

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. 2012/26817

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1. REPORTABLE: YES NO	
2. OF INTEREST TO OTHER JUDGES: YES NO	
3. REVISED.	
25/10/13	<i>N. Mdalane</i>
DATE	SIGNATURE

In the matter between:

KOKA KELEGANE NELLY

Applicant

and

QUEEN COURT TRADING CC

First Respondent

MASHININI NTSEBENG DOMINIC

Second Respondent

JUDGMENT

MDALANA AJ

1. The applicant in this matter was married to the deceased Zacharia Nkopodi Koka who in turn was a member of the first respondent holding a 50% member's interest in the first respondent. The remaining 50% interest is held by the 2nd respondent. The applicant is an appointed executrix of the deceased estate of Zacharia.
2. On 17 July 2012 the applicant brought an application for an order that the first and the second respondents should provide her with accounting records of the first respondent. It appears that the true reason of seeking such information was for the applicant to know the actual value of the 50% members' interest of her late husband in the first respondent. It appears that application was settled between the applicant on the one hand and the first and second respondents on the other hand. A settlement agreement dated 14th November 2012 was made an order of court. Paragraphs 2.1 to 2.5 of the settlement agreement deal with the agreement to appoint an independent accountant who would determine the value of the 50% member's interest of the deceased in the first respondent.
3. The settlement agreement is silent on what ought to happen after the independent accountant has presented his valuation report. The independent accountant of the firm C & Z Professionals valued the deceased 50% member's interest as R1 663 463.00. Pursuant to that valuation the applicant launched this current application on notice of motion dated 23 July 2013.

4. In this application the applicant seeks an order that the first and second respondents should pay to the deceased estate the sum of R1 663 463.00. The applicant also seeks a cost order on an attorney and own client scale.

5. The first and second respondents oppose the application and they have filed an answering affidavit. The respondents deny that they are obliged in law to pay the amount aforesaid to the deceased estate. The respondents contend that the amount the applicant demands arises from the flawed and professionally deficient accounting report drafted by the accountant of the firm C & Z professionals. In paragraph 9 of the respondents' heads of argument it is contended as follows:

“9. The value of the deceased member's interest in the first respondent is not an amount that was owed to and payable to the deceased. It is therefore not an amount that is currently owing, due and payable to the applicant.”

6. It is further contended by the respondents in paragraph 8 of the heads of argument that the applicant is not entitled in law to demand from the respondents payment of the value of such member's interest simply because the estate of a late husband is entitled to it.

7. In motion proceedings where a final order is sought the applicant bears onus of proof. The applicant is required to make out a case in its founding papers.
8. In the founding affidavit deposed to by the applicant the legal basis upon which an entitlement to payment of the said amount has not been alleged. The settlement agreement does not impose an obligation on the respondents to pay any money to the deceased estate upon the submission of the valuation report by an independent accountant. It was submitted from the Bar on behalf of the applicant that the independent accountant report upon which the applicant relies for her claim is an interim report.
9. The 50% member's interest that was held by the deceased did not automatically revert to the respondents upon the death of the deceased. The respondents have no right or claim to the deceased 50% member's interest except if they elect to purchase that member's interest and their offer is accepted by the executrix (the applicant).
10. In **Stellenbosch Farmers' Winery v Distillers Corporation 1962 (1) SA 458 (A)** the Court stated that "A member's interest can be described as a personal right as against the close corporation, entitling the holder to a pro rata share in the aggregate of member's interests and to participate in a distribution of profits and, on liquidation, in a distribution of the remaining assets after all creditors have been paid." It is not competent for the applicant, in an effort to dispose of her late husband's member's interest

in the first respondent, to demand from the first and second respondents payment of the value of such member's interest simply because the deceased estate is entitled to that interest.

11. It is common cause that the deceased and second respondent were equal partners in the first respondent and that they conducted the business of property development from and in around 2005 to date of deceased's passing. It is also common cause that there existed no association agreement between the deceased and the second respondent that regulated the relationship between them. The result is that the applicant as an executrix is free to apply the provisions of s35 of the Close Corporation Act, 69 of 1984, unfettered by provisions of an association agreement.

12. Section 35 of the Close Corporation Act reads as follows:

*** 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 other than the deceased member;
- (ii) to any 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 ss (2) of s 34 shall *mutatis mutandis* apply in respect of any such sale.'

13. Section 35 of the Close Corporations Act regulates the disposal by an executor of an interest of a deceased member in a close corporation. Section 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. The applicant contends that she sought a transfer of the deceased member's interest and the second respondent declined to consent to a transfer. The second respondent denies that he declined to consent to a transfer of the deceased members' interest and contends that he advised the applicant to first register with the relevant authorities.

14. Section 35 (b) provides that if any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, the executor shall sell the deceased member's interest to the corporation, or

to any other remaining member or members, or to any other person who qualifies for membership of a corporation in terms of section 29. It is clear that the executor cannot unilaterally impose a sale on anyone in any categories contained in s 35(b), which is what the applicant is in effect doing in this case.

15. The applicant does not allege in the founding affidavit that she made an offer to sell the deceased member's interest to the respondents and that such offer was accepted. In the absence of these material allegations there is no basis in law for the applicant to claim payment of the value of the deceased 50% member's interest.
16. In the circumstances, the applicant has not made out a case for the relief it seeks.
17. The respondent has challenged the *locus standi* of the applicant from the Bar. The applicant has alleged in the founding affidavit that she is an executrix of the estate of the deceased. This allegation has been admitted by the respondents in their answering affidavit. Furthermore, the *locus standi* of a party to the proceedings should be challenged in the papers and not from the Bar. Apart from that I am satisfied that the applicant did establish that she has *locus standi* to bring this application. The letter of appointment as an executrix was not a pre-condition for it to be attached unless it was in dispute that the applicant is an appointed executrix.

Accordingly I make the following order;

- (1) The application is dismissed with costs.



M P MDALANA
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	:	MR MANTSHA
INSTRUCTED BY	:	LUNGISANI MANTSHA INCORPORATED
COUNSEL FOR RESPONDENTS:		ADV RAMANO
INSTRUCTED BY	:	MATELA SIBANYONI & ASSOCIATES
DATE OF HEARING	:	23 OCTOBER 2013
DATE OF JUDGEMENT	:	25 OCTOBER 2013