



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

Heard: 24 November 2023

Judgment delivered: 01 December 2023

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1151/2021

In the matter between: -

SCHALK WILLEM VICTOR

APPLICANT

and

PHOKOJE TARZAN FIELAND

FIRST RESPONDENT

KGOMOTSO MABATHO ZWANE

SECOND RESPONDENT

KAMAROSSSI 35 CC

THIRD RESPONDENT

**REGISTRAR OF COMPANIES
AND CLOSE CORPORATIONS**

FOURTH RESPONDENT

**THE DEPARTMENT OF MINERAL RESOURCES
AND ENERGY**

FIFTH RESPONDENT

**THE REGIONAL MANAGER
NORTHERN CAPE PROVINCE:
DEPARTMENT OF MINERAL RESOURCES AND ENERGY**

SIXTH RESPONDENT

THE MASTER OF THE HIGH COURT

SEVENTH RESPONDENT

JUDGMENT

INTRODUCTION: -

[1] On 07 June 2021, the applicant filed an application requesting the following relief, namely that: -

- 1.1 The actions of the first and second respondents in having the applicant removed as a member of the third respondent be set aside;
- 1.2 The second respondent be removed as a member of the third respondent;
- 1.3 The applicant be reinstated as a member of the third respondent, holding a membership interest in the third respondent of 50%, such reinstatement to be made retrospective to 22 December 2020;
- 1.4 The fourth respondent be directed to register the reinstatement of the applicant as a member of the third respondent and to remove the second respondent in order to give effect to prayers 1, 2 and 3, within 7 days from the date of the order; and

- 1.5 The first and second respondents to pay the costs of the application on an attorney and own client scale, severally and jointly, the one to pay, the other to be absolved.
- [2] The application was served by the sheriff on the respondents on 14 and 17 June 2021 respectively.
- [3] The first respondent passed away on 09 March 2022, some 8 months after the application was served on him. He did, however, not oppose the application prior to his death, nor did he file an answering affidavit. The first respondent was not substituted by his executor, Mr. EBG Mothibi, but the application was served on him on 10 May 2022.
- [4] The applicant's cause of action is the *rei vindictio*. According to him, he was the registered owner of 50% membership interest in the third respondent until 22 December 2020 when he was fraudulently and unlawfully deprived thereof by the actions of the first and second respondents.
- [5] The second and third respondents oppose the application on the following grounds: -
- 5.1 The third respondent obtained the applicant's 50% membership interest lawfully, and in accordance with section 33 of the Close Corporations Act, Act 69 of 1984 ("the Act");
- 5.2 The third respondent lawfully acquired a further 25% of the membership interest from the first respondent during late December 2020;
- 5.3 The applicant failed to prove that he was dispossessed of his ownership as a result of fraud as he failed to appoint a handwriting expert in support of his allegations; and

- 5.4 A dispute of fact exists in respect of the applicant's claim to the 50% membership, which that cannot be resolved by way of an application.

ISSUES FOR DETERMINATION: -

- [6] The issues for determination are crisp. In the first instance, has the applicant proved that he was unlawfully deprived of his ownership of 50% of the membership interest in the third respondent, and in the second instance, has the applicant made out a case for the cessation of the second respondent's membership in the third respondent?

THE EVIDENCE: -

- [7] In support of his allegations that he was unlawfully and fraudulently deprived of his 50% interest in the third respondent, the applicant stated that: -

7.1 The CK2 amended founding statement¹ does not contain his signature and he did not give any person a power of attorney to sign same on his behalf;

7.2 He did not attend a meeting of the third respondent, supposedly held on 22 September 2020, during which meeting he was removed "*from the list of directors for the entity due to his resignation from the entity.*"²; and

7.3 He did not attend a meeting with the first and second respondents on 01 November 2020 where a decision was minuted that he would resign as a member and that the second respondent would be appointed as a new member. He also did not sign the minutes of the alleged meeting.³

¹ Volume 1, Page 24.

² Volume 1, Page 28.

³ Volume 1, Page 27.

[8] In respect of the allegations that the CK2 amended founding statement contains a forged signature, the second respondent answered as follows: -

"I have no knowledge of who signed the documents which Mr Victor claims were forged or when they were signed. I have never met Mr Victor."

[9] In response to the allegations pertaining to the alleged meeting held on 22 September 2022, the second respondent stated that negotiations between herself and the first respondent only commenced during November 2020. She admitted that the applicant's signature does not appear on the purported minutes, but made a bald denial in respect of the remainder of the allegations pertaining to this meeting.

