

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26156/20

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

18 January 2021

C.J. COLLIS

In the matter between:

SONJA DU PREEZ

Applicant

and

PETRUS WILLEM VAN ROOYEN

Respondent

In re:

STITCHED FLAGS AND BANNERS CC

(Reg No: 2006/0991963/23)

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgement is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 18 January 2021.

JUDGMENT

COLLIS J

INTRODUCTION

- (1) This is an opposed application wherein the applicant as per the Notice of Motion¹ applies in terms of section 36(1) read with section 36(2) of the Close Corporation Act 69 of 1984, for the following relief:

- 1.1 That the 15% membership of the respondent in the Close Corporation Stitched Flags and Banners CC (Reg No: 2006/0991963/23) be and is hereby terminated;
- 1.2 That the applicant shall be the owner of 100% of the membership interest of and in the Close Corporation aforesaid;

¹ Notice of Motion Index 001: 1–3.

- 1.3 That it be declared that the 'Memorandum of Agreement' between the parties dated the 16th March 2020 is null and void alternatively, terminated and of no force and effect and that all any monies paid by the applicant to the respondent in execution thereof are to repaid by the respondent to the applicant;
- 1.4 Any Association Agreement between applicant and respondent be and is hereby set aside;
- 1.5 That the applicant's costs of the application to be paid by the respondent.

BACKGROUND

- (2) By way of background the applicant and the respondent are members of Stitched Flags and Banners CC ("the Corporation"), holding 85% and 15% membership interest respectively.
- (3) On 16 March 2020 the parties concluded a written agreement/contract of sale of the respondent's 15% membership interest in the corporation to the applicant ("the contract"). In respect of the sale of contract the purchase consideration of R 1 250 000-00 was payable in instalments.
- (4) The applicant defaulted on her payments of the purchase price. She also repudiated the contract. The respondent accepted this repudiation and cancelled the contract. This transpired on 5 June 2010².

² Founding Affidavit 001 – 79 Annexure 'K'.

- (5) Pursuant thereto, the applicant launched the present proceedings seeking the relief as set out in her Notice of Motion.
- (6) The respondent as mentioned opposes the relief and also filed a counter-application for damages as a result of the applicant's breach of contract. Simultaneously, the respondent also tendered the transfer of his 15% membership interest against the payment of the amount claimed of damages.³

COMMON CAUSE ISSUES

- (7) As per the Joint Practice Note⁴ the following appears to be common cause facts. During 2016 the respondent commenced employment in the business being run at the moment in the CC.
- (8) At the time the business was being run as the sole proprietorship of the applicant, but as a common venture between the applicant and her then husband, mainly under her husband's supervision.
- (9) A few years later, during 2019 the respondent was given 15% membership in the CC, with the applicant retaining 85%. For his membership interest, the respondent was not required to pay equity of valuable consideration for it. During this time the aforesaid business was being run in and by the CC, and all business assets in use were the assets that the applicant had as sole proprietor and which assets had never been sold to the CC.

³ Counter Application para 201 Index 004: 64 onwards

⁴ Joint Practice Note Index 008: 14 - 19

- (10) Around December 2019 the relationship between the applicant and the respondent as two members of the trading CC had broken down and in terms of an agreement between them the respondent had sold his 15% membership to the applicant. The consideration for his 15% membership interest was to be paid by the applicant in instalments.
- (11) The applicant proceeded to pay two instalments, totalling R275 000 and thereafter repudiated the agreement, which repudiation was accepted by the respondent and the agreement was thereafter cancelled.
- (12) As per the counter application the unpaid portion of the purchase price i.e. R975 000,00 is being claimed by the respondent as damages.

ISSUES FOR DETERMINATION

AS PER THE APPLICANT

- (13) This court as per the applicant was to determine whether the applicant's claim for cancellation of the respondent's 15% membership in the CC can be upheld in terms of section 36 of the Close Corporation Act.
- (14) Secondly, this court is to determine whether the sale agreement in question is enforceable or not. The applicant contends that the agreement is null for vagueness and if the court is against this finding the agreement can nevertheless be rescinded in terms of the court's power under section 36(2).

