

25/01/2018 ✓✓



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

CASE NO: 12223/16

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|---|--------------------|
| (1) REPORTABLE: YES/NO | YES/NO |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO | YES/NO |
| (3) REVISED | |
| DATE | SIGNATURE |

In the application of:

JAC ERASMUS

Applicant

and

**KALENTRA DEALS 120 CC
STEYN SJS
BMS TAX CONSULTANTS**

**First Respondent
Second Respondent
Third Respondent**

JUDGEMENT

NAIR AJ:

[1] The applicant in these proceedings seeks an order in the following terms:

[1.1] Transfer of 10% membership interest in the first respondent to his name;

[1.2] A forensic audit to be conducted by a firm of independent auditors into the affairs of the first respondent, over a specified period, to establish the value of the first respondent and such audit to be paid for by the first respondent;

[1.3] Interim interdictory relief preventing alienation, burdening or encumbering of the first respondent's assets and funds, pending finalization of the forensic audit.

[2] The applicant is Johannes Erasmus, an adult male and former farm manager at the farm Harlestone, Mpumalanga. The 1st respondent is a Close Corporation ((Kalentra), duly incorporated in terms of the Close Corporations Act, with registered address at Three Rivers, Vereeniging, Gauteng. The 2nd respondent is a medical practitioner and the only registered member of Kalentra which owns the farm Harlestone. The 3rd respondent is a tax consulting practice and a close corporation with registered offices in Vereeniging.

[3] The applicant was employed as a farm manager of the farm Harlestone from November 2005 until October 2015. The farm belonged to the first respondent. In terms of clause 4.4 of the contract of employment dated 30 November 2005, entered into between the applicant and the first respondent the applicant is entitled to ten percent of the member's interest in the 1st respondent.

[4] The agreement makes provision for the applicant to receive a 1 % membership interest in Kalentra annually commencing from 2006 and includes a share in the profits of the 1st respondent. The applicant was not involved in the daily financial and administrative running of Kalentra because he concentrated on operational duties as the farm manager.

[5] The applicant considered the signing of the agreement as both an opportunity and an investment. In November 2005, one Dr Fulton joined Kalentra as a member. The 2nd respondent and Dr Fulton had 50% members' interest each in Harlestone.

[6] On 1 February 2008 a meeting was held between the 2nd respondent and Dr Fulton. The minutes of that meeting confirm the value of the farm to be R12 000 000. Of importance to the applicant is that a 2% members' interest was so recorded as being his as per the minutes of the meeting.

[7] On 28 February 2008, the immovable property was valued at R11 000 000. This is evinced by a valuation certificate by one Clive Lang. The 2nd respondent has since bought out Dr Fulton in 2015.

[9] Things turned sour in the relationship after the applicant suffered a stroke in May 2015 and was booked off until August 2015. He resigned effective end October 2015. His wife who was also employed at the farm was also retrenched.

[10] He then received a letter and valuation dated 15 December 2015 by 3rd respondent. The second respondent, requested his banking details and gave an undertaking to pay R 747 457,30 for applicants 10% membership interest in 1st respondent within 6 months.

[11] The applicant believed that the 1st respondent's net assets were valued at R7 474 573, 00 by the 3rd respondent as evinced by a valuation report by the 3rd respondent dated 10 December 2015. At the beginning of 2015 the applicant compiled his own inventory in respect of the movable assets of the first respondent. His investigation revealed that the first respondent owns movable assets to the amount of no less than R 13 485 050, 00.

[12] In February 2008, the immovable property of the first respondent was valued at eleven million rand (R11, 000 000). The applicant concluded therefore that his ten percent (10%) membership interest in the first respondent would amount to three million three hundred thousand (R3, 300 000) being 10% of R 33 000 000.

[13] The offer to pay R 747 457, 30 came as a shock and he consulted his attorneys on the 6th January 2016. He was further surprised when he conducted a Windeed search on the 6th of January 2016 which reflected that the second respondent was the only active member of the first respondent. The search revealed that no membership interest in the first respondent was ever registered in the applicant's name.

[14] On the 8th of January 2016 the applicant's attorneys wrote a letter to the first and second respondents the salient aspect of which are set out hereunder:

1. Demanding immediate registration of the applicants ten percent (10%) membership in the first respondent,
2. Rejecting the second respondent's offer to pay R 747 457, 30 as the applicant's ten percent (10%) membership interest in the first respondent.
3. Inviting the second respondent to concede to the current value of the first respondent being R 33 000 000 and to do so within 7 days, in the failure of which the applicant requested the appointment of an independent valuator.
4. Offering to accept payment of R 3 300 000 for his ten percent (10%) membership interest in the first respondent.

[15] In response to his letter, the respondent's attorney addressed a letter dated 6th January to the applicant's attorney with a further valuation report by the third respondent dated 7th January 2016.

