REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 16115/11

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

MARK DEMETRIOS LIVANOS N.O.	First Applicant
BERNADETTE LIVANOS N.O.	Second Applicant
MARK DEMETRIOS LIVANOS	Third Applicant
BERNADETTE LIVANOS	Fourth Applicant

and

LESLIE OATES	First Respondent
ARCHITECTURAL HARDWARE CC	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent
THE REGISTRAR OF COMPANIES AND CLOSE CORPORATIONS	Fourth Respondent

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J U D G M E N T

WEPENER, J:

[1] The applicants, the executors of an estate, seek an order declaring that the estate of the deceased has validly sold the deceased estate's 50% membership interest in the second respondent to the third applicant in terms of a sale agreement and additional relief. The first respondent filed a counter-application for a declaration that the agreement of sale is unenforceable and for its setting aside. The first respondent also seeks to review the decision of the third respondent's consent to the sale.

[2] The first and second applicant (Mark), is the son of the deceased. The second and fourth applicant (Bernadette), is the wife of the deceased. They brought the application both in their personal capacities and as the duly appointed executors of the estate of the deceased. The first respondent, Oates, has a 50% member's interest in a close corporation in which the deceased held the other 50%. The second respondent is the close corporation (the corporation), which owns a business and the third respondent is the Master of the High Court, whilst the fourth respondent is the Registrar of Companies and Close Corporations.

[3] The facts are largely common cause, but where there are conflicts I will approach it on the basis that Mark bears the *onus* in respect of the application brought by him and Oates bears the *onus* in respect of a counter-application, subject to the normal rules governing disputes of fact in motion proceedings. See *Luster Products Inc v Magic Style Sales CC* 1997 (3) SA 13 (A) 21H. The normal rules are that the applicant will be entitled to final relief on the undisputed facts together with the facts contained in the respondent's affidavit and the respondent will, in its counter-application, be subject to the same rules regarding the counter-application. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[4] The factual disputes in the main application are few. The parties are *ad idem* regarding the issue that falls to be determined. The disputes of fact relate to the relationship between Mark and Oates and their respective conduct towards each other, all of which have no bearing on the interpretation of the parties' rights pursuant to s 35 as read with s 34(2) of the Close Corporations Act, 69 of 1984 (the "*Close Corporations Act*"). The applicant sets out the issues out as follows:

> "*13. The second applicant and me as the executors in the deceased estate have sold the deceased's 50% interest in the corporation to me personally in terms of section 35(b)(iii) as read with section 34(2) of the Close Corporations Act. Notwithstanding that this sale has become effective and is to be implemented in terms of section 34(2)(c) of the Close Corporations Act, the first respondent has refused to co-operate in giving effect to the sale including the signing of an amended founding statement in order to enable lodgement of the amended founding statement with the fourth respondent, reflecting the transfer of the deceased's 50% interest to me and reflecting me as a 50% member in the corporation.*

> *14. The first respondent contends that he as the remaining member of the corporation is entitled to purchase the deceased's 50% interest in the corporation at a fair market value, that he is prepared to do so and that accordingly he is not obliged to consent to or co-operate in giving effect to the sale by the deceased estate of the deceased's 50% interest to me.*
>
> *15. The central issue in this application is the interpretation of section 35 as read with section 34(2) of the Close Corporations Act. The applicants contend that upon a proper interpretation of these sections, the sale by the deceased estate of the deceased's 50% interest in the corporation to me is effective and that the first respondent must co-operate in giving effect thereto.*
>
> 16. *The first respondent contends that upon a proper interpretation of section 35 read with section 34(2) of the Close Corporations Act he is entitled to purchase the deceased's 50% interest at a fair market value (which, the first respondent contends has been valued by his professional valuer in the sum of R10,7 million) and accordingly need not accede to the sale by the deceased estate to me of the deceased's 50% interest.*"

The response by Oates is:

> "*This is a fair summary of the respective positions taken up by the parties. The issue is indeed the interpretation of section 35 read with section 34(2) of this Act. In addition however the validity of the Master's consent is in issue in the counter-application.*"

[5] Although there was an earlier agreement of sale of the 50% member's interest by the executors to Mark, it was later substituted with an amended agreement and nothing turns on that issue and I am not called upon to decide anything in relation thereto.