AS PER THE RESPONDENT

- (15) As per the respondent, this court was to determine whether the contract whereby the respondent sold his 15% membership interest ought to be declared as contended for by the applicant null and void, alternatively declared terminated and of no force and effect.
- (16) Conditional, upon the granting of the aforesaid declaratory relief whether the applicant is entitled to repayment of the R275 000 paid in terms of the contract.
- (17) Again, conditional upon the granting of the aforesaid declaratory relief, the setting aside of the association agreement between the parties and the concomitant termination of the respondent's membership interest in the corporation in terms of section 36(1) of the Close Corporation Act 69 of 1984.
- (18) The court is also called upon to determine the respondent's counter application.
- (19) The applicant in order to succeed with the relief she seeks comes the overall (*onus*).⁵
- (20) What will be required of an applicant is to show with evidence the relevant facts required to sustain the relief as set out in section 36(1) and section 36(2) of the Close Corporation Act and a court will evaluate such evidence on a balance of probability.
- (21) The above finding was made in the decision *Geaney v Portion 117 Kalkheuwel Properties CC and Others* 1998 (1) SA 622(T).

ENABLING LEGISLATION

⁵ *Smyth and Another v MEW* 2010 (6) SA 537 (SCA) at 543E para [26].

(22) Section 36 of the Close Corporation Act provides as follows:

“36 Cessation of membership by order of Court-

(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 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 is not reasonably practicable for the other 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."

(23) In his discussion on section 36(1) of the Act Meskin Henochsberg on the Close Corporation Act Issue 3, com 82 states that:

"A corporation is essentially a partnership between the members which as such (and unlike a partnership at common law) is a separate legal persona. The legislature's recognition of this fact is the reason for the enactment of this provisions. Its purpose is to empower the court to dissolve the association between the members without winding up the corporation on the ground that such would be just and equitable as envisaged by section 68(d), in circumstances, which, in the context of a partnership would warrant its dissolution."

- (24) A contract is an agreement between parties which gives rise to personal rights and corresponding obligations.⁶
- (25) “An agreement is a contract only if it comprises a number of essential elements, the all-important are being that the agreement is one for performance or non-performance in the future by one or more of the parties.”⁷
- (26) The other essentials are that the parties must have legal capacity to contract;⁸ that they must seriously intend to bind themselves,⁹ and the agreement must not be contrary to statute law, public policy or good morals in its formation, performance or purpose.¹⁰
- (27) If any one or more of the essential elements is lacking the agreement is void of legal effect from the beginning. No order of court is required to set the agreement aside for its non-existent.¹¹

APPLICANT’S VERSION

- (28) On the applicant’s version she started her business known as Stitched Flags and Banners CC, together with her former husband Thomas Reid Du Preez during 2005. By 2014 her business had grown to such an extent that it employed several dedicated personnel amongst others, the respondent as a general manager.¹²

⁶ Registrar of Deeds v Ferreira Deep Ltd 1930 AD 180.

⁷ Wille’s Principles of the South African Law (Juta 6th Ed) 301.

⁸ Conradie v Rossouw 1919 A.D. 320.

⁹ Conradie 283, 314; 324.

¹⁰ Wille’s Principles of South African Law (Juta 6th Ed) 302.

¹¹ Harrismith Board of Executors v Odendaal 1923 A.D. 537.

¹² FA para 10 Index 001 – 6.

