

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

Case No. 3433/2010

In the matter between:

NOEL DANIELS

First Applicant

FUNDAMENTALS TRAINING CENTRE CC

Second Applicant

and

GRANVILLE STANDER

Respondent

JUDGMENT:

OLIVIER (AJ)

DATE OF JUDGMENT:

1 APRIL 2011

ADV. FOR 1ST & 2ND APPLICANTS:

Adv. C. Tsegarie

INSTRUCTED BY:

Brink & Thomas INC.

ADV. FOR RESPONDENT:

Adv. D.A. Stephens

INSTRUCTED BY:

Mario Walters and Associates

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Sven OLIVIER, AJ

1. This is an application in terms of section 36 of the Close Corporations Act, Act 69 of 1984, in terms of which the first applicant, Mr Daniels, a member of the second applicant, Fundamentals Training Centre CC, seeks an order

that the member's interest of the respondent, Mr Stander, in Fundamentals Training Centre be acquired, at fair value, by Fundamentals Training Centre.

2. The applicants predicated the application, and the relief sought thereunder, on the provisions of sections 36(1)(c) and (d) of the Close Corporations Act. Section 36 provides as follows:

"(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:

...

(c) that the member so conducts himself or herself in matters relating to the corporation's business that it 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."*
- 3. Fundamentals Training Centre commenced trading in April 2006 and it was incorporated as a close corporation later that year. It has three members, each holding 33⅓ per cent member's interest. The three members are Mr Daniels, Mr Stander and Mr Howard Johnson. The three members' contributions consisted of the contribution of money and relevant skills for the purposes of the corporation's business.
- 4. Fundamentals Training Centre carries on business as an education service provider in the Western Cape, elsewhere in the country and also abroad. The education training services provided consist mainly of leadership and management programmes for major corporations, governments, both national and provincial, and communities. These are provided to end users through written training contracts. The contracts generate the income for Fundamentals Training Centre. Marketing forms a cornerstone of Fundamentals Training Centre's business, and it utilises aggressive marketing strategies.

5. Mr Daniels is (or was)¹ employed by the Western Cape Educational Department as a deputy chief education specialist. The skills contribution of Mr Stander was in the creation of a learning management system and the implementation and training of this management system. A secondary task was the development and subsequent implementation of a strategic marketing plan for Fundamentals Training Centre. Mr Stander was tasked to manage Fundamentals Training Centre's marketing portfolio.
6. In the replying affidavit Mr Daniels made an about turn, having stated in the founding affidavit that Mr Stander was in the employ of Fundamentals Training Centre, it was now contended that Mr Stander was never employed by Fundamentals Training Centre. These allegations are completely contradictory and somewhat startling, given the allegations made in the founding affidavit. I accept Mr Stander's version that he was only employed for a brief period in February 2008.
7. When Mr Stander became a member of Fundamentals Training Centre in July 2007 the management was essentially in the hands of its three members, each member possessing particular skills and expertise. Mr Stander was the "*driver*" of the marketing plan prepared for Fundamentals Training Centre and he was also involved in the development of numerous strategic plans relating to the envisaged further development of Fundamentals Training Centre. Mr Stander was previously employed with the Western Cape Education Department and his decision to expend his

¹ It is in dispute whether he is still in the employ of the Western Cape Educational Department

energies and skills on the development on Fundamentals Training Centre represented a major career change for him. He became a full time employee of Fundamentals Training Centre in February 2008 with his prime area of responsibility being the strategic planning and domestic marketing of Fundamentals Training Centre.

