IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No. 15/01417

DELTE WHICHEVER IS NOT APPLICABLE

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

DATE: **SIGNATURE:**

In the matter between:

NOELAND IAN YOUNG	Applicant
And	
NEIL WHITEFOORD CURTIS	First Respondent
LEEROY NORMAN POULTER	Second Respondent
THE KART SHOPPE CC	Third Respondent
SANJA KARIN PIAZZA-MUSSA	Fourth Respondent
KYALAMI KARTING CIRCUIT CC	Fifth Respondent

JUDGMENT

VAN DER LINDE, AJ:

1 The applicant applies on motion for an order directing the first and second respondents to purchase the applicant's one-third interest in the third respondent for the purchase price of R2 986 388.90. The application is opposed and substantial disputes of fact are raised in

the answering affidavits. This has persuaded the applicant to ask for a referral of the matter to trial. The respondents oppose this on the basis that there is no true dispute of fact that ought to persuade the court to exercise its discretion to refer the matter to trial, since the evidential material that the applicant puts up as his factual version is made up of inadmissible evidence.

2 The relief which the applicant seeks in the application is founded on sections 49(1) and (2) of the Close Corporations Act 69 of 1984. In terms of those provisions, a member of a close corporation who alleges that acts or omissions of any other members of the close corporation are unfairly prejudicial, unjust or inequitable to him, may make application to a court for an order under section 49(2). The latter section provides that if on such an application it appears to the court that the acts or omissions are in fact unfairly prejudicial, unjust or inequitable, to the applicant, and if the court considers it just and equitable, the court may make such an order as it thinks fit, including an order for the purchase of the interest of any member of the close corporation by its other members.

3 There are three legs to the unfairly prejudicial, unjust and equitable conduct that the applicant alleges against the respondents. They are, first, that the proposal for the training of the applicant's son failed to materialise and the first and second respondents showed no interest in

him; second, that since the applicant had acquired his member's interest in the third respondent he has not had sight of its financial records; and third, that the first and fourth respondents are involved in the misappropriation and sharing of cash monies generated by the fifth respondent's business.

4 The applicant's case and argument was presented on the basis that the fifth respondent is a close corporation in which the fourth respondent held 50% of the member's interest, and the first respondent held the remaining 50%, but not beneficially and only as nominee for the third respondent. This meant that the third respondent, also a close corporation, was said to be the beneficial owner of 50% of the member's interest in another close corporation, being the fifth respondent.

5 Since in terms of section 29 of the Close Corporations Act no juristic person may hold an interest in a close corporation through a nominee, this meant that the member's interest which the third respondent was said to have in the fifth respondent might not have been lawful. However, in the course of argument it transpired that the fifth respondent was converted from a close corporation to a company on 25 June 2013. This is a material date because the unfairly prejudicial conduct of which the applicant complains was committed both before and after that date.

6 The consequence of this fact, for the applicant's case, is that certainly a part of the unfairly prejudicial, unjust and inequitable conduct on which he relies, might not be lawfully cognisable, because it will have been conducted in a close corporation which was in law not an asset of the third respondent, which was the corporation in which the first and second respondents held their member's interest.

7 The point about referring to this aspect of the matter is that in the exercise of the court's discretion whether to dismiss the applicant's application outright at this stage, or whether instead to refer it to trial, a factor which ought to weigh with the court is that in a trial action this issue will likely be properly investigated.

8 It was in this context that the debate arose as to whether the dismissal of an application in the present circumstances would preclude the applicant from thereafter instituting action afresh for the same relief. The answer to this question is given in Prinsloo NO & others v Goldex 15 (Pty) Ltd & another, 2014 (5) SA 297 (SCA). There, Brand, JA held that a judgment on motion proceedings did not serve as *res judicata* because the motion court in that matter in fact did not properly investigate the factual disputes. Two subsequent judgments of the Supreme Court of Appeal followed this judgment; they are Hyprop Investments Ltd & others vs NSC Carriers & Forwarding CC & others,

2014 (5) SA 406 (SCA), and Royal Sechaba Holdings (Pty) Ltd v Coote & another, 2014 (5) SA 562 (SCA).

9 Similarly, in this matter, an outright dismissal of the applicant's application at this stage would therefore not preclude the applicant from instituting action afresh, because a dismissal would not have been against the applicant on the merits after thorough analysis of the facts.

10 The implication for the present matter of this conclusion is that if this court were now to dismiss the applicant's application, little purpose will have been served other than to have mulcted the applicant in costs. That is self-evidently a consideration against dismissing the applicant's application at this stage, unless it could be argued that the court ought for some reason to express its opprobrium towards the applicant's conduct for having initiated the proceedings on motion. Having regard to the wording of the section, the applicant was entitled to have done so.

11 There is however a second consideration which operates in favour of referring the matter to trial. The predicate of the respondents' argument is that the court ought not to refer the matter to trial, because no *bona fide* dispute has properly been raised on the papers. That proposition is another way of saying that there is no point in

referring the matter to trial, because there is no factual dispute which is capable of being resolved at trial. But that argument inverts in favour of the respondent an argument which is usually raised by an applicant against a respondent.

12 Usually an applicant might say that since the respondent does not raise a *bona fide* factual dispute, the motion court is the appropriate forum for resolving factual disputes in favour of the applicant (since there are no true factual disputes). In such a case judgment may then be given in favour of the applicant against the respondent.

13 But it does not follow that the converse equally applies, for this reason. An applicant or plaintiff is always entitled as of right to institute proceedings against a respondent or defendant, and no court can deny that entitlement. There is no procedure whereby, before the matter arrives at trial, an applicant or plaintiff's case can be thrown out because the applicant will not have been able to show that at the subsequent trial it will not have sufficient evidence to prove its case.

14 Put differently, if an applicant says that it wants to take a matter to trial, there to present evidence to support its case, there is no principle or procedure whereby it may be stopped to do so.

15 Take the present case. The respondents now argue that the applicant is not possessed of any evidence that would establish a case against

them. Therefore the matter should be dismissed and not be referred to trial.

16 However, as discussed above, the applicant will upon such a dismissal be free nonetheless afresh to institute action and to take the respondents to trial without a court being entitled to block the applicant.

17 In view of the above considerations it is in my judgment appropriate to refer the matter to trial and to make the usual costs order. In this latter regard the applicant has argued that the opposition was unreasonable and that therefore the respondents should be ordered to pay the costs of the day. I am disinclined to make such an order, if only on the basis that it may turn out that the respondents are completely vindicated in their submissions; in that event it will have been unfair, all considerations taken into account, to have penalised them with the costs of the argument.

18 In the result I make the following order:

1. The application is referred to trial.

2. The applicant's notice of motion will stand as a simple summons, and the applicant is to file his declaration within 30 days of this order.

3. The costs of this application are costs in the trial.

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WHG VAN DER LINDE, SC
ACTING JUDGE OF THE HIGH COURT

For the Applicant:	Adv. JA Kaplan
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Date argued:	3 September 2015
Judgment delivered:	11 September 2015