REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 4407 / 2004

In the matter between:

MICHAEL MONGEZI KLAAS Applicant

and

ALBERT BASIL SUMMERS First Respondent

JOEY WILLIAMS Second Respondent

COMMUNITY WORKERS FISHING ENTERPRISES CC
(Registration Number CC 1995/038299/23) Third Respondent

THE REGISTRAR OF CLOSE CORPORATIONS Fourth Respondent

GREYSTONE TRADING 839 CC Fifth Respondent

ALBERT BASIL SUMMERS AND ISMAIL ANTOOLEY
(*Nominee officio*, in their capacity as trustees for time being of the BASIL SUMMERS FAMILY TRUST) Sixth Respondent

NAZAREEN JOSEPHS Seventh Respondent

JUDGMENT : 10 DECEMBER 2007

BOZALEK, J:

[1] The applicant in this matter was dispossessed of his member's shareholding in a close corporation by his fellow members and shareholders on the basis of an alleged breach of the terms of an association agreement. He now seeks an order setting aside his removal and reinstating him as a member and shareholder in the corporation. Failing the granting of such relief the applicant seeks the setting aside of the valuation of his forfeited shareholding and directing a re-valuation thereof.

[2] The action is opposed by the corporation, third respondent, and by the two other initial shareholder/members, first and second respondents. At a later stage subsequent shareholders in the corporation, namely fifth, sixth and seventh respondents, were, by agreement, joined as respondents. The Registrar of Close Corporations is the fourth respondent.

[3] At the material time, in November 2003, the applicant held a 41,02% shareholding in third respondent. He lost his shareholding pursuant to an alleged breach of clause 13.1 of the association agreement (hereinafter "the agreement") which reads as follows:

"Powers of members to bind Corporation

13.1 Notwithstanding the provisions of section 54(1) of the Act, as between the Members of the Corporation, only a Management Committee member, duly authorized, shall have the power to represent the Corporation in its dealings with third parties and all other Members of the Corporation shall be disqualified from representing the Corporation;

13.2 Any Member of the Corporation who breaches the provisions of clause 13.1 shall

13.2.1 be liable to the Corporation for any damages which it may suffer as a result of his breach and,

13.2.2 if the breach is material, be deemed to have offered his Equity to the remaining

Members of the Corporation at the fair value thereof as determined by an independent auditor appointed by the Accounting Officer on the following terms and conditions:

13.2.2.1 The person making the deemed offer in terms of this clause 13.2.2 is hereinafter in this clause referred to as the "Offeror";

13.2.3 The remaining Members shall be entitled, within a period of 30 (thirty) days following the presentation of the independent auditor's valuation of the Offeror's Equity, by written notice to the Offeror, to purchase his Equity at such valuation; Provided that the remaining Members may acquire only the whole and not the part of the Offeror's Equity;

13.2.2.3 Should the offer be accepted by more than one of the remaining Members, they shall acquire the Equity being offered in proportion to their respective Members' interests at the time that the deemed offer is made or in such other proportions as they may unanimously agree."

[4] On 9 July 2003 first and second respondents' legal representative wrote to the applicant listing various complaints relating to his alleged non-compliance with the terms of the agreement. Amongst the complaints was one which ultimately formed the basis upon which the application was divested of his shareholding in the corporation. It accused the applicant of "*concluding agreements with third parties wherein you bind the corporation in circumstances where such agreements are prejudicial to the corporation and beyond the scope of our (the members') authority*". The letter advised applicant that if he objected to the deemed offer clause being invoked, he should furnish notice to that effect within seven days.

[5] Whilst not giving the formal notice requested, the applicant instructed his legal representatives to take up the matter on his behalf and a correspondence ensued between the respective legal representatives. The applicant disputed that he had breached the provisions of clause 13.1. Notwithstanding this, the process invoked by the respondents proceeded and culminated in a meeting of third respondent's members,

save for the applicant, on 24 September 2003. At that meeting a resolution was passed authorising first respondent "*to do all things that may be necessary or reasonably required for the purposes of finalising the change of members' interests*" to reflect that the applicant's interest in the corporation had been forfeited and divided in equal shares between first and second respondents. In consideration thereof, the applicant was to be paid the sum of R455 322.

[6] It is common cause between the parties that the case against the applicant for an alleged breach of clause 13.1 rests on two acknowledgements of debts executed by him in respect of loans obtained in his personal capacity from *Lusitania Financial Services Pty Ltd*. The acknowledgments were concluded in December 2002 and June 2003 for loans in the amount of R25 000 and R45 000 respectively.