8. The relationship between him and Mr Daniels deteriorated and mid-February 2008 Mr Daniels and Mr Johnson demanded that he leave the employ of Fundamentals Training Centre. He agreed to leave, in the best interest of Fundamentals Training Centre and in order to protect his member's interest in Fundamentals Training Centre. He took a *"long term pragmatic view of the situation and reconciled myself to the fact that a strong possibility existed that I might eventually be well rewarded as a result of having a member's interest in second applicant."* He informed Messrs Daniels and Howard that he would, in due course, demand a repayment of his loan account of R 82 000.00. He did not there and then demand immediate payment as that would not have been in the best interest of Fundamentals Training Centre.
9. In November 2008 a resolution under the hand of Mr Daniels and Mr Howard, the other member of Fundamentals Training Centre, was adopted by Fundamentals Training Centre, which authorised the institution of proceedings in terms of section 36 of the Close Corporations Act. It does not appear that any notice of the intention to adopt this resolution was given

to Mr Stander, and in his affidavit he stated that, since his departure, he has been denied any involvement in the management of Fundamentals Training Centre, or any insight into its financial affairs.

10. Mr Stander denied any suggestion that he had not fulfilled his obligations towards Fundamentals Training Centre. In short, Mr Stander has not been involved in the operational activities of Fundamentals Training Centre since mid February 2008. Though it was contended that Mr Stander's proposed professional role entailed that he be involved in the day to day running of the business, it is clear that he was not at all so involved since then. He was never called upon to fulfil any further duties or obligations towards Fundamentals Training Centre. He stated that had been "*deliberately*" excluded from the affairs of Fundamentals Training Centre.

11. The applicants contended that, because marketing formed part of the core operational activities of Fundamental Training Centre, Mr Stander's "*continued existence as a member posed a grave danger for the effective and profitable running of the corporation's business activities*". Hence, it was submitted that his membership fell to be terminated in terms of section 36(1)(c) of the Close Corporations Act.

12. The allegations that he had not fulfilled his obligations were denied by Mr Stander – in addition he pointed out that he had not, since February 2008 been involved in the operational activities of the close corporation and no allegation was previously made that he had not fulfilled his obligation prior to

his resignation as an employee in February 2008. He denied that he had done anything to prejudice the interests of Fundamentals Training Centre.

13. Finally he disputed that any attempt had been made to resolve any *"impasse"* as was alleged by the applicants. In addition, he pointed out that there was a total lack of financial information, as required by section 36(2) of the Close Corporations Act, and that *"it (was) well nigh impossible to determine what financial adjustments ought to be made"*.
14. In the replying affidavit, for the first time, reliance was placed on a partnership between the members. In this regard the following allegations were made:
 - (a) the active participation of the members were at all times essential *"hence the idea and/or proposal of a partnership;"* and
 - (b) *"the nature of the business required the members to form a partnership in terms of which the business of the corporation could be carried out."*
15. It was further contended in the replying affidavit that Mr Stander's involvement *"was on a professional basis, in the sense, that he would provided respondent renders the expert services to the exclusive financial benefit of the second applicant, obtained a members interest of 33⅓%."*

16. It would seem to me that it must follow from this that where Mr Stander now holds an undisputed 33⅓ per cent interest in Fundamentals Training Centre, that he had rendered the requisite services entitling him to hold his member's interest.

17. It was further contended that

(a) because Mr Stander had failed to either carry out his allocated duties or had failed to generate any revenue for Fundamentals Training Centre he was not entitled to receive any monetary benefits, despite the fact that he holds a 33⅓% member's interest in Fundamentals Training Centre - *"(i)n other words the respondent's member's interest does not automatically entitle him to any monetary benefits in the corporation"*.

(b) a member would only be entitled to a commission if the assigned tasks were successfully executed and Fundamentals Training Centre in fact earned the revenue. It was somewhat cryptically suggested that there was a system in terms of which commissions were credited to the loan account of a member even though the revenue had not yet been generated. The payment of any commission was, in addition, also dependent upon the close corporation being able to pay such commission.

(c) In respect of Mr Stander's loan account – that the amount of R 82 000.00 was a *"projected amount"*, which only became due and

payable upon the successful rendering of the "*stipulated revenue generating services*".

