

2. Further and/or alternative relief.

3. That the Respondents, jointly and severally the one paying the other to be absolved, are ordered to pay the costs of this application."

The application is premised on *Section 49* of the *Close Corporations Act No. 69 of 1984*. Applicant alleges that the failure by first respondent acting with the remaining respondents, to pay to him the total accrued loan account in the first respondent constitutes both acts and omissions by the respondents which are unfairly prejudicial, unjust and inequitable to him. On the basis further that the affairs of first respondent are being conducted in a manner that is unfairly prejudicial, unjust and inequitable to him.

[2] First respondent is a Close Corporation duly registered in accordance with the Company Laws of the Republic of South Africa with its registered head office in East London and its principal place of business at […..]. Second respondent is an adult […..] businesswoman presently residing at Stirling, East London and with her business address at […..]. Third respondent is an adult […..] presently residing in East London. Fourth respondent is an adult […..] presently residing in East London. Second to fifth respondent are also members of the first respondent.

[3] It appears to be common cause that applicant, became a member of first respondent which conducts business as Civil Engineering Contractors and held 22½% member interest. **Messrs Vince Thompson**, **Danie Janse Van Rensberg** and **George Kirsten** were the other members of first respondent. During 2009, **Thompson, Van Rensberg** and **Kirsten** sold their members interest which had a total value of R22 500 000.00. This total member interest was purchased as follows:

Applicant purchased a further 10½% member interest which resulted in him having 33% member interest in first respondent;

Second respondent purchased 51% of the member interest in the first respondent;

Third respondent purchased 10% member interest and fifth respondent 1% member interest.

[4] It appears to be common cause that first respondent is indebted to the applicant in respect of his loan account in first respondent. What appears to be in dispute however is the amount of such loan. According to applicant the amount owing to him in respect of the loan to first respondent is R2 526 466.00. To this end he annexes a copy of first respondent's draft financial statement wherein his loan to first respondent is reflected to be the amount of R2 526 466.00. In an affidavit deposed to by the second respondent, she states that the precise amount in this regard is unknown due to, *inter alia*, applicant bought various construction materials for use at his private residence utilizing first respondent's funds. Paid a builder who was working at his house with a cheque from first respondent's account. Purchased light delivery vehicles without permission (presumably of second respondent). It is also common cause that applicant was designated the managing member of first respondent. It is common cause that it was as a consequence and in the course of applicant being the managing member that problems within members of first respondent crept up, especially between applicant and second respondent who is a majority shareholder. It is common cause that as a result of disputes between the applicant and other members of first respondent especially with second respondent that the working relationship between them deteriorated. This

culminated in the suspension of the applicant as manager in October of 2011 and in him subsequently resigning from his employment with first respondent.

[5] According to applicant, during the October meeting immediately after he was informed of his suspension, he gave notice that his members interest was for sale and that he would like his loan account to be paid out within thirty days. It is common cause that his loan account was not paid hence this application.

[6] The application is opposed on several grounds:

(i) That the recovery of a loan is not envisaged by *Section 49 of the Close Corporations Act*;

(ii) The amount of the loan that is owed to the applicant has not been finally determined;

(iii) In terms of the draft association agreement disputes between members should first be dealt with by means of arbitration, this has been occurred in this case.

It is contended on behalf of the respondents that in view of the manifold disputes of fact which amount to genuine disputes of fact, and in an absence of an application to refer the matter to oral evidence, the version of the respondents should be accepted.

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

"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 an 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."

[8] As indicated earlier in this judgment it is not in dispute that first respondent is indebted to the applicant to the value of applicant's loan account. It is equally not in dispute that applicant demanded payment of the value of his loan account, and that same has not been paid to him. The question therefore, is whether by so doing, namely by not paying to the applicant the value of his loan account, the respondent's action or omission in this regard is unfairly prejudicial, unjust and inequitable to him as envisaged in *Section 49 of the Close Corporations Act*.

[9] It is trite that *Section 49* gives the court a wide discretion to make such order as it thinks fit in the case of unfairly prejudicial conduct against a member. As to what the section is meant to achieve, the following was stated by *Jones J* in ***Gatenby v Gatenby and Others [1996] 2 All SA 333 at 338 b-e***:

"The object of section 49 is to come to the relief of the victim of oppressive conduct. The section gives the court the power to make orders "with a view to settling the dispute" between the members of a close corporation if it is just and equitable to do so. To this end the court is

given a wide discretion. It may "make such order as it thinks fit" , within the framework of either "regulating the future conduct of the affairs of the corporation" or "the purchase of the interest of any member of the corporation by other members thereof or by the corporation". These are far reaching powers. One member can be compelled to purchase the interest of another at a fair price, whether he wants to or not."

