

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

ECD 180/2008
Date Heard: 27/05/08

Case No: EL 80/2008

Date Delivered: 12/06/08

In the matter between

MARCELLE ANNE GODFREY

First Applicant

GRANT GODFREY

Second Applicant

CLINT ERNEST DU PLESSIS

Third Applicant

and

DR ZUKISWA JAFTHA

First Respondent

ILIFU TRADING 330 CC

Second Respondent

JUDGMENT

REVELAS J

[1] This is an application in terms of section 36 of the Close Corporation Act no 69 of 1984. I refer to it as “The Act”. The three applicants and the first respondent are members of the second respondent, a close corporation. The first two applicants, and the first respondent, each hold a 30% member’s interest in the second respondent. The remaining 10% member’s interest is held by the third applicant.

[2] The applicants seek the cessation of the first respondent’s membership in the second respondent, as well as the transfer of her

membership in the second respondent to the three applicants. In addition the applicants seek an order that the first respondent be paid an amount of R40 000.00 plus interest thereon, calculated from 1 September 2005 to date of final payment, as compensation for her 30% member's interest in the second respondent.

[3] It is common cause that the relationship between the applicants on the one hand, and the first respondent's husband (who is the more prominent, and perhaps the most dominant business figure) on the other hand, has soured to the extent that its continuation is untenable.

[4] It is convenient to quote section 36 of the Act in full. It reads 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:

- 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 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 himself 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**
- 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 para (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 ss (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".

[5] The amount of R40 000.00 proffered as compensation for the first respondent's membership interest is the sum equal to her loan account. The amount seems to have been arrived at arbitrarily by the applicants. The second respondent owns a house which has not been properly valued for purposes of an application such as this, but may well be valued in excess of one million rand. No audit has been conducted and it is not evident that the goodwill of the carpeting business has not been assessed or taken into account, in respect of any such calculations or valuations which may have been done.

[6] Counsel for the applicants properly conceded that there is no sufficient evidence on the papers as they stand to support the relief prayed for in respect of compensating the first respondent for her membership's interest. However, it was suggested that I only make an order for the cessation of the first respondent's membership, and grant no further relief.

[7] The question then arose whether I was entitled to make an order to the effect that the first respondent ceases to be a member of the second respondent in terms of section 36 (1) (d) of the Act, without making any additional orders in terms of section 36 (2) of the Act, which relates to the financial consequences for both respondent's, if the first respondent's membership is terminated.

[8] A member of a close corporation seeking to invoke the provisions of section 36 (1) (d), as the three applicants have done in this case, bears the onus to prove entitlement to the relief sought in the notice of motion. Such relevant facts must be averred to place a court in a position to decide whether on the facts, it can make an order in terms of section 36 (1) (d) of the Act, and then to enable it

to decide what the financial consequences should be or make the necessary financial adjustments ¹ as required by section 136 (2) of the Act.

[9] When a court is approached for the type of relief provided for in section 36 (1) (d) of the Act, it appears to be a very common occurrence that such an application emanates from a troubled and acrimonious relationship between the members of the close corporation in question. This matter was no different, and it was difficult to attribute fault to any particular member. However, Mr Madase, the first respondent's husband, who is not a member, seems to be the dominant figure who makes vital decisions with significant consequences and influences matters without incurring any risk as a member. I mention this because it was of concern to me in considering the appropriate relief in this matter.

[10] To grant the applicants the relief they seek, namely an order in terms of section 36 (1) (d) of the Act, would mean that the first respondent's membership would be terminated, without the court fulfilling its required function of making the necessary financial adjustments. That would not be fair and equitable as far as the first respondent is concerned, because she would find herself in the unenviable position of trying to retrieve the value of her member's interest from the position of a third party or an outsider. As pointed out above, a proper valuation of the immovable property and goodwill has not been done. The situation clearly calls for a proper audit and financial assessment to determine the value of the first respondent's interest.

[11] Because it is not possible to make an order in terms of section 36 (2) of the Act, it follows that an order cannot be made in terms of

¹ Geany v Portion 117 Kalkheuwel Properties CC and Others 1998 (1) SA 622 at 631 H-J; and de Franca v Exhaust Pro CC (de Franca intervening 1997 (3)) SA 878 SA 878 at 895 B-E

section 36 (1) (d) in isolation.

[12] The first respondent argued that the only route to follow is to dismiss the application with costs. Such an order would be unfair to the applicants. They wish to carry on with the business, but without the first respondent, who in any event also wishes to sever her ties with the second respondent. Dismissal of the application might mean that the issue of the cessation of the first respondent's membership and related aspects could become *res judicata* and that would frustrate finding a solution to the existing problems. I have expressed my reservations to counsel for both sides in preparation of this judgment. It would appear that it is not open to me, in this application, to solve the parties' problems with a solution which comes as an invitation to agree on an auditor, for instance. I considered ordering the parties to appoint an independent auditor (and I discussed this with counsel) but I have decided that such an order may just cause more problems for the parties.

[13] Accordingly, I must dismiss the application with costs, which I hereby do.

E REVELAS
Judge of the High Court

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES: **MARCELLE ANNE GODFREY AND 2 OTHERS**
v
DR ZUKISWA JAFTHA AND 1 OTHER

- Case Number: **EL 80/2008 ECD 180/2008**
- High Court: **EAST LONDON CIRCUIT LOCAL DIVISION**
- DATE HEARD: **27 May 2007**

DATE DELIVERED: **12 June 2008**

JUDGE(S): **REVELAS J**

LEGAL REPRESENTATIVES -

Appearances:

- 3) for the Applicant(s): **Adv Koekemoer**
- 4) for the Respondent(s): **Adv De La Harpe**

Instructing attorneys:

- Applicant(s): **Wylde & Runchman In**
- Respondent(s): **Bax Kaplan In**

CASE INFORMATION -

- e) *Nature of proceedings:*

- f) *Topic:***
- g) *Key Words:***