18. As set out above the application was premised on the provisions of sections 36(1)(c) and (d). Mr Stephens, who appeared on behalf of Mr Stander, submitted that neither subsections could find application as Mr Stander was not involved in the management of Fundamentals Training Centre, and no allegations could be made that any of his conduct, therefore, fell within the ambit of the provisions of section 36.
19. Mr Stephens pointed out that the litany of complaints relating to Mr Stander's alleged non-performance of his duties clearly only applied to the period when Mr Stander was in actual fact employed by Fundamentals Training Centre. There is a clear distinction, so Mr Stephens contended, between membership of a corporation and employment by such corporation – he submitted that the applicants failed to show that Mr Stander's continued membership of Fundamentals Training Centre fell to be terminated pursuant to the provisions of section 36(1)(c) or (d). There was, so he contended, simply no evidence that Mr Stander's continued membership had a deleterious effect upon the activities of Fundamentals Training Centre.
20. The applicants contended that Mr Stander lacked the skills he professed to possess. Mr Tsegarie, who appeared for the applicants, submitted that, because Mr Stander made no monetary contribution, and because the member's interest were based on the undertaking to introduce skills to

Fundamentals Training Centre, it would be inequitable for Mr Stander to receive any payment in respect of his member's interest.

21. Moreover, Mr Tsegarie contended that, by virtue of the nature and size of the corporation's business, no member was or could have been regarded as a so-called silent partner or investor, nor could anyone of the members afford not to be actively participating in the business of Fundamentals Training Centre.
22. The applicants contended that Mr Stander's membership should cease because *"he so conducted himself in matters relating to the corporation's business that it is not reasonably practicable for the other members to carry on the business of the corporation"*.
23. This latter contention is simply not borne out by the facts. To the contrary – Mr Stander has stated that when disagreement arose between him and Mr Daniels, he left the employ of Fundamentals Training Centre in the best interests of Fundamentals Training Centre. This was in February 2008. Three years later Fundamentals Training Centre is still trading – in those circumstances it can hardly be contended that his conduct impacted upon the ability of the other members to carry on the business of Fundamentals Training Centre in any manner as is contemplated by section 36(1)(c).
24. The further question which arises is whether there are circumstances which would render it just and equitable that Mr Stander should cease to be a member, as is contemplated by section 36(1)(d).

25. Mr Tsegarie submitted that by virtue of the fact of Fundamentals Training Centre's business, namely the rendering of education services to the end users was such that revenue would only be earned if such services were executed properly and successfully, commission thus being dependent upon such proper and successful execution, the court *"should refrain from ruling that the respondent's membership should be acquired for any monetary value. In other words the respondent should not be compensated in circumstances where he dismally failed to add any financial or other benefit and/or value to the second applicant's business, as a whole or in part or in any other tangible form"*.
26. In support of the argument that Mr Stander was not entitled to enforce the right to remain as a member of Fundamental Training Centre, the applicants alleged that the relationship that existed between them was akin to a partnership. In this regard reliance was placed, but then only in the replying affidavit, on the draft of a proposed partnership agreement which provided, amongst other things, for each partner to acquire a third member's interest in a close corporation.
27. No evidence was adduced as to the content of the founding statement. The applicants seem to contend that they are entitled to demand the transfer of the member's interest by virtue of the fact of the breach of the partnership agreement by Mr Stander.

28. Even then, on the partnership analogy, the position of Mr Stander was not that of an ordinary partner. He has not taken any part in the day-to-day management since February 2008. This state of affairs was accepted by all, so it appears, at least until November 2008 when the resolution was adopted. Even then a further 16 months elapsed before the instant application was instituted.
29. In Stewart v Schwab and Others 1956 (4) SA 791 (T) De Wet J held as follows at 793D-G