[10] The second respondent denied that she was invited or attended a meeting that took place on 01 November 2020. She also denied that the signature that appears next to her name on the minutes is her signature. She furthermore stated that no representatives from Dikwena Minerals (Pty) Ltd ("Dikwena") attended the meeting and that discussions with the first respondent *"were far from finalised as at that date."*

[11] According to the second respondent, she obtained her interest in the third respondent by virtue of a contribution she made in accordance with the provisions of section 33 of the Act. In this regard, the second respondent alleged that: -

11.1 Negotiations commenced during November 2020 between the first respondent and Dikwena, of which the second respondent is a director, in terms of which the first respondent requested Dikwena to fund the prospecting and development of a mine in which the third respondent held a prospecting right;

11.2 The first respondent informed Dikwena's representatives that: -

11.2.1 The applicant was a member of 50% interest in the third respondent, which he obtained by undertaking to provide R10 000 000,00 in finances and services for the establishment of the mine; and

11.2.2 The applicant did not comply with his undertaking whereafter the first respondent "*resolved to proceed without Mr Victor.*" and that he was accordingly not entitled to any membership and/or that he had forfeited same.

REI VINDICATIO: -

[12] It is trite that an owner of immovable property who claims possession of his/her property with the *rei vindicatio*, must allege and prove: -

12.1 Ownership of the thing (whether movable or immovable);⁴ and

12.2 That the defendant was in possession of the property when the action was instituted.⁵

[13] As possession of an owner's property by another is *prima facie* wrongful, it is not necessary to allege or prove that the possession is wrongful or against the wishes of the owner.⁶

⁴ Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at page 82A.

⁵ Chetty v Naidoo [1947] 3 All SA 304 (A) at page 309.

⁶ Singh v Santam Insurance Co Ltd [1997] 1 All SA 525 (A) at page 525.

DISPOSITION AND ACQUISITION OF MEMBERSHIP INTEREST: -

[14] Section 33 of the Act prescribes how a new member might acquire part of the member's interest: -

"33. Acquisition of member's interest by new member.

(1) A person becoming a member of a registered corporation shall acquire his or her member's interest required for membership—

(a) from one or more of the existing members or his or her or their deceased or insolvent estates; or

(b) pursuant to a contribution made by such person to the corporation, in which case the percentage of his or her member's interest is determined by agreement between him or her and the existing members, and the percentages of the interests of the existing members in the corporation shall be reduced in accordance with the provisions of section 38 (b).

(2) The contribution referred to in subsection (1) (b) may consist of an amount of money, or of any property (whether corporeal or incorporeal) of a value agreed upon by the person concerned and the existing members."

[15] Section 36 of the Act regulates the cessation of membership in close corporations by orders of court and section 37 prescribes the procedure for other dispositions, save in respect of deceased or insolvent members: -

"Section 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 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 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: ...*

Section 37.

Every disposition by a member of a corporation of his or her interest, or a portion thereof, in the corporation, other than a disposition provided for in section 34, 35 or 36, whether to the corporation, any other member or any other person qualifying for membership in terms of section 29, shall be done—

- (a) in accordance with the association agreement (if any); or*
- (b) with the consent of every other member of the corporation:*

Provided that no member's interest shall be acquired by the corporation unless it has one or more other members."

DISPOSSESSION OF THE APPLICANT'S 50% MEMBERSHIP INTEREST: -

[16] It is well established under the *Plascon Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.⁷ If, however, the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable, a court would be justified in rejecting them merely on the papers.⁸

[17] To my mind, the second respondent's version do not bolster her denial of the manner in which the applicant was dispossessed of his 50% interest in the third respondent, more specifically in light of her allegations that: -

17.1 The negotiations between Dikwena and the first respondent only commenced in late November 2020, after the two meetings of 22 September 2020 and 01 November 2020;

17.2 She does not know the applicant;

17.3 Her signature on the minutes of the meeting of 01 November 2020 was forged; and

17.4 The applicant never participated in the negotiations.

[18] The second respondent's denial of the authenticity of the applicant's signature is accordingly a bald denial, intrinsically improbable and raises a fictitious

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at page 624.

⁸ *National Director of Public Prosecutions v Zuma (Mbeki and Another Intervening)* [2009] 2 All SA 243 at paragraph [26].

dispute of fact. In my view, an oral hearing would not disturb the balance of probabilities and the dispute can be resolved on the papers.

- [19] Ms. Makwela, on behalf of the second respondent, relying on the judgment in the matter of ***SPF and Another v LBCCT/A LB and Another***⁹ submitted that the applicant failed to prove the fraud clearly and distinctly.
- [20] This argument is not borne out by the facts. The applicant clearly established that his signature was forged and that he was fraudulently dispossessed of his 50% membership interest in the third respondent.
- [21] Ms. Makwela, with reference to the judgment in ***Legator McKenna Inc. v Shea ("Legator McKenna")***,¹⁰ also argued that there was no defect in the real agreement and as a result, the applicant's 50% membership interest was validly transferred to the second respondent.
- [22] In ***Legator McKenna***, Brand JA confirmed that if there is any defect in what he termed the "real agreement" – that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively – then ownership will not pass, despite registration. This principle was unanimously approved and has been followed consistently since then.¹¹
- [23] This Supreme Court of Appeal in ***Legator McKenna***¹² explicitly held that:-

"... Although the abstract theory does not require a valid underlying contract, for example sale, ownership will not pass despite registration of transfer if there is a

⁹ (26492/13) [2016] ZAGPPHC 378 (20 April 2016) at paragraph [14].

