CC MEMBER'S MAJORITY VOTE GETS HIM THE OTHER MEMBER'S INTEREST: HARSH OUTCOME NOT NECESSARILY UNJUST

Marcelle Props 118 CC and Others v Bryan (A5076/ 2021) [2022] ZAGPJHC 671 (7 September 2022)

Two colleagues hold members' interest (split 75%/25%) in a CC in which they own a holiday home. When their relationship sours to the extent that proper conducting of the CC's affairs is no longer achievable, a resolution is passed to wind up the CC and sell the 25% interest to a highest bidder. This smacked of unjust maneuvers, said the 25% interest holder, who also wanted control of the CC. What irked specifically, was that the purchaser of the 25% member's interest was a company of which the 75% interest holder was the sole director. The Court here explained why this was in no way unjust or unfair conduct in the circumstances, and that commercial interest of the CC will outweigh the personal interests of members.

The Judgment can be viewed [here](#).

FACTS

Marcelle Props 118 CC ("the CC") has two members, Bryan who holds a 25% member's interest and Mitchell who holds the remaining 75% member's interest.
The sole business of the CC was to own immovable property in the form of portion 9 of the farm Lake Lyndhurst in Kwa-Zulu Natal. The property was used by the members as a holiday home.

After acquiring the member's interest in the CC, Mitchell continued to acquire other property interests in the same area through Bravo, a company of which he was the sole director. During the course of 1999, Bravo acquired six other portions of the farm Lake Lyndhurst and in 2005, it acquired three further portions of the farm.

The relationship between Bryan and Mitchell deteriorated over time to the extent that it was no longer possible for the close corporation to function effectively.

Thus, early in 2017, Mitchell had started giving thought to acquiring Bryan's interest in the CC. An email was sent to her asking what she believed her interest was worth. Her response was that the value of an asset of this nature was "whatever the buyer is prepared to pay for it" and that this was not necessarily a market related value. She indicated that she would be prepared to sell for an amount of R1 mil. (Bryan later, in the court papers, characterized this offer as "tongue-in-cheek" and asserted that she held no intention of selling her interest at the time.)

Mitchell considered the R1 mil price tag excessive, but took Bryan's response to indicate that she would be willing to sell at the right price. In May 2017 he procured a valuation of the underlying property from Mr Ansara and this penned the value at R1,2 million ('the Ansara valuation').

In December 2017, Mitchell offered Bryan an amount of R320,000 for her 25% interest in the CC, which Bryan refused.

By February 2018, Mitchell had decided that he would use his majority position to bring things to a head, by disposing of the property and winding up the close corporation. He believed that resolutions had to be passed to the effect that the CC would sell the property for not less than R1,2 mil and a resolution to wind up the CC .(In the later court papers, Mitchell stated that he had formed an intention that Bravo should purchase the property. He considered that in light of

Bravo's other holdings in the area and its intention to develop the area, the property would be worth more to Bravo than to an outside purchaser. Mitchell wanted, however, "to invite offers by third parties so as to establish a ballpark figure by an informed seller and an informed buyer, which could then be countered by a Bravo offer.")

Mitchell arranged a members' meeting for 2 March 2018 with a view to passing the required resolutions. Bryan took the view that a meeting would "serve no purpose". She communicated that she was not prepared to sell her member's interest to Mitchell, but now offered to acquire Mitchell's 75% member's interest for an amount of R937,500. (This effectively valued Mitchell's interest at 75% of the Ansara valuation.) Although communications followed on this, no deal emerged.

At the scheduled meeting, the proposed resolutions were passed and a copy of the minutes were sent to Bryan. She was advised further of the bidding process adopted in the resolutions, that the property would be disposed of to the highest bidder and that she was welcome to make a bidding offer.

Bryan responded by again stating that she was prepared to offer R937,500 for Mitchell's interest. Mitchell then decided, in his capacity as the sole director of Bravo, to make an offer at a price that Bravo was prepared to pay for. In June 2018, Bravo submitted a formal written offer to purchase the CC's property for R2,3 million. A meeting was scheduled for 12 July 2018 for the CC's members to decide whether or not to accept the Bravo offer.

Bryan then approached the Court. The primary point of contention in the proceedings was whether Mitchell's approach to resolving the impasse amounted to an abuse of his position of control of the corporation as holder of a 75% member's interest, and whether his *de facto* control of Bravo rendered Bravo's offer a sham that could or should be ignored in determining what was just and equitable in the circumstances.

The Court *a quo* concluded that Mitchell's conduct as holder of a 75% member's interest in the CC fell within the ambit of section 49 of the Act as it constituted unjust and prejudicial conduct. Consequently that Court ordered Mitchell to dispose of his 75% interest in the close corporation to Bryan.

The CC appealed.

HELD

The applicable legal principles

- Section 49 of the Act provides members of a close corporation with **protection** against acts or omissions by the corporation or one or more of its other members that are **unfairly prejudicial, unjust or inequitable**. It provides that:

  > "49(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him … or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him … may make an application to a Court for an order under this section."