- (29) Around 2017, her marriage to her former husband fell apart and at some stage during the divorce negotiations it was suggested to them that they should “gift” the respondent with a 10% stake in the business whilst she and her former husband shared the rest of the ownership.¹³
- (30) Her divorce was finalized during 2018 and as part of the divorce settlement she paid her former husband an amount of R 3 040 000,00 (Three Million Fourty Thousand Rand) for the goodwill of the business.
- (31) The business and all its assets were then left to her and as a result she resolved to increase the offering of 10% stake to the respondent to 15%. This was done to secure his loyalty and commitment to her and to the business and in facilitating of this offer around July 2018 an “Association Agreement” was drawn up by her attorneys.¹⁴ This, the respondent received “free of charge” in return for his utter most dedication to the business and to herself as his business partner, albeit that their relationship was somewhat strained and distant.
- (32) By way of example the respondent appropriated himself the title “managing member”, when this was never discussed with her and when it was discovered that two sales employees were running their own side business whilst being employed by the CC, he refused to dismiss them.¹⁵

¹³ FA para 12 Index 001 – 7.

¹⁴ FA para 19 Index 001 – 10.

¹⁵ FA para 24 & 25 Index 001 – 12.

- (33) During or about August 2019 the respondent informed her that she had made the work environment impossible for him and that he wanted “out”. The applicant wanted instead to “fire” him, but on legal advice received, decided to rather buy him out.¹⁶ As a result annexure “H” was then signed by both of them¹⁷ on 16 March 2020.
- (34) This agreement the applicant contends is void in that the matter of “sale claims” is incapable of comprehension or definition or performance. She further contends that the agreement is also wholly unenforceable, unconscionable as well as unfair. Moreover, that at no time was she advised by her then legal team about the better option available to her in terms of section 36 of the Close Corporation Act, to actually get rid of the respondent.¹⁸
- (35) By reason of the “lockdown” and the complete cessation of the business, she became unable to meet further payments as envisaged by annexure “H” and as a result requested extensions and postponements for payments.¹⁹
- (36) Her current set of attorneys were thereafter engaged and the present application pursued.
- (37) On her version, had she received the advice of removal of the respondent in terms of section 36 of the Close Corporation Act, she would never have acceded to signing annexure “H”. As there is nothing left of the relationship between herself and the respondent it is on this basis that she contends the provisions of section 36(1)(c) and/or section 36(1)(d) have been fulfilled.²⁰

¹⁶ FA para 41 Index 001 – 16.

¹⁷ Annexure “H” Index 001 – 55.

¹⁸ FA para 46 Index 001 – 17.

¹⁹ FA para 48 Index 001 – 18.

²⁰ FA para 52 Index 001 – 19.

- (38) Furthermore, as a result of the lockdown she seeks financial assistance and the respondents continued membership is an obstacle as long as he is a member of the CC and the CC cannot obtain financial assistance without his suretyship or consent.²¹
- (39) The respondents continued membership has thus incapacitated the corporation as envisaged by section 36(1)(a) and is prejudicial to the welfare of the corporation [section 36(1)(b)] in that without access to credit it will be impossible to overcome the setbacks by the lockdown.

RESPONDENT'S VERSION

- (40) The respondent at the outset denies that the applicant has made out a case for the relief claimed by her.²²
- (41) In amplification thereof he denies that she has allege facts to have the sale agreement declared "null and void" and for it to be set aside.²³
- (42) Furthermore, he denies that a case has been made out by her for the cessation of his membership interest in terms of section 36(1) of the Act.²⁴

²¹ FA para 54 Index 001 – 19.

²² AA para 18.1 Index 004 – 7.

²³ AA para 18.2 Index 004 – 7.

²⁴ AA para 18.3 Index 004 – 7.

- (43) In addition the respondent contends that the current application is nothing more than a disingenuous attempt by the applicant to circumvent her remaining obligations in terms of the sale of membership interest agreement.²⁵
- (44) The decision to exit the corporation was conveyed to the applicant in a letter directed by his attorneys to the applicant's legal representative and that this had transpired around December 2019. In the said letter the irreparable breakdown of the relationship between applicant and the respondent was highlighted.²⁶
- (45) In the said letter directed by his attorney, the provisions of section 36(1)(b) and section 36(1)(c) were also brought to her attention.²⁷
- (46) As per the respondent after months of correspondence being exchanged between the applicant and his representatives, the parties eventually reached consensus on the terms of the sale agreement of his membership interest on 16 March 2020, which terms are disclosed in annexure "H" to the founding affidavit.²⁸ It is on this basis that he asserts that himself and the applicant concluded the sale agreement with open eyes and had reached consensus as to the purchase price, the *merx* and the intension to sell his member's interest.
- (47) What followed on the day thereafter was a payment made by the applicant in the amount of R 250 000 and a further payment of R25000 around May 2020.

