



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: **3795/07**

In the matter between:

MAXIE MARGARETH SANDRA RÜCKERT

Plaintiff

and

HANS PETER KURT MARTIN RÜCKERT

First Defendant

CHRISTIAN UWE PAPE

Second Defendant

SUZANNE WENTZEL PAPE

Third Defendant

WITNEY PROPERTIES CC

Fourth Defendant

THE REGISTRAR OF CLOSE CORPORATIONS

Fifth Defendant

HEYNS AND PARTNERS INCORPORATED

Sixth Defendant

JUDGMENT delivered on the **2nd** of **DECEMBER 2010**

NGEWU AJ.

1. The crucial question for determination in the matter is whether a Plaintiff, not yet being a member of the fourth Respondent could legally transfer her members interest in the fourth Respondent to First, Second and Third Defendants and whether the membership interest redistribution agreement concluded by the parties is valid.

The following facts are not in dispute:

2. In or about 1999 the Plaintiff and the first Defendant, once a wealthy businessman from Camp's Bay, were married to each other out of community of property, which marriage has since been dissolved by divorce.
3. Prior to their marriage, and on or about the 25th of November 1997, the parties purchased the immovable property situate at 1 Donkin Road, Sea Point then held as an asset in the name of the Fourth Defendant, Witney Properties CC. The property was to be registered in the name of the Plaintiff as the sole member of the fourth Defendant. The parties agreed to contribute equally towards repayment of the bond instalments in respect of the property.
4. Plaintiff's 100% membership was not registered in her name by the fifth Defendant (CIPRO) due to an oversight. In 2000 the parties commenced renovations to the property. Plaintiff caused her membership interest to be registered on 12 August 2004.
5. Whilst Plaintiff and first Defendant were still under the erroneous impression that she held 100% membership in the fourth Defendant, Plaintiff and First Defendant entered into an agreement in terms of which:

- (i) He would acquire 71% of the member's interest in the fourth Defendant by virtue of the money he had invested in renovations to the property;
- (ii) Second and third Defendants would be given a joint 9% member's interest in view of the monies they had advanced to the Plaintiff and first Defendant in furtherance of renovations, and
- (iii) The Plaintiff would hold a 20% member's interest in the fourth Defendant.

and on 18 October 2005, the member's interest in the fourth Defendant were registered as agreed above.

~~Plaintiff's case~~

- 6. The Plaintiff has now approached the Court seeking an order that:
 - (i) The registration of the member's interest by the fifth Defendant on 18 October 2005 be set aside, and that her 100% member's interest in the fourth Defendant be restored.
- 7. Plaintiff alleged in her Particulars of Claim that the First, Second and Third Defendants, or the first Defendant acting on behalf of the second and third Defendants caused her to sign a CK2 form altering the

membership interest in the fourth Defendant on the 7th November 2001 and same was registered on 18 October 2005.

8. At the time of registration of the member's interest first Defendant knew or ought to have known that Plaintiff denied or repudiated the agreement.
9. On 7 November 2001 and during March 2004, the Plaintiff was not the registered owner of any member's interest in the fourth Defendant and her signature disposing of her interest at the time was not competent as she was not the owner of any member's interest. She was only competent to resign her member interest after 12 August 2004 when same was registered in her name.
10. By way of alternative relief the Plaintiff repudiated or denied any alleged agreement and claimed that the amended registration of the member's interest of 18 October 2005 was induced by misrepresentation.
11. Plaintiff's evidence during trial was riddled with many material contradictions. She denied having signed the CK2 form. Her other version was that she could not recall seeing the CK2 form or signing the member's interest part of the form. She denied and at the same time agreed that the signature on the CK2 form was hers, or could not

recall if her signature appears on the CK2 form. She refused to answer if the signature appearing on the CK2 form was hers or not.

12. The Defendants contended that the Plaintiff signed the CK2 (amended founding statement) voluntarily in terms of an agreement reached by all other members with full knowledge of its contents and that the agreement was valid and binding. All parties laboured under the erroneous belief that the member's interest in the fourth Defendant had been registered in Plaintiff's name.