*"The first question is whether the first and second respondents have impliedly bound themselves by contract not to vote in favour of the contemplated resolution. It seems to me that the three parties have agreed that their relationship *inter se* would be that of three partners. If in fact there had been a partnership the relationship could only have been brought to an end by dissolution of the partnership, and it seems to follow that it must have been contemplated that their relationship would continue until the company was dissolved. A possible exception to this position would be if one of them relinquished his rights in terms of the agreement, and possibly also if shares are sold to an outsider in terms of the provisions of the articles of association. It is not necessary to decide what the position would be in these eventualities which have not arisen. Nor is it necessary to decide whether the applicant has the right to apply for the liquidation of the Company in view of the attitude of his co-directors. It is presumably a step which he does not wish to take."*

(my emphasis)

30. Mr Stander has not voluntarily relinquished his rights as a member of Fundamentals Training Centre and, as De Wet J held in Stewart, it seems to follow that the relationship as between the members will continue until the close corporation is liquidated, or if the applicants are successful in the instant application.
31. It seems to me the partnership analogy cannot readily achieve the result that Mr Daniels seeks. The termination of a partnership does not result in the automatic loss of ownership of a share of the partnership assets here represented by their member's interests.
32. Mr Tsegarie argued that it would be repugnant to one's sense of justice to allow Mr Stander to remain a member.
33. It is appropriate in this regard to refer to an English case.
34. In re Legal Costs Negotiators Ltd v Hately, Morris and Others v Hateley and Legal Cost Negotiators Ltd² the argument was that it was prejudicial (in the context of section 459 of the English Companies Act) for an erstwhile director and employee to remain as shareholder. The court accepted that it was a typical case of a *quasi* partnership and that reliance could be placed on the legitimate expectations of the contributories and which was not reflected in the articles of association.

² Case number CHANI 98/0863/CMS3, 18 February 1999

35. The Court of Appeal (per Gibson LJ) held as follows

"Mr. Collings then said that the prejudicial state of affairs had not been brought to an end. He argued that the matter complained of in the petition had not been remedied by Mr. Hateley's removal as an employee and director, because, he explained, that matter was the retention by Mr. Hateley of his shares in circumstances where there had been a quasi-partnership. He said that it was unfair that Mr. Hateley, whom he described as having "decimated" the quasi-partnership by his bad conduct of the affairs of the Company and as having brought about his own dismissal, should continue to benefit from his interest as a shareholder in the Company, when the legitimate expectations were as described in para.3.3 of the petition.

I would comment first that there is an inconsistency between Mr. Collings' reliance on past conduct and his explanation that the matter complained of in the petition was the continuing act of retention by Mr. Hateley of his shares. Further, the retention of those shares is not conduct of the Company's affairs or an act of omission of the Company. True it is that the petitioners' dissatisfaction stems from past conduct of the Company's affairs by Mr. Hateley, but that conduct has been terminated by his removal as employee and director."

36. The claim advanced in paragraph 3.3 of the petition was as follows:

"Each of the contributories had legitimate expectations that the Company would be run in the manner aforesaid, and that each would contribute and continue to contribute to the Company and be engaged full time on its business. Such expectations were legitimate in the light of each of the contributories own contributions and commitment to the Company."

37. The analogy between the provisions of paragraph 3.3 and the contentions advanced by Mr Tsegarie in the instant case are self evident. It would seem to me that the argument presented on behalf of the applicants is also directed at the unfairness of Mr Stander exercising his rights as a member. As Gibson LJ has appointed out the retention of the shares is not conduct of the company's affairs.
38. Are there, on the facts, which are not in dispute, any equitable considerations which would preclude Mr Stander from remaining a member? Even if the working relationship between the members had terminated, that did not bring about the termination of his membership in the close corporation.
39. Holmes JA in Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A) held at 452A-G:
- 'Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner '.*
40. I am of the opinion that the no case has been made out to defeat Mr Stander's right to remain a member. It seems to me that this basis of the application must fail.