²⁵ AA para 24 Index 004 – 10.

²⁶ AA para 37.1 Index 004 – 14 and Annexure "PR3".

²⁷ AA para 37.6.1 Index 004 – 15.

²⁸ AA para 57 Index 004 – 22.

- (48) The respondent further alleges that given various email exchanges between the legal representatives that she (the applicant) at all times were desirous to honour her obligations in terms of the sale agreement and at no point tried to avoid fulfilling same,²⁹ but that she had experience challenges with the Covid 19 pandemic to comply with her payment obligations.
- (49) The respondent contends the utter about turn came about when she changed legal teams and repudiated the sale agreement, which repudiation was accepted by him.³⁰

ANALYSIS

- (50) This court in determining therefore as to whether the contract in issue is void *ab initio* the court must carefully consider whether the essentialia of a contract has been met.
- (51) The essentialia for a contract of sale are the following:
- (a) The parties must have agreed to purchase and sell;
 - (b) on the thing purchased; and
 - (c) on the price.
- (52) There can be no valid contract of sale unless the parties have agreed expressly or tacitly on a purchase price. The object sold must be identified or identifiable and the purchase price.

²⁹ AA para 66 Index 004 – 25.

³⁰ AA para 75 Index 004 – 27.

- (53) In the present instance both applicant and respondent had reached consensus on the irretrievable breakdown of the fiduciary relationship between them. They further had reached agreement that as a result of this breakdown that the respondent would exit the corporation and that in exchange for him exiting the corporation that the applicant would purchase his membership interest from him. The price for his membership interest was even agreed upon and it was agreed upon that this price would be paid in instalments, and the consensus reached by them was eventually recorded in annexure "H" to the founding affidavit.³¹
- (54) *Ex facie* the affidavits the terms set out in annexure "H" and how it all came about are all common cause facts between the parties. It is also common cause between them that at all material times the parties were assisted with legal representation, and that the applicant, upon her change in legal team, had repudiated the sale agreement. Prior to this point in time, she was desirous to fulfil her obligations in terms of the contract of sale so concluded.
- (55) Upon assessing the probabilities; the inescapable conclusion to be drawn, is that there exists no basis for a finding by this court that annexure "H" so concluded is void *ab initio* and no such finding will be made by this court.

³¹ AA Annexure Part 2 Index 004 – 122. See also email dated 24 February 2020. Index 004 – 125.

- (56) On the affidavits presented before this court, the applicant is in breach of her obligations in terms of the contract of sale entered into with the respondent, which repudiation was accepted by the respondent.³² As a result of this repudiation on her part, the respondent suffered damages, which forms the basis of his counter application.
- (57) In the alternative, the applicant is seeking that the contract concluded with the respondent be declared terminated and of no force and effect.
- (58) On the evidence set out in the respective affidavits, the applicant herself repudiated the contract by failing to pay sale price as agreed between the parties, which repudiation as previously mentioned, was accepted by the respondent. The acceptance of repudiation of the contract was also conveyed to the applicant as previously mentioned.
- (59) To rely on repudiation the innocent party (i.e. in this case the respondent), must allege and prove the following:
- (a) repudiation of a fundamental term of the contract - that is conduct the exhibits objectively a party's deliberate and unequivocal intention not to be bound by the contract;
 - (b) an election by the innocent party to terminate; and
 - (c) communication of the election to the guilty party.³³

³² AA Annexures PART 2 Index 004 – 140 and 142.