[7] In both acknowledgements of debt the following clauses appear:

> "2.2 I further hereby authorize and instruct Community Workers Fishing Enterprises CC….. to pay to the Creditor all amounts that may be due to me by virtue of my members' interest in the corporation until the full debt in terms of this acknowledgment has been settled." …
>
> 10. I hereby agree to provide security to the Creditor for any and all amounts that may be due by me to the Creditor now or in the future, the said security being in the following form; a pledge of all my members' interest in Community Workers Fishing Enterprises CC…. and the cession of my loan account in the said Corporation to the Creditor or the Creditor's nominee. I hereby irrevocably and *in rem suam* nominate, constitute and appoint the Creditor as my attorney and agent in my name, place and stead to sign and execute all such documents and to do all such things as it in its sole and absolute discretion may consider necessary, requisite or desirable to give effect to this security, including but not limited to, signing all documentation required to register the member's interest in the name of any party nominated by the creditor as envisaged in terms of this clause."

In addition the later acknowledgment of debt contained the following

clause:

> "11. I confirm I am satisfied with Capital Community Workers Joint Enterprise Agreement on the MFV Marie Claire Vessel Company (Pty) Ltd and I shall do all things necessary to maintain our involvement in that regard"

[8] The principal question to be determined by this Court is whether the applicant's conduct in concluding the acknowledgements of debts in the aforesaid terms amounted to "representing" third respondent as provided for in clause 13 1. of the agreement. Should this be answered in the positive, subsidiary questions are, furthermore, whether the provisions of clauses 13.2.1 and 13.2.2 ought to be read conjunctively or disjunctively and the materiality of the applicant's breach. Should these questions be answered in favour of the respondents and the applicant is consequently not entitled to be re-instated as a member of third respondent, there remains the question of the alternative relief sought by the applicant, namely, the setting aside of the valuation of the applicant's members interest in the sum of R455 322,00 by a firm of auditors in August 2003. In this regard the applicant's case is that the valuation was both procedurally and substantially unfair.

[9] On behalf of the respondents, Ms Pillay contended that in concluding the loan agreement the applicant bound the third respondent and that this in effect constituted "representing" it as prohibited by clause 13.1. She submitted that, having regard to the clause's heading "Power of Members to bind the Corporation", that any contract or acknowledgement of debt having such effect would constitute

"representing" the corporation as envisaged by the clause. It should firstly be noted that the heading of clause 13 cannot alter the meaning of the phrase "represent" within the context of clause 13.1, not least because the agreement provides that the headings of clauses shall not be used to interpret, modify or amplify the terms of the agreement.

[10] In seeking to give the term "represent" a wider meaning, one which encompasses any conduct which has the effect of "binding" of the corporation, Ms. Pillay relied also on the provisions of s 54 of the Close Corporations Act which reads as follows:

> Power of members to bind corporation:
> 1. Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.
> 2. Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the members so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has or ought reasonably to have knowledge of the fact that the member has no such power".

[11] On the basis of these references to "binding" the corporation, Ms. Pillay in effect contended that any act by a non-member of the Management Committee which bound the corporation breached the provisions of clause 13.1 of the agreement. Since the applicant had, through the acknowledgements of debt, "bound" the third respondent by authorising and instructing it to pay monies owing by it to him directly to the creditor he had in effect represented the corporation. On the same reasoning, Ms. Pillay argued, the applicant's undertaking in clause 11 of the second acknowledgment of debt, to do all he could to retain certain arrangements between the creditor and third respondent, undoubtedly breached the provisions of clause 13.1.

[12] On behalf of the applicant, who was represented by Mr. Schubart, it was contended that in concluding the acknowledgements of debt he in no way “represented” third respondent. The acknowledgements merely contained an instruction and authorisation to the third respondent to pay to the creditor whatever monies were owing to the applicant by third respondent until the loan was repaid in full. The pledge by the applicant of his member’s interest in third respondent was merely for the purpose of providing security and amounted to no more than what any creditor could obtain should judgment be taken against the applicant and lead to execution against his property. As far as the undertaking pertaining to the Marie Claire Vessel Co (Pty) Ltd, Mr. Schubart contended that the applicant went no further than making certain undertakings on his own behalf which again in no way bound or purported to bind the third respondent.

