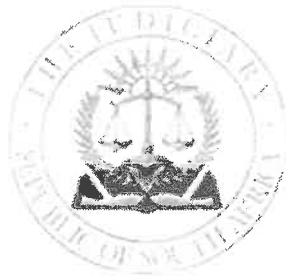


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

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

CASE NO: 29842/2018

07/8/2019
DATE

[Signature]
SIGNATURE

In the matter between:

VANESSA LOUREIRO, NO

EXCIPIENT

and

COMBINED CEILINGS & PARTITIONS CC

FIRST RESPONDENT

JOAQUIM PEDRO

GUIMARAES LOUREIRO

SECOND RESPONDENT

RICARDO LOUREIRO

THIRD RESPONDENT

In re:

COMBINED CEILINGS & PARTITIONS CC

FIRST PLAINTIFF

GUIMARAES LOUREIRO

SECOND PLAINTIFF

RICARDO LOUREIRO

THIRD PLAINTIFF

and

VANESSA LOUREIRO, NO

DEFENDANT

JUDGMENT

DREYER AJ:

[1] The Excipient, the executor of the estate late Licinio Guimaraes Loureiro ("the deceased"), pleads that the Respondents' Particulars of Claim fail to disclose a cause of action in that the Plaintiffs rely on an oral variation of an association agreement concluded between the members of the First Respondent which is in conflict with the written association agreement. Consequently, the oral variation is in breach of both Sections 44(3) of the Close Corporation Act, 69 of 1984 ("the Act"), *alternatively* Section 44(6) of the Act.

[2] The deceased until his death and the second and third respondents were formerly members of the first respondent.

[3] Clause 6 of the association agreement sets out the express pre-emptive rights of the members of the First Respondent, including the methodology to be followed when a member seeks to sell its members' interest or on the happening of specified events, which include the death of a selling member.

[4] As a consequence of the death of the deceased, the remaining members (the Second and Third Respondents) had the right to acquire the equity of the deceased

in the First Respondent. As a consequence, the methodology set out in clause 6 is the agreed methodology to determine the value of the deceased's members' interest.

[5] The Plaintiff plead in addition to these pre-emptive rights, a further oral agreement was concluded between the members of the first respondent in terms of Section 44(3) of the Act, that a life insurance policy would be taken out on the life of each of the members, the First Respondent would make payment of all premiums in respect of the life insurance policies; and on the death of a member, the proceeds of the life insurance policy would be utilised to purchase the deceased member's interest from its estate. On receipt of payment of the proceeds of the life insurance policy, the deceased member's interests would be transferred to the remaining members in proportion to their members' interests, or in such proportion as they may agree.

[6] The Excipient, argues that the oral agreement is at variance with the written association agreement in that it determines a different methodology to determine the value of the members' interest. The written association agreement provides for an express methodology to determine the market value of the members' interest and, in comparison, the oral agreement makes no determination of the value of the members' interest, pleading merely that the proceeds of the insurance policy would be utilised to purchase the deceased member's interest. The oral agreement has no procedure for the actual determination of the members' interest or what the consequences are where the proceeds of the insurance policy are either in excess of or far below the value of the member's interest. The oral agreement has not been reduced

to writing. Consequently the excipient argues, the oral agreement breaches both section 44(3)¹ and 44(6)².

[7] The Respondents argue that the oral agreement did not vary the written association agreement, but co-existed with it. The Respondents contend that there is no conflict between the two agreements, as the oral agreement supplements and fills the *lacunas* in the written association agreement. What these lacuna were, was not expanded on in argument. The Respondents contend that an interpretation of the pleadings is that the seller has an election either to determine the value of the members' interest in accordance with the written association agreement, or to accept payment for the member's interest under the payment of the proceeds of the insurance policy. The respondents contend that this is a plausible interpretation which can be supported by the facts³. Consequently, the respondents argue the pleadings are not excipiable and that the exception falls to be struck down

[8] On the analysis of the pleadings, there is a clear disconnect between the express terms of the oral agreement, as pleaded, and the written association agreement. The oral agreement is clearly an amendment to the association agreement, as the methodology for the determination of the members' interest clearly differs. The oral agreement is at variance with the written terms of the association agreement. The interpretation contended by the Respondents is untenable if regard is to be had to the express written provisions of the association agreement. The provisions of section 44 (3) of the Act have not been complied with. There has been

¹ The section reads: *whether or not an association agreement exists, any other agreement express or implied, between members of a corporation on any matter that may be regulated by an association agreement shall be valid, provided that the express or implied agreement (a) is not inconsistent with any provision of the association agreement.*

² The section reads: *any amendment toan association agreement shall be in writing and signed by or on behalf of each member, including a new member referred to in subsection (5)"*


³ **H v Fetal Assessment Centre** 2015 (2) SA193 (CC) @10

non-compliance with the provisions of Section 44(6) of the Act, as this amendment is not in writing, signed by each of the members.

[9] I am persuaded that the particulars of claim are excipiable.

[10] In the result, I make the following order:

1. *The exception is upheld;*
2. *The Plaintiffs are afforded the opportunity of 20 days from date of this order to amend their Particulars of Claim, failing which the Defendant is granted leave to apply on these papers to have the Plaintiffs claim struck out and dismissed with costs.*
3. *The Respondents are ordered to pay the costs occasioned by the exception."*



C.J. DREYER
Acting Judge of the High Court of
South Africa
Gauteng Local Division
Johannesburg

APPEARANCES:

Date of hearing: 19 August 2019

Date of judgment: 27 August 2019

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RHK ATTORNEYS

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