[6] Sections 34 and 35 of the Close Corporations Act read as follows:

"***34. Disposal of interest of insolvent member.***– *(1) Notwithstanding any provision to the contrary in any association agreement or other agreement between members, a trustee of the insolvent estate of a member of a corporation may, in the discharge of his or her duties, sell that member's interest –*

(a) to the corporation, if there are one or more members other than the insolvent member;

(b) to the members of the corporation other than the insolvent member, in proportion to their member's interest or as they may otherwise agree upon; or

(c) *subject to the provisions of subsection (2), to any other person who qualifies for membership of a corporation in terms of section 29.*

(2) If the corporation concerned has one or more members other than the insolvent, the following provisions shall apply to a sale in terms of subsection (1)(c) of the insolvent member's interest:

(a) The trustee shall deliver to the corporation a written statement giving particulars of the name and address of the proposed purchaser, the purchase price and the time and manner of payment thereof;

(b) for a period of 28 days after the receipt by the corporation of the written statement the corporation or the members, in such proportions as they may agree upon, shall have the right, exercisable by written notice to the trustee, to be substituted as purchasers of the whole, and not a part only, of the insolvent member's interest at the price and on the terms set out in the trustee's written statement; and

(c) if the insolvent member's interest is not purchased in terms of paragraph (b), the sale referred to in the trustee's written statement shall become effective and be implemented.

35. Disposal of interest of deceased member.– *Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties -*

> *(a) cause the deceased member's interest in the corporation to be transferred to a person who qualifies for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person; or*
>
> *(b) if any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member's interest –*
>
> *(i) to the corporation, if there is any other member or members than the deceased member;*
>
> *(ii) to any other remaining member or members of the corporation in proportion to the interests of those members in the corporation or as they may otherwise agree upon; or*
>
> (iii) *to any other person who qualifies for membership of a corporation in terms of section 29, in which case the provisions of subsection (2) of section 34 shall mutatis mutandis apply in respect of any such sale.*"

[7] It is common cause that there existed no association agreement between Oates and the deceased that regulated the relationship between them. The result is that the executors were free to apply the provisions of s 35 unfettered by provisions of an association agreement. S 35 of the Close Corporations Act regulates the disposal by an executor of an interest of a deceased member in a close corporation. S 35(a) provides that an executor is first to seek a transfer of a deceased member's interest to the legatee or heir and that such transfer can only be effected if the remaining members of the corporation consent to the transfer. It is common cause that Bernadette is the sole heir of the deceased's 50% member's interest and that the executors requested Oates, as the remaining member, to consent to the transfer of the deceased member's interest to Bernadette as the heir. It is further common

cause that Oates declined to consent to the transfer of the member's interest to Bernadette as heir.

[8] Oates, having not given the requisite consent within 28 days in terms of s 35(a), the executors were entitled to proceed to sell the deceased member's interest in terms of s 35(b) of the Close Corporations Act.

[9] The executors sold the member's interest to Mark for the sum of R16 million (as per a substituted agreement). On 18 June 2009 Oates, as remaining member of the close corporation, was requested by the executors to consent to the transfer of the deceased's 50% member's interest in the close corporation to Mark. The executors, on behalf of the estate, addressed a letter to the close corporation enclosing a copy of the sale agreement of the member's interest from the deceased estate to Mark. The request was made in terms of s 35 as read with s 34(2) of the Close Corporations Act. Oates did not consent to the transfer within 28 days as provided for in s 34(2) of the Close Corporations Act. Pursuant to s 35(b)(iii) this would be a proposed sale as envisaged in that subsection. A failure to transfer deceased member's interest pursuant to s 35(a) results in the executor's obligation to act pursuant to s 35(b). Section 35 uses the word "*shall*" and it was argued that the provisions of s 35(b) are consequently mandatory. It can only be mandatory if one reads the subsections of s 35(b) disjunctively i.e. as "*or*" and not only as "*or*" between subsections (ii) and (iii) because an executor can never be compelled, in the absence of obtaining a transfer pursuant to s 35(a), to sell such interest to the corporation or any of its members, as provided for in s

35(b)(i) as none of them may wish to purchase it. "*Moreover, the executors simply may not be able to sell the interest: construing the language literally, this would mean that the Legislature intends that he is to be in breach of the Act. This cannot have been intended. It is accordingly submitted that, notwithstanding the use of the word 'shall' and the grammatical effect of the usage in the section as a whole, s 35 should be construed on the basis that the provisions of para (a) are mandatory but those of para (b) are permissive*." See Meskin: Henochsberg on The Close Corporations Act Com-80. Indeed, conceptually, the executors cannot unilaterally impose a sale on anyone in any of the categories contained in s 35(b). There is no provision in the Close Corporations Act as to a basis upon which an executor would be obliged to sell the member's interest to the corporation or the remaining members in terms of sub-sections (i) or (ii).