Plaintiff, therefore, acted surreptitiously in registering her 100% membership interest on 12 August 2004 after she had expressly agreed to dilute her member's interest in order to secure a loan from second and third Defendants.
13. Mr. Van Geens, the attorney at whose office the CK2 form was signed, testified that the purpose of the CK2 form was fully explained to the Plaintiff and she signed it freely and voluntarily after understanding its contents. That evidence was not challenged by Plaintiff's counsel. This corroborated the first Defendant's version in totality.
14. Section 37 of the Close Corporations Act, 69 of 1984 allows any member of a Corporation to voluntarily dispose of his/her member's interest or a portion thereof to any other person qualifying for membership in terms of Section 29. Such disposition must be done in

accordance with an association agreement, if any, or with the consent of every other member of the Corporation. Section 29(2) states that a person qualifies for membership the moment he is entitled to a member's interest. (See *Cilliers et al: Close Corporation Service; Issue 35*).

15. There is no specific requirement in the Close Corporations Act that the transfer by a member of her/his membership interest must be registered to be effective. In terms of Section 15(1) and (2) any change in percentage of a member's interest takes effect when the change is made and not when the amended founding statement is registered. Thus, transfer of the member's interest to the First, Second and Third Defendants became effective at the time the agreement was reached. Likewise, the Plaintiff was a holder of a member's interest at the time she transferred a portion of her interest to the First, Second and Third Defendants as she was not a registered sole member of the Close Corporation. She had acquired such membership interest by purchasing the property, being the only asset fourth Defendant possessed. The transfer of member's interest and percentages were reflected in both amended founding statements (i.e. one reflecting 100% membership by Plaintiff, and the subsequent one reflecting redistribution by Plaintiff of the 100% to her and the first to third Defendants.

16. A Close Corporation is a juristic person. The assets are held by it and members are not co-owners of the assets. On transfer of the 100% membership interest to the Plaintiff, by the original member or members of the fourth Defendant, the latter's membership of the Close Corporation terminated and thus, the Corporation remained without a member. The Plaintiff, as transferee of the member's interest, would have become the sole member of the Corporation if the amended founding statement designating her as such was successfully registered.
17. There was no evidence led suggesting that any or both transfer agreements provided for transfer of the membership interest only upon registration of the amended founding statements, a situation that would have postponed or delayed acquisition of the membership interest itself.
18. Parties to a contract are bound together in a legal relationship and the principle of *bona fides* underlies our law of contract. An innocent party aggrieved by a major breach may terminate the contract relationship by cancelling the contract.
19. The test to be applied in determining if a party has repudiated the contract is whether such repudiating party acted in such a way as to lead a reasonable person to conclude that he/she did not intend to fulfill his part of the contract. In *Datacor International (Pty) Ltd v Intamarket*

(Pty) Ltd 2001 (2) SA 284 (SCA) 294 it was stated: "Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming . . . The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a serious matter requiring anxious considerations and because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments, not lightly to be presumed."

The party repudiating must thus disclose an intention no longer to be bound by the contract.

In *Street v Bublin* 1961 (2) SA 4 (W) at 10 Williamson J stated that the test as to whether conduct amounts to such repudiation as justifies cancellation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound.

20. From the above exposition of the law, it is clear that nothing hindered the acquisition of the member's interest by the second and third Defendant's from the Plaintiff in view of the money/loan they advanced to the Plaintiff and the first Defendant. Most unfortunately the Act does not deal specifically with the manner of transfer of a member's interest. No evidence was led to suggest that the cession of the member's interest to the first, second and third Defendants was irregular. The

amount they advances to Plaintiff and first Defendant was applied towards renovation of the property, and I cannot reject the evidence that the agreement between the parties was that they would recover their money so invested by way of acquisition of a percentage member's interest in the Close Corporation. The evidence by the Plaintiff that she renovated the property for residential purposes clearly cannot stand. She could not come up with any possible agreement reached to repay the advance amount to the second and third Defendants.

21. It is a commercially sound practice to respect sanctity of the contracts and to enforce contractual obligations. Plaintiff cannot be heard to say that she now repudiated the contract many years after she received/accepted the loan and applied it towards renovation of her property.
22. Thus, Plaintiff has no legal basis for her allegation that the First to Third Defendants knew or ought to have known that she denied or repudiated the contract. She signed the contract freely and voluntarily knowing fully well what its contents were and without misrepresentation or fraud. The contract is therefore a binding one and First, Second and Third Defendants are entitled to enforce the contract by asking for an order for specific performance.

The Plaintiff's claim is therefore dismissed with costs.


NGEWD AJ.