41. Mr. Stephens furthermore contended that, in order to bring the application within the purview of section 36, the applicants also had to place sufficient information before the court regarding the value of the close corporation's members' interest, in order for the court to determine what a "fair value", as referred to in section 36(2) and paragraph 3 of the notice of motion, would be. He referred to Geaney v Portion 117 Kalkheuwel Properties CC and Others 1998 (1) SA 622 (TPD), at 631H-632A, De Franca v Exhaust Pro CC (De Franca Intervening) 1997 3 SA 878 (E) at 894F-G; Kanakia v Ritzshelf 1004 CC t/a Passage to India and Another 2003 2 SA 39 (D & CLD) at 48E-F as authority for the proposition that it was incumbent upon an applicant in an application such as this, to make out a case in this regard in his founding papers.
42. In Geaney v Portion 117 Kalkheuwel Properties CC and Others 1998 (1) SA 622 (TPD) the Court held as follows at 631H
- "A member of a close corporation seeking to invoke the provisions of s 36(1) (d) quite obviously bears an onus to prove the relief he seeks. He must set out the relevant facts to place the Court in a position:*
1. *to decide whether on the facts it can and should grant an order in terms of ss (1) (a), (b), (c) and (d):*
2. *to carry out its functions in terms of ss (2) and, in particular, to decide what financial adjustments should be made."*
43. More recently in Smyth v Mew (270/09) [2010] ZASCA 56 (1 April 2010) Bosielo JA held as follows:

"[25] It should be clear from the provisions of s 36(1) and (2), as quoted above, that the court retains a discretion, firstly whether to grant an order for the cessation of a member's interest in the corporation, and secondly as regards the disposition of such member's interest and the terms and conditions under which such disposition should occur.

[26] Counsel's reliance on clause 8 of the association agreement is misplaced in that this clause simply does not provide for a valuation of the business by Coco Haven's accounting officer and auditor in the event of a compulsory buy-out in terms of s 36 of the Act. The court was accordingly not bound by Haasbroek's valuation. The court had to be placed in a position which would have enabled it to exercise its discretion and carry out its functions in terms of s 36(2) and, in particular, to decide what financial adjustments should be made: see De Franca 894F-G; Geany v Portion 117 Kalkheuwel Properties CC & another (1) SA 622 (T) at 631H-632A; Kanakia 48E-F. Such discretion can only be exercised if there is sufficient information before the court to enable it to 'make such further orders as it deems fit' in regard to the matters referred to in s 36(2): De Franca 896H; Geany at H-I. The member who makes the application in terms of s 36(1) must place the necessary evidence before the court: see Gearney 631 H and Kanakia 48E-F."

44. Mr Tsegarie, faced with what appears to me to be insurmountable obstacles, made a number of submissions.
45. The first was that all three of the cases relied upon by Mr Stephens were procedurally of a different nature. In those cases liquidation applications were brought, and counter-applications were lodged in terms of section 36 to ward off the imminent liquidations.

46. It seems to me that the procedural differences are of no real significance. The courts there dealt with the requirements of an application made in terms of section 36 and the findings made in regard thereto were made unequivocally. I am bound to follow them, and apply the principles enunciated.
47. Mr Tsegarie's second argument was premised on the proposition that the value of the members' interest is constituted by their respective contributions in the form of intellectual property. The close corporation, at its commencement, had no value – each member contributed intellectual property – and as the close corporation, in essence, traded upon that intellectual property, when a member left, he took with him his own intellectual property. On this basis, so Mr Tsegarie contended, Mr Stander would have no claim for any payment, as the member's interest would revert to nil when he left the employ of the Fundamentals Training Centre. This novel approach to the valuation of the members' interest was also not advanced in the founding or replying affidavits and Mr Stander was accorded no opportunity to deal therewith.
48. No financial information, such as financial statements of Fundamentals Training Centre, was placed before me. Accordingly I do not know that Mr Tsegarie's submission is supported by the manner in which Fundamentals Training Centre dealt with matters. One would assume, however, that the value and assets of the applicant would not only be constituted by this intellectual property of its members, but that the various contracts it would have entered into (and from which it earns its revenue), and the profits

retained, at least, would also have value and have to be taken into account in valuing a member's interest. The requisite financial information was not furnished. There only remains speculation on the valuation of the member's interest and this cannot found a basis upon which a discretion can be exercised.