- Section 36 of the Act deals with other circumstances in which a court may order the **transfer of a member's interest** in a close corporation. It provides that:

  "36(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) …

  (b) that the member has been guilty of such conduct as … is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself… that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him; or

(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation…"

(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 … 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 …; or

(c) any other matter regarding the cessation of membership which the Court deems fit."

- The purpose of the protection in section 49 is to provide a mechanism for a member who is a "victim of oppressive conduct" to secure relief from the court. To come within the ambit of section 49, conduct must be prejudicial to a member and the member must have suffered some adverse consequence in a practical sense.
- The requirement of prejudice means that the conduct must be shown to have caused harm - in a commercial sense and not merely in an emotional sense. As to when conduct that is prejudicial will be regarded as unfair, our courts have generally followed the "reasonable bystander test": "The test of unfairness must …be an objective, not subjective, one. In other words, it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test… is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interest."
- The key distinction between the circumstances in which a party may have recourse to the provisions of section 49 of the Act as opposed to section 36, is a lack of sincerity (probity) by a member in the conduct of the corporation's affairs:
  - Section 49 applies where powers are being abused, or where there is "a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder that entrusts his money to a company is entitled to rely".
  - Section 36 applies where there has been a serious breakdown in relations to the extent that it may be regarded as unfair for a minority member, even in the absence of any abuse or lack of probity, to have her assets locked up in the entity in circumstances where a majority determines the entity's affairs. With the proviso, however, that Courts will be slow to interfere in the management of legal persons because "in judging the conduct of the majority, regard must be had to the principle that by becoming a shareholder in the company a person undertakes by his contract to be bound by the decisions of the majority of shareholders if those decisions are arrived at in accordance with law, even if they adversely affect his rights as a shareholder or prejudice his interests."

Applying these principles to the facts in the present matter: Was Mitchell's conduct unfairly prejudicial in the sense contemplated in section 49?

- The facts herein provide no basis for a conclusion that Mitchell's conduct fell within the ambit of section 49. Mitchell did nothing unfairly prejudicial, unjust or inequitable by procuring the Ansara valuation and presenting it to Bryan. He did not, as a matter of fact, offer to sell his member's interest to Bryan at a price determined by the Ansara valuation.
- All that can properly be concluded from the relevant sequence of events is that Mitchell, like Bryan, preferred to retain control of the property. Bryan was willing to demand a high premium for the purchase of her member's interest, but could not afford and was not willing to offer any premium for Mitchell's interest. She also could not match the Bravo offer or offer corresponding value for Mitchell's interest.
- Mitchell reasonably concluded that there was an irresolvable impasse between members of the close corporation. Bryan had reached the same conclusion. In those circumstances Mitchell was entitled to set in motion steps to resolve the impasse, including by resolving to wind up the close corporation if necessary.

- When the impasse persisted, it was not unreasonable for Mitchell to propose the sale of the property and the winding up of the CC. In formulating this proposal he treated the Ansara valuation as a floor price, thereby protecting the interests of the CC and its members.
- The offer made by Bravo could not, reasonably construed, be contrived to frustrate Bryan's aspirations or as being prejudicial to the interests of the CC or its members. Certainly Mitchell was determined to retain control of the property. There was nothing wrong with that. He held 75% of the members' interests in the corporation that owned the property. Bryan was equally determined, and remains so, despite holding only a 25% members' interest. There was nothing wrong with that either.
- It was further not wrong or prejudicial as regards the CC or its members that Mitchell had deeper pockets than Bryan and could, via Bravo, pay a significant premium on the market value to retain that control.
- The Bravo offer did not seek to or in fact deprive Bryan of value or reduce the value of the corporation. On the contrary, it undoubtedly increased the value that could be placed on the corporation. All that can be said of Mitchell's conduct is that he was determined to pay the highest price reasonably necessary to secure the property. That is not unfair conduct, and it cannot properly be characterized as prejudicial to Bryan in any commercial sense.

It follows that the decision of the Court a quo must be overturned in as far as it heals that Mitchell's conduct fell within the ambit of sec 49 of the Act.

An order in terms of sec 36 of the Act: Which member should cease to be a member, and on what terms:

- In determining the appropriate remedy, the Court should not take into account either the conduct of the parties leading up to the breakdown in their relationship or their respective personal reasons for seeking to acquire the property - in the case of Bryan because of emotional attachment to the property and in the case of Mitchell a desire to consolidate the holdings of Bravo and potentially to incorporate the properties into a protected area.
- Instead the matter should be determined simply with regard to the reasonable commercial interests that the respective parties have in the joint enterprise: It would be just and equitable to value the property at the highest price that either party is willing to pay or able to procure, whether they make that offer themselves or through any third party. As there exists an impasse, it is best for the joint shareholding to be terminated in order to achieve the sale of the shares to a third party (in this instance, Bravo).

CONCLUSION

As a result, it was ordered that Bryan should cease to be a member and should transfer her member's interest to Mitchell a price established by the Bravo offer, in other words R575,000.