



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	<u>REVISED.</u>
11/3/2016
DATE	SIGNATURE

CASE NO: 11384/2015

1/3/2016

In the matter between

ANDRE 'TLAM

First Applicant

MUNGANLALL JULARR

Second Applicant

LUCY ANNE 'TLAM

Third Applicant

LA CABLES CC

Fourth Applicant

and

OUPA LAZARUS TLADI

First Respondent

REGISTRAR OF CLOSE CORPORATIONS

Second Respondent

J U D G M E N T

MALI AJ:

- [1] This is an application in terms section 36(1) of the Close Corporations Act, 69 of 1984 ("the Act") in which the applicants seek an order in *inter alia* the following terms:
- 1.1 that the first respondent ceases, with immediate effect, to be a member of the Close Corporation named LA CABLES CC (Fourth Applicant);
 - 1.2 that the fourth applicant acquires, in terms of section 36(2)(a) of the Act, the membership interest of the first respondent, with immediate effect, pending a decision by the remaining members of the disposal of the first respondent's membership interest or the acquisition thereof by the remaining members;
 - 1.3 that the Registrar of Close Corporations be ordered to amend its records in accordance with the order;
 - 1.4 that the value of the membership interest of the first respondent in LA CABLES CC be valued and determined by an independent valuator to be appointed by the Chairperson of the South African Institute of Chartered Accountants (SAICA) and such valuation to take into account the unpaid portion of the purchase price of the membership interest acquired by the first respondent in September 2002, such determination to be final;
 - 1.5 that following the valuation of the first respondent's membership interest the First Respondent shall be entitled to receive payment

in respect of his membership interest from the fourth applicant within a period of 12 months from date of the order;

1.6 that the cost of the evaluation shall be borne equally between the parties. Should any of the parties pay the account of the valuator in full, he/she/it shall be entitled to recover *pro rata* contributions owing from the other parties.

- [2] The first applicant is an adult male residing at No 7 Bantry Street, Kenmare Extension 4, Mogale City (Krugersdorp), Gauteng. He is a founding member of the fourth applicant and currently holds a 39% member's interest in the fourth applicant.
- [3] The second applicant is an adult male residing at No 4 Crous Drive Helderkruijn, Roodeport, Gauteng. He is a 26% holder of the member's interest of the fourth respondent and is also employed by the fourth respondent.
- [4] The third applicant is an adult female residing at No 7 Bantry Street, Kenmare Extension 4, Mogale City (Krugersdorp), Gauteng. She is a 10% holder of the fourth respondent's members' interest and is employed by the fourth respondent.
- [5] The fourth applicant is the close corporation duly registered as such in terms of the Close Corporations Act, No 69 of 1984 ("the Act") with registration number CK/1995/02838/23 and with registered office at 8 Church Street, Mogale City (Krugersdorp), Gauteng and with principal place of business at No 7 Bantry Street, Kenmare Extension 4, Mogale City, Gauteng. The fourth applicant has been trading for nineteen (19) years in the installation of telephone cables for Telkom nationally.

- [6] The first respondent holds a 25% member's interest in the fourth applicant and is a former employee of the fourth applicant.
- [7] The second respondent is the Registrar of Companies and Close Corporations with its principal place of business at DTI Campus, Sunnyside, Pretoria. The second respondent is only cited for purposes of giving effect to any order which may be granted by the court.
- [8] Towards the end of 2013, a dispute arose between the fourth applicant and the first respondent. The said dispute resulted in the first respondent's dismissal by the fourth applicant. The dispute was referred to arbitration where the termination of the first respondent's employment with the fourth applicant was upheld. The parties reached a settlement agreement on 8 August 2014. It is common cause between the parties that a deadlock has arisen, as to the fair compensation of the first respondent and the issue of accuracy of the members' interests.
- [9] The relationship between the first respondent and the other applicants has irretrievably broken down. All the parties are in agreement that it is no longer in the interests of the fourth applicant that the first respondent remain as a member of the fourth applicant; hence this application.
- [10] Section 36 of the Act provides:

"(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

- (a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of*

performing his or her part in the carrying on of the business of the corporation;

- (b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;*
- (c) that the member so conducts his or her in matters relating to the corporation's business that it is not reasonably practicable for the other member or member or members to carry on the business of the corporation with him or her; or*
- (d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:*

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

- (2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to –*

- (a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or*
- (b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the*

corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or

(c) *any other matter regarding the cessation of membership which the Court deems fit."*

- [11] The cases dealing with section 36 of the Act make it clear that an applicant must, in order to succeed, place acceptable evidence before the court as to a fair value for the member's interest of the member who will be forced to dispose thereof.
- [12] In **Geaney v Portion 117 Kalkheuwel Properties CC & others** 1998 (1) SA 622 at 631 G-I the court said that an applicant "*must set out the relevant facts to place the Court in a position, inter alia, to decide what financial adjustments should be made*".
- [13] In **Kanakia v Ritzshelf 1004 CC t/a Passage to India & another** 2003 (2) SA 537 (SCA) at 48 E-F, the court held that it is incumbent on an applicant to place sufficient evidence before the court to enable it to decide both legs of the section 36 enquiry - the entitlement to both an order in terms of section 36(1) and any further relief in terms of section 36(2).
- [14] In **Smyth & another v Mew** 2010 (6) SA 537 (SCA) at 25, it is stated that an applicant must provide the court with all necessary facts so that it can properly exercise its discretion to determine a fair value for the buy-out of a member's interest. In the absence of that evidence, the application must fail. The judgment of Smyth is supported by **Daniels & another v Stander** 2012 (2) SA 586 (WCC) at paragraph 58.

- [15] It is apparent from the facts that the first respondent does not oppose his removal as a member of the fourth applicant; however, he makes pertinent submissions related to the fair and equitable compensation. The submissions are clouded by various allegations and disputes. For example, it was argued on behalf of the respondent that there is an interim settlement of R500 000 offered by the applicants which has not yet been effected. It was also argued that other applicants have sought to conceal assets of the fourth respondent. These submissions are denied by the applicants.
- [16] The applicants' argument is that solutions to the respondent's concerns should be found in prayer 4 of the relief sought in the Notice of Motion. The said relief is to the effect that an independent valuator with sufficient accounting qualifications be appointed by the chairperson of SAICA in order to determine the value of the first respondent's member's interest as from September 2002. I cannot agree with this contention, in that something more per above quoted case law is required for the court to exercise its discretion.
- [17] There is no doubt in my mind that the requirements provided for in law, particularly the presentation of fair values before the court, are intended to protect the member sought to be removed. I do not see how the former member's interest will be safely guarded when he is no longer a member, no matter how independent the valuator might be. The determination of equity leading to fair and equitable compensation cannot be a post event. The applicants have not presented the necessary evidence and, therefore, the application must fail.

ORDER

[18] In the result the application is dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line.**NP MALI****JUDGE OF THE HIGH COURT****APPEARANCES**

For the applicants:	Adv AT Lamey
Instructed by:	Hurters & Spies Incorporated
For the respondents:	Adv Ledwaba LP
Instructed by:	Mashazi, Sishi, Mathibela Incorporated
Date of hearing:	10 November 2015
Date of judgment:	01 March 2016