[10] The section does not oblige the executor to sell the member's interest to the corporation or the remaining members. The intention of the legislature is clearly that in the event of s 35(a) not being applicable, that the executors can dispose of the member's interest in one of the three manners provided for in s 35(b).

[11] Oates had the opportunity to acquire the member's interest when he first received the letter but he failed to do so within the time period prescribed.

[12] The executors were therefore free to employ the options contained in s 35(b) and, in particular, the option contained in s 35(b)(iii). Having entered

into a sale with a person who qualifies, i.e. Mark, the executors also had to comply with the provisions of s 34(2). At this stage the corporation or the remaining member is entitled, in terms of section 34(2)(b), to exercise what is effectively a pre-emptive right within 28 days of receipt of the applicable written statement to be substituted as purchaser for the member's interest at the price and on the terms set out in the written statement and that if they fail to do so, then the sale to Mark will become effective and be implemented. However, Oates recorded that he wished to purchase the member's interest at an agreed price failing which a mechanism should be agreed to determine the value of the member's interest. Mr Gautschi, appearing for Oates, argued that an objective market value must be determined. For this proposition Mr Gautschi referred to s 36 of the Close Corporations Act, which requires a court to determine a value of a member's interest in the case of a dispute between members.

[13] Section 36 has no application to a sale of the member's interest from a deceased's estate and if the legislature wished a fair value to be placed on the price on the member's interest pursuant to ss 34 and 35 of the Close Corporations Act, it could so have stated in these sections. The maxim *inclusio unius, est exclusio alterius* is applicable and the provisions referred to in s 36 have no application to ss 34 and 35. In my view, ss 34(2) and 35 are clear and there is no warrant to read in to it the requirement of fair value as argued by Mr Gautschi. The power conferred upon a court in terms of s 36(2) is limited to where the court makes an order in terms of s 36 of the Close Corporations Act and provided the grounds for such relief are present. There

is no reason to transpose that power into s 35, the latter which is clear in its content and meaning. The price which Oates or the corporation had to match in order to be substituted as purchasers was that which was contained in the written statement referred to in s 34. Oates failed to exercise his pre-emptive right in terms of s 35(b)(iii) as read with s 34(2) of the Close Corporations Act to match the offer, and the sale to Mark became effective. It cannot be doubted that a person, like Mark, may wish to purchase his father's member's interest for reasons of his own, and as he says, even at a premium. It was common cause that, if the interpretation contended for by the applicants is upheld, there was compliance with the sections.

[14] Having come to this conclusion, the values obtained by the respondent in order to justify what he regards as a fair value for the member's interest, take the matter no further.

[15] Oates, for a number of reasons set forth in his affidavit, does not wish Mark to be his co-member in the corporation. This he could have prevented but he failed to exercise the options available to him pursuant to the provisions of ss 34 and 35 of the Close Corporations Act.

[16] Pursuant to s 49 of the Administration of Estates Act 66 of 1965, the Master of the High Court is required to sanction a sale of any property in an estate to an executor of that estate. The reason seems obvious: The Master is to ensure that the executors do not act to the detriment of the estate in order to enrich themselves. It is the executor's duty to obtain the best price for

the estate. The Master did so give her consent. The counter-application is aimed at setting aside the decision of the Master's consent to the sale. The argument is that the Master had to also take into account the interests of third parties, such as Oates, in deciding whether to consent to the sale. If it could be said that this argument is correct (which I do not accept as correct), Mark offered R16 million and Oates wanted to offer an amount in excess of R 5 million less. The interests of the estate are paramount and it is the Master's duty to see that its interests are best served. The Master is to guard against any potential conflict between the estate and the executor. See Meyerowitz Administration of Estates and Estates Duty (2007 ed) p 13-11. Where a sale is concluded with the knowledge and consent of the heir, as in the case in this matter, there should be no obstacle to the sale. Meyerowitz at p 13-11 and *Ex Parte van Niekerk* 1918 (CPD 108). Oates' interests are not of such a nature that they should form part of the facts to be considered by the Master as those interests are removed from the interests of the estate. Indeed, Oates' offer would be prejudicial to the estate. The lesser offer by Oates will not serve the interests of the estate and it would in my view, be contrary to the interests of the deceased estate if an executor is to be compelled to dispose of the deceased's member's interest at a price lower than the price offered by Mark. There is consequently no basis to review the decision of the Master.