³³ Highveld 7 Properties (Pty) Ltd v Bailes [1999] 4 ALL SA 461 (A); 1999 (4) SA 1307 (A).

- (60) The founding affidavit contains no allegation to support the alternative relief to declare the contract terminated and of no force and effect and it thus follows that the alternative relief cannot be granted.
- (61) The party who asserts that the other party has repudiated the contract may seek as relief either of the following:
- (a) restitution;
 - (b) damages, usually assessed at the agreed date of performance:
See *Novick v Benjamin* [1972] 2 ALL SA 510 (A);
 - (c) specific performance of accrued rights.
- (62) In the absence of the applicant succeeding with her relief to declare the contract void *ab initio* or terminated no basis exist for any money paid by her to be repaid.
- (63) As to her relief sought to have the Association Agreement set aside the *onus* rests on the applicant to allege and prove a cause, reason or flaw existing at the time when the Association Agreement was concluded which now entitles her to repudiate and claim *restitutio in integrum*.³⁴ In the event of the applicant succeeding to have the association agreement set aside, the resultant effect would be to have the respondent's membership interest returned in favour of the applicant.

³⁴ Willes Principles of the South Africa Law (Juta 6th Ed) 303.

- (64) As per the Notice of Motion no such ancillary relief is sought by the applicant, nor have any case therefore been pleaded. Consequently, I find, she cannot succeed with this portion of the relief which she also seeks.
- (65) What remains is then the termination of the respondent's membership interest to section 36(1) of the Close Corporation Act.
- (66) In carefully having considered the applicants pleaded case, at best the respondent's membership is to be terminated on account of circumstances, which renders it just and equitable as provided for in terms of section 36(1)(d).
- (67) In amplification of this ground the applicant avers that the respondents continued membership serves as an impediment to the corporation's financial flexibility, and in addition to this it is common cause that the fiduciary relationship between the parties had broken down irretrievably.
- (68) To my mind, the objective of section 36(1) and section 36(2) of the Close Corporation Act, is precisely what was envisaged with the conclusion of the contract of sale i.e. the termination/cessation of the respondent's membership interest against any amount to be paid in respect of the member's interest concerned.
- (69) On the conspectus of the evidence presented, this will therefore be just and equitable result.
- (70) In relation to the counter-application same is premised and the contract of sale concluded between the parties and the subsequent cancellation by the respondent.

- (71) In terms of this contract of sale the purchase price for the respondent's membership interest was agreed to be R1 250 000 with the applicant having paid R275 000 towards the purchase price. This leaves a balance of R 975 000,00 and in the event of the contract of sale not having been breached by the applicant, this balance would have been paid by the applicant.
- (72) As previously mentioned an innocent party in the event of repudiation may either seek restitution/damages or specific performance.
- (73) *In casu*, the respondent accepted the repudiation and cancelled the contract and what was due to him (his loss) at that point forms the basis for his counter application. On the evidence presented the respondent has discharged his *onus* to succeed with his counter application.

ORDER

- (74) In the result the following order is made:

74.1 In terms of section 36(1)(d) of the Close Corporation Act the 15% membership interest of the respondent in the Close Corporation Stitched Flags and Banners CC (Reg No: 2006/0991963/23) be and is hereby terminated, against payment by the applicant to the respondent of the amount of R 975 000 in terms of section 36(2)(c) of the Act.

74.2 Upon receipt of such payment mentioned in paragraph 74.1 the respondent is directed to effect transfer of his 15% interest in the corporation to the applicant.

74.3 The applicant shall thereafter be the owner of 100% of the membership interest of and in the Close Corporation aforesaid.

74.4 The respondent's counterclaim is upheld, with costs.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	: Adv. B.G Savvas
Attorney for the Applicant	: Venn & Muller Incorporate
Counsel for the Respondent	: Adv. J. Lubbe
Attorney for the Respondent	: Schuler Heerschop Pienaar
Date of Hearing	: 10 November 2020
Date of Judgment	: 18 January 2021

Judgment transmitted electronically.