¹⁰ 2010 (1) SA 35 (SCA) at paragraph [21].

¹¹ *Knysa Hotel CC v Coetzee NO*. 1998 (2) SA 743 (SCA) at page 753; *Meintjes N.O. v Coetzer* 2010 (5) SA 186 (SCA) at paragraph [9]; *Gainsford and Others NNO v Tiffski Property Investments (Pty) Ltd* 2012 (3) SA 35 (SCA) at paragraphs [38] and [39].

¹² *Supra* at paragraphs [22].

defect in the real agreement.” (references omitted).

- [24] This argument does not withstand muster as the perpetrated fraud patently resulted in the “real agreement” between the parties being defective.
- [25] In addition to my findings in paragraphs [17] to [24], I am persuaded that the transfer of the applicant’s 50% membership interest in the third respondent to the second respondent was not lawful, for the following reasons: -
- 25.1 It is not in dispute that the applicant was the holder of 50% membership interest in the third respondent from its inception in 2009 until 22 December 2020 and that the second respondent obtained 50% of the membership interest in the third respondent on 22 December 2020;
- 25.2 The applicant proved that the dispossession of his 50% did not occur in terms of an association agreement as provided for in section 37(a) of the Act, neither with his consent as stipulated in section 37(b) of the Act, nor in terms of an order of court; and
- 25.3 On her version, the third respondent acquired the 50% membership interest pursuant to a contribution she made to the third respondent. This would require compliance with the provisions of section 33(1)(b) of the Act as her percentage had to be determined by agreement between her and the existing members (*my emphasis*). This was evidently not done as only the first respondent was involved in the negotiations.
- [26] The applicant has thus established his right to vindicate and is entitled to reclaim possession of his 50% membership interest in the third respondent from the second respondent.

CESSATION OF THE SECOND RESPONDENT'S MEMBERSHIP INTEREST: -

- [27] The second respondent averred that she holds a further 25% membership interest in the third respondent, which she acquired pursuant to negotiations that took place during December 2020 between herself, Dikwena and the first and third respondents. According to her, the first respondent advised her that he would attend to the necessary formalities, and she accepted in good faith that the affairs between the applicant and the first respondent were in order.
- [28] The applicant, subsequent to the filing of the second respondent's answering affidavit, did not amend his notice of motion to address the allegations pertaining to the additional 25% membership interest obtained by the second respondent.
- [29] Somewhat tersely, the applicant merely denied the allegations and added that same amount to hearsay evidence. The applicant has therefore not seriously disputed the transfer of the additional 25% membership interest to the second respondent.
- [30] During argument, Mr. A van Jaarsveld, on behalf of the applicant, contended that the *status quo ante* must be restored to the position of 22 December 2020, with the resultant effect that the applicant and the deceased estate of the first respondent should both be allocated 50% membership interest in the third respondent.
- [31] Furthermore, the applicant was not a member of the third respondent when this application was launched, and as such, he does not have the necessary *locus standi* to request an order of cessation in terms of section 36(1) of the Act; and neither did he make out a case for the cessation of the second respondent's membership interest on any of the grounds provided for in section 36(1)(a) to (d) of the Act.

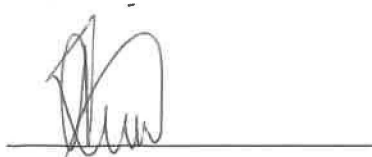
COSTS: -

- [32] The applicant was substantially successful in his application. The convention is that costs are awarded against the unsuccessful party. Courts may, however, depart from this general rule and decide each case on its own merits. At the end of the day, at stake is the issue of fairness to both sides.
- [33] Mr. Van Jaarsveld submitted that the respondents' actions were morally and legally repugnant and he requested a punitive cost order against the first and second respondents.
- [34] To my mind, the second respondent was justified in opposing at least the relief pertaining to the cessation of the additional 25% of the membership interest. Taking into consideration the fact that the first respondent is responsible for the problems herein, and that he failed to come to the Court's assistance before he passed away, it would be just to grant a cost order against the first respondent's estate.

WHEREFORE I MAKE THE FOLLOWING ORDER: -

1. The actions of the first and third respondents in having the applicant removed as a member of the third respondent is set aside;
2. The applicant is reinstated as a member of the third respondent, holding a membership interest in the third respondent of 50%, such reinstatement to be made retrospective to 22 December 2020;
3. The fourth respondent is directed to register the reinstatement of the applicant as a member of the third respondent to give effect to prayer 2, within 7 days from the date of the order; and

4. The estate of the first respondents shall pay the applicant's costs on an attorney and client scale.



STANTON J

On behalf of the applicant:

Mr A van Jaarsveld

Gous Vertue and Associates Inc.

(c/o Adv JM Labuschagne)

On behalf of the second and third respondent:

Ms Makwela

Makwela Attorneys