[13] Clause 13.1 of the agreement vests, in the Management Committee members, the power to represent the corporation in dealings with third parties. It seeks to ensure that other members, falling outside the aforesaid category, do not purport to speak and act on behalf of the corporation. Put differently, the mischief which it seeks to avoid, is that of a non-Management Committee member binding the corporation by speaking or acting, or more accurately, purporting to do so, on behalf of the corporation.

[14] In West's **Legal Thesaurus / Dictionary**, the primary meaning given for "represent" is "*to speak or act with authority on behalf of another person (she represents the company)*". **The Concise Oxford English Dictionary**, tenth edition, revised, page 1215, likewise gives as the primary meaning "*be entitled to act or speak for*". It is in this context that the phrases "*represent*" and "*bind the corporation*", as they appear in clause 13 of the agreement and its heading, must be understood.

[15] Ms Pillay called in aid the provisions of s 54 of the Act. Commenting on this section, the authors of Henochsberg on the Close Corporations Act, observe that its provisions are far-reaching and that their intention is that "*every member of a corporation, merely as such, is to be an agent of the corporation for all purposes, including, even, a purpose which has nothing whatever to do with the carrying on of the business of the corporation, in relation to a person who is not a member of the and is dealing with it*" (my underlining). The member is such an agent even if no authority has been conferred upon him by the corporation which is "*bound by the related act unless the third party knew, or ought reasonably to have known, of the absence of authority*". The position is not altered simply by the corporation or its members purporting to withhold such authority from the member "*whether in an association or any other agreement or resolution of the members or otherwise*" (at Com – 149 issue 15).

[16] It has further been noted that s 54 of the Act was aimed at avoiding, in

so far as dealings with a close corporation are concerned, the application of, *inter alia*, the *ultra vires* doctrine and the doctrine of constructive notice which apply in respect of companies. (See the comments of J.S McLennan in "**Contracting with close corporations**" 1985 SALJ 322 in respect of the wording of s 54 prior to its amendment.)

[17] The provisions of s 54 do not, however, in my view assist the respondents in their quest for a broader interpretation of the conduct prohibited by clause 13. The latter provisions are clearly subsidiary to those of s 54 of the Act and do no more than regulate the position between the corporation's members in the event of an unauthorised member representing or purporting to represent the corporation in the dealings with third parties.

[18] Furthermore, notwithstanding the far-reaching effect of the provisions of s 54, they do not, in my view, extend to binding a corporation *vis a vis* a third party in relation to an act by an unauthorised member who is expressly not acting as a representative of the corporation and where this is clearly understood by the third party. That qualification is to be found both in the words "*and is dealing with the corporation*" and in the structure and purpose of s 54. The words quoted connote, in my view, that, for the corporation to be bound, the third party must believe, at least, that he is engaging with the corporation as opposed to an individual acting on his own behalf. They imply, moreover, that the

dealings, at least on the face of it, concern the affairs or business of the corporation.

[19] The purpose of s 54, as reflected in its wording, is to bind the corporation *vis a vis* a third party where there have been dealings between such person and a member of the corporation, whether authorised so to act or not, and irrespective of whether the members "act" was in fact performed for the purposes of carrying on the corporation's business or not. The rationale for the provision is to protect the interests of third parties who deal with the corporation through a member, unaware that he/she has no authority to represent the corporation, and who are not negligent in failing to establish the true position.

[20] The provisions of s 54 cannot bear the wider interpretation contended for. Such an interpretation would hold corporations bound to third parties by virtue of the acts of its members even where such members clearly acted in a non-representative capacity and were understood by the third party to be acting in such capacity. This could lead to a extensive increase in the liability of close corporations for the acts of their members in circumstances where this was neither justified in law nor for reasons of policy.

[21] For these reasons I consider that neither the provisions of clause 13.1 of the agreement nor those of s 54 of the Act support the broader

interpretation of the concept of “representing” the corporation for which Ms. Pillay contends.

[22] In my view in order for the provisions of clause 13.1 to be breached the member must purport to speak or act on behalf of the corporation. Nor do I see that any difference is made where, in his dealing with a third party, the member instructs the corporation to do something which he would ordinarily be entitled to require of it, for example, to honour a stop-order in favour of a creditor against emoluments due to the member by the corporation. In doing so the member does not purport to speak or act on behalf of the corporation.