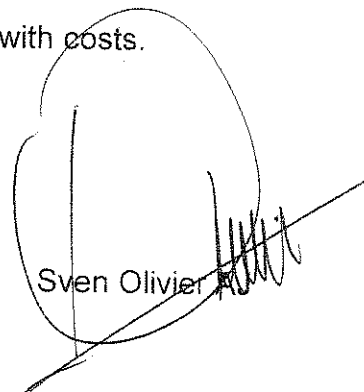
49. In the third instance, Mr Tsegarie submitted that, therefore, Mr Stander would only be entitled to payment of his claim on loan account. In the replying affidavit a certificate from the auditors is annexed which reflects an amount of R82 000,00 as owing on loan account to Mr Stander on 29 February 2009. It will be recalled that Mr Stander left the employ of Fundamentals Training Centre in mid-February 2008. Mr Tsegarie has submitted that this was an advance on commissions which were to have been earned and – as it turned out – were not earned.
50. Mr Tsegarie contended that the amount of R 82 000,00 was a “*projected amount*”, linked to the member's successful completion of a project. This loan would only become due and payable upon the successful rendering of the stipulated revenue generating services.
51. The difficulty with that, of course, is that the certificate does not reflect that, and it seems that a year after Mr Stander has left, the amount is still reflected as being due, without qualification, to Mr Stander.
52. Mr Tsegarie further submitted that various amounts failed to be deducted from this loan account. These deductions are dealt with in the replying

affidavit and the schedule is annexed, which, in the final instance, reflects that Mr Stander owes R12 000,00 to Fundamentals Training Centre. All of this was contained in the replying affidavit.

53. Mr Stephens raised his objection to the introduction, in reply, of material that ought to have been dealt with in the founding affidavit. Mr Tsegarie submitted that it was open to Mr Stander to have dealt with the allegations made in the replying affidavit in a further affidavit.
54. Mr Stephens's objection is well-founded. It is trite that save where the averments in an answering affidavit reveal the existence or possible existence of further grounds that support the relief that is being sought by an applicant (see Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 (D) at 705A-B), it is impermissible to make out new grounds in a replying affidavit for the relief that is being claimed (see Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H-636A).
55. This information, even were I to have regard thereto, still does not address the more fundamental issue, namely the lack of financial information as to the value of the member's interest in Fundamentals Training Centre. There is no information before me regarding the financial affairs of Fundamentals Training Centre upon which I could, were I to make an order in terms of section 36, order a fair value.
56. In the final instance Mr Tsegarie submitted from the bar that his instructions were that as at 4 February 2011, that Fundamentals Training Centre was "in

the red" and, therefore, that no value attached to Mr Stander's member's interest. Mr Stephens did not accede to the invitation that oral evidence be adduced in that regard. It seems to me that any introduction of oral evidence on this aspect would require discovery to be made. That would entail that the matter stand down to some future date for hearing, something which Mr Tsegarie informed me, given Fundamentals Training Centre's financial position and the pressures being applied by financial institutions, would not assist. I accordingly refuse the application for oral evidence to be adduced.

57. Absent the financial information regarding the affairs of Fundamentals Training Centre, the application must, also on this ground, fail.
58. In conclusion, for the reasons set out above, the applicants have failed to make out a proper case to invoke the provisions of section 36 of the Close Corporations Act. They have made out no case as to why the respondent's membership in the Fundamentals Training Centre is to be terminated. In addition, where the applicants sought an order that the member's interest be acquired a fair value, they must at least disclose the financial position of the close corporation and the manner in which such fair value is to be derived at. This they failed to do.
59. In the premises, the application is dismissed with costs.


Sven Olivier