[10] The application is assailed on the basis that it is not concerned or does not concern applicant as a member of the first respondent but as an individual creditor of first respondent and in this regard he does not enjoy protection under *Section 49*. This also in view of the fact that he has expressed the intention to make an application in terms of *Section 36* at a later stage. *Section 36* deals with the cessation of membership by order of court upon application by a member of the corporation. If anything the case referred to by the respondents to support their submissions in this regard, support the contrary view in that matter – ***McMillan NO v Pott 2011 (1) SA 511 at page 525 [29]*** *Binns-Ward AJ* as he then was states:

"In my judgment there is considerable cogency in the considerations urged by the applicant's counsel. It is indeed clear that McMillan participated in the joint venture and advanced his capital contribution for the purchased of the issued shareholding in the company, only on the basis that this would provide him with employment and the opportunity to 'grow' the company's business, primarily for his own benefit. His later decision, to establish the McMillan Family Trust and to direct that the 30 per cent interest he was entitled to in the company should be registered in the trust's name, did not affect the essential basis of this initial investment and continued participation in the joint venture. Likewise, the basis on which the trust obtained and held its shares in the company was indistinguishable from McMillan's joint venture involvement in the company. The trust had no commercial reason to continue to hold shares in TBM if McMillan was not to be a director of the company and in charge of the day-to-day running of its business."

It is my considered view that likewise *in casu*, the applicant's advancement of loan to first respondent cannot be separated from his membership of first

respondent and consequently the running of the affairs / conduct of first respondent. By their own admission, respondents allege that the loan account of all the members contribute the working capital of the corporation. (See para 15 of respondent's heads of argument) This in my view is a further indication that applicant's loan in the first respondent and his membership are indistinguishable. That being the case the issue of the payment of applicant's loan falls under the ambit of *Section 49*.

[11] I also do not see how the issue of the cessation of applicant's membership cannot be dealt with separately from the payment of the value of his loan. Because in the case of the cessation of his membership the question of the value of his member interest will come into play. However to avoid the anomalous situation where applicant withdraws his portion of the working capital and yet continue to benefit as a member of first respondent, it will be appropriate to put him to terms as far as applying for the cessation of his membership in first respondent in terms of *Section 36* is concerned.

[12] Respondents also contend that loan repayment can only be made as provided for in *Clause 13* of the draft association agreement. It is common cause that the said agreement was never signed by the members. I am of the view and it is my judgment that it does not form an agreement between the members. As such, no reliance can be placed on it. The same goes for the contention that this application has been brought prematurely because the dispute between members has not been referred to arbitration as provided for in the draft association agreement.

[13] As far as the value of the loan in question is concerned paragraph 31 of the answering affidavit deposed to by second respondent, reads as follows:

"31.1. The draft financial statements referred to by Applicant as "LEJ" were not attached to the papers served on me and I am not certain as to exactly what draft Applicant is referring to. It does however appear in the February 2012 financial statements that Applicant's loan account is **R2,534,168.00 (TWO MILLION FIVE HUNDRED AND THIRTY FOUR THOUSAND ONE HUNDRED AND SIXTY EIGHT RAND).** This figure is not accurate as, since those financial statements were prepared, further amounts owing by Applicant to First Respondent have been ascertained."

There is however no indication of what those amounts relate or why they had not been ascertained since applicant left the employ of the first respondent in October 2011.

[14] It is common cause between the parties that as things stand, all trust between them has been destroyed. That is not practical for them to work together. (See para 45-48 of founding affidavit, as well as 30.2 of the answering affidavit). It is my considered view that it will be unfairly prejudicial, unjust and inequitable for the first respondent to retain applicant's loan in it in the circumstances.

[15] I am satisfied that the applicant has succeeded in showing that he is entitled to the relief sought in prayer 1.1.1 of the notice of motion in the amount admitted by the respondents. And that will be just and equitable to grant the order sought by the applicant.

[16] Accordingly:

1. First respondent is ordered to pay to the applicant the sum of R2 534. 168.00 in full and final settlement of applicant's loan account in the first respondent, within fourteen (14) days of the date of this order.

2. First respondent is ordered to pay interest at legal rate on the amount due to applicant in respect of his loan account, a *tempore morae*, to date of payment.

3. Applicant is ordered to lodge an application in terms of section 36 of the Close Corporations Act within ninety (90) days of the date of this order.

4. Respondents, jointly and severally the one paying the other to be absolved, are ordered to pay costs of this application.

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N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: S H Cole
Instructed by	:	MONAGHAN ATTORNEYS 9 Winsor Road Vincent EASTLONDON Tel.: 043 – 642 5889 Ref.: MAT2506
For the Respondents	:	Adv: Paterson SC
Instructed by	:	ABDO & ABDO ATTORNEYS 33 Tecoma Street Berea East London Tel.: 043 – 700 7900 Ref.: MR C ABDO/Samantha/ l36
Date Heard	:	20 August 2013
Date Reserved	:	20 August 2013
Date Delivered	:	10 June 2014