[23] Using what I consider to be the ordinary meaning of “represent” as intended in clause 13.1 of the agreement, and leaving aside for the time being clause 11 of the second acknowledgment of debt, I consider that neither the fact nor the terms of the acknowledgements of debt executed by the applicant can in any way be said to have amounted to the applicant “representing” third respondent. The acknowledgments of debt concerned the applicant’s personal affairs and in them he did no more than acknowledge his personal indebtedness to a creditor and instruct third respondent to pay to such creditor any amounts due to him (the applicant) by virtue of his interest in the corporation.Third respondent was not thereby obliged to pay any of its funds but only those belonging to the applicant. To the extent that there was any “binding” of the corporation, as opposed to a lawful instruction from the

applicants to the corporation, this was not a “binding” to a third party in the sense contemplated by the provisions of either of s 54 or, for that matter, clause 13.1 of the agreement.

[24] The content of clause 11 of the second acknowledgment of debt goes somewhat further. There the applicant goes beyond an ordering of his personal affairs and deals with the internal affairs of the corporation. The applicant’s undertaking that he was satisfied with third respondent’s arrangement or agreement, relating, presumably, to the use of a vessel, sits uneasily in his personal acknowledgement of debt. It exposes the applicant to criticism that he allowed his personal affairs to compromise his responsibilities as a member of the corporation.

[25] It is clear, furthermore, that in making the undertaking the applicant spoke in his capacity as a member of the corporation, albeit not on behalf of the corporation. This distinction is evident in the repeated use in clause 11 of the personal pronoun “*I*” juxtaposed against the phrase “*our involvement*”. In my view, the terms of the undertaking are expressly personal or non-representative and, as such, were clearly made by the applicant speaking on his own behalf and not in a representative capacity on behalf of the corporation. Further, they leave little room to doubt that the applicant’s creditor (the third party) must have been aware, in obtaining the undertaking, that it was “dealing with”, not the corporation, but a member thereof speaking or acting only on his own behalf. Certainly no evidence to gainsay this

was tendered by the respondents.

[26] For these reasons, although the applicant's undertaking in clause 11 of the second acknowledgment of debt related to the carrying on of the business of the corporation, its expressly non-representative nature coupled with the third party's understanding of it as such, leads me to the conclusion that the applicant's conduct did not amount to a breach of clause 13.1.

[27] If I am incorrect in coming to this latter conclusion, however and the applicant's undertaking in fact amounted to him "representing" the corporation, the questions of the materiality of the breach and how clauses 13.2.1. and 13.2.2 are to be read, arise for consideration. In the first place, on a fair reading of clause 13 it seems clear that the two sub-clauses must be read disjunctively and that, in the event of a breach of clause 13.1, the aggrieved members can both sue for damages and, if the breach is material, deem the offending member to have offered his or her equity for purchase by the remaining members. In other words such members are not limited to only one of the remedies set out in clause 13.

[28] No evidence was led in the present matter regarding the consequences for third respondent of the undertaking given by the applicant in clause 11 of the second acknowledgement of debt. There is thus no basis upon which to find that the breach, assuming it to be such, was

material, thereby bringing the deemed offer provisions into operation. It follows then that the dispossession by the first and second respondents of the applicant's members' interest in the third respondent was unlawful and must be reversed. In the light of this conclusion it becomes unnecessary for me to express any view on the lawfulness or fairness of either the valuation process or the resultant valuation. The applicant must succeed in having his removal as a member of third respondent set aside and in obtaining the consequential relief sought.

[29] In the result the following order is made:

1. **The actions of the first and second respondents in having the applicant removed as a member of third respondent are set aside.**

2. **The applicant is reinstated as a member of the third respondent, holding a member's interest in the third respondent of 41.02%, such reinstatement to be retrospective to 6 November 2003.**

3. **First, second, fifth, sixth and seventh respondents are directed to take all such steps and sign all such documents as are necessary to give effect to the order in paragraph 1 and 2 above.**

4. **In the event of the first, second, fifth, sixth and seventh**

respondents failing to take all such steps as are required within fourteen days of the date of the granting of this order, the sheriff is authorised and directed to take all such steps and sign all such documents on their behalf to give effect to the order in paragraph 1 and 2 above.

5. **The fourth respondent is directed to register the reinstatement of the applicant as a member of the third respondent in order to give effect to paragraphs 1 and 2 above.**
6. **First and second respondents are ordered to pay the applicant's costs in this application, jointly and severally, the one paying the other to be absolved.**

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LJ BOZALEK, J