[16] According to this letter marked annexure O, the following is recorded:

1. That the second respondent admits the contract of employment between the applicant and the first respondent.
2. That the current value of the assets of the first respondent at around R 33 000 000.
3. An alleged loan account of the second respondent showing indebtedness of the first respondent to the second respondent in the amount of R21 402 137.
4. Further alleged debts of the first respondent in the amount of R 10 227 802.
5. The first respondent's net asset value as R234 315, 00 and therefore concluding that the ten percent members interest that the applicant held in the first respondent amounted to R 23 431, 50.

[17] This sudden change for the worse in the value of his membership interest against the back drop of no fewer than three valuations, prompted him to bring this application. Paragraph 5 & 6 of the founding affidavit states:

"The second respondent has been misleading the applicant regarding the value of member's interest in the 1st respondent apparently in collaboration with the third respondent. The purpose of this application is to protect my interests and to enable me to make informed decision about my membership interest in the 1st respondent". I am unable to make such decision, due to the inconsistent and contradiction version,

pertaining to the value of the 1st respondent presented to me by the 2nd and 3rd respondent recently”.

[18] The second respondent argues that the applicant's right to take up his 10% membership was never disputed and that he offered the applicant in writing, in the letter dated 15 January 2016, to indicate whether the applicant would prefer to accept a cash amount or take up the 10% membership in the first respondent.

[19] This clearly does not reflect the content of the letter or the purport thereof.

Paragraph 17 of the particular letter reads as follows:

“In the circumstances, we look forward to hearing from you as to whether your client is willing to agree to the valuation of its 10% in Kalentra (being an amount of R23 431.50 (twenty three thousand four hundred and thirty one rand and fifty cents) alternatively whether it would prefer it (or its trustee) to be appropriately recorded on Kalentra's member's register as 10% member. In this regard, should your client chose this option, our client will be in contact with your client directly in an effort to facilitate the-payment of outstanding contributions from your client”.

[20] The second respondent states that as a member, the applicant has access to all the financial records of the first respondent He believes that the reason why the applicant desires to have his interest valuated is because the applicant is not willing to pay for the valuation of his interest in the first respondent which according to the second respondent, the applicant wants to sell back to the respondents.

[21] Strangely the respondent in the very next paragraph alleges that the respondent has failed to set out any justification legally or otherwise for the request to valuate the first respondents business. The respondent also contends that the applicant has failed to make any financial consideration in return for his membership in the first respondent.

[22] In June 2016, the second respondent caused the name of the applicant to be registered as a member of the second respondent with a 10% member's interest therein. The first prayer has therefore become moot. I pause at this juncture to note that the application was launched in February 2016. All that remains to be decided on this score is the issue of costs. The respondent belatedly contends that the applicant has failed to contribute anything in respect of the purchase of his member's interest as he is required to do so by law. In addition he states that any physical labour by the applicant cannot equate to a monetary contribution as is the legal requirement.

[23] The interim relief sought by the applicant is to be decided on the criteria relating to the determination of an interim interdict : Those requirements were set out in *Webster v Mitchell* 1948 (1) SA 1186 (WLD) as (i) a *prima facie* right that might be open to doubt; (ii) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (iii) the balance of convenience favourable to the grant of the interdict; and (iv) the absence of any other adequate remedy.

[24] The applicant has shown that he has a *prima facie* right and this is evinced by the late registration of his membership in the second respondent. The sequence of events and late disclosure of the first respondent being indebted to the second respondent gives rise to doubt. The likelihood of dissipation of assets or encumbering the first respondent reveals that reality of irreparable harm. The change in the value of the applicant's membership from R 747 457, 30 to R23 431, 50 is indeed surprising.

[25] The applicant entertained the genuine bona fide belief at all times that he was a member of Kalentra. Such belief was founded on for example a power of attorney to tender for cattle on 12 May 2008 which was repeated on 23 September 2010.

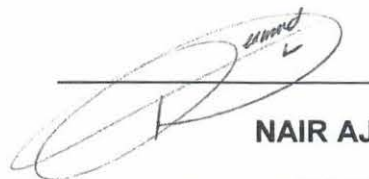
[26] There is no other remedy available to the applicant and there is equally less prejudice to the respondents than to him if the interim order is granted. The balance of convenience indeed favours the applicant.

[27] In the result the application is granted in the following terms:

ORDER

[28] The second respondent is prevented from alienating, burdening or encumbering the first respondent's assets and funds, pending finalization of a forensic audit to be conducted by an independent auditors firm into the affairs of the first respondent, over a 6 months period, to establish the value of the first respondent and such audit is to be paid for by the first respondent;

[29] Costs will follow the result and the applicant is awarded costs including costs of counsel.



NAIR AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCE:

COUNSEL FOR THE APPLICANT : **J GREEF**
INTRUCTED BY : **WYNAND PRINSLOO AND VAN**
EENDEN
COUNSEL FOR RESPONDENT : **ADV. B R ANDERSON**
INTRUCTED BY : **CLIFF DEKKER HOFMEYR INC**

DATE OF HEARING :
DATE OF JUDGEMENT :