[17] Mr Gautschi argued that because the Master stated:

> "*Since there was no objection lodged with the Master by the first respondent, I therefore consented to the sale,*"

it was a concession that the rights of Oates had to be considered. I do not agree. That statement by the Master must be seen in the light of paragraph 1 of the report which states:

> "*The first respondent's notice of counter-application, with annexures, were received by me on 24 May 2011 and same corresponds with my records insofar as it relates thereto.*"

Clearly, the Master reacted to the documents served upon her after she had taken the decision and she only became aware of the counter-application when the documents were so served. The statement is factually correct and it is not, in my view, a concession that she should have had regard to the interests of Oates when considering the interests of the estate when approving the sale in terms of s 49 of the Administration of Estates Act.

[18] Mr Gautschi argued that the sale to Mark was not be *bona fide*. The *onus* of successfully questioning the *bona fides* of the sale is on the first respondent. See Meyerowitz at p 13-11 and the cases there cited. If this test is stated too high, it is still the applicant's version (together with the admitted facts) that must be considered. The argument was based on speculative averments by Oates in his affidavit, all of which were denied by Mark. The speculation and argument are effectively countered by a number of facts. Firstly, insofar as the facts are disputed, reliance is to be be placed on the applicants' version. Thus the disputes as to the value of the member's interest must be determined on Mark's version as he is the respondent in the counter-application. That version shows that the price offered by him is justified. Secondly, the sale to Mark was an open and transparent process and the sole heir approved of it. Thirdly, payment of the R16 million will be

reflected in the liquidation and distribution account. Fourthly, estate duty will have to be paid on the full purchase price. Fifthly, the Master will have control over the sale and speculation to the contrary is premature. The speculation regarding Mark's ability to pay can also not affect the sale. The ability to pay comes into play at the time when payment must be made.

[19] In the circumstances, the attack on the sale to Mark as not being *bona fide*, fails and the Master's decision consequently does not fall to be reviewed and set aside on the basis suggested by Oates.

[20] If I am wrong in this view, s 49 of the Administration of Estates Act allows for the Master or the court to consent to a sale from an estate to an executor thereof. Mr Gautschi argued that I should refer the matter back to the Master in the event of my reviewing the Master's decision. I do not agree. Insofar as there may be a technical defect regarding the time periods allowed by the Master and in the event of her decision being reviewable for that reason, it is clear that all of the facts are before me and there is nothing that is contained in the affidavits of Oates to indicate that he did not place his case fully before the court or that there may be additional information to be placed before the Master who would then be in a better position to exercise a discretion.

[20] Insofar as it may be necessary, I consent to and confirm the sale of the 50% member's interest of the deceased to Mark.

[21] I consequently grant the following order:

1. Declaring that the deceased estate of Dimitrios Constantin Livanos ("*the deceased*") with Master's reference number 3251/09, as represented by the first and second applicants, has validly sold the deceased estate's 50% member's interest in the second respondent to the third applicant in terms of the sale agreement annexed as "*MDL22*" to the founding affidavit ("*the sale*).

2. Directing the first and second respondents to take such steps as are necessary to give effect to the implementation of the sale with effect from 26 February 2011, including the signature of the amended founding statement annexed hereto as "*NOM1*" and lodging in the prescribed form an amended founding statement, with the fourth respondent in terms of s 15(1) of the Close Corporations Act, 69 of 1984, failing which, authorising the Sheriff or Deputy Sheriff to take such steps as are necessary to give effect to the implementation of the sale, including the signature of the amended founding statement and any further documents.

3. Directing the fourth respondent to register the amended founding statement upon payment of the prescribed fee and

upon lodging of the amended founding statement in the prescribed form.

4. Directing the first respondent to pay the costs of the application, including the costs of two counsel.

5. The counter-application is dismissed with costs, including the costs of two counsel.

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W L WEPENER
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANTS	ADV A SUBEL SC WITH B GILBERT
INSTRUCTED BY	ALLAN LEVIN AND ASSOCIATES
COUNSEL FOR THE RESPONDENT	ADV A GAUTSCHI SC WITH P STRATHERN
INSTRUCTED BY	YAMMIN HAMMOND ATTORNEYS
DATE OF HEARING	1 MARCH 2012
DATE OF JUDGMENT	14 MARCH 2012