REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 10636/10

16/8/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

16-8-2012
DATE

SIGNATURE

In the matter between:

NTHABISENG MATSHWENE EVELYN KGATLA-KGAPHOLA Applicant

and

DAVEL, DE KLERK, KGATLA INC Respondent

J U D G M E N T

MSIMEKI, J

INTRODUCTION

[1] This is an application for a final interdict ordering the Respondent to refrain from using the Applicant's name as part of the Respondent's registered name.

[2] Mr H M Barnadt represented the Applicant while Ms C Naudé represented the Respondent. The condonation for the late filling of the Respondent's Short Heads of Argument requested for in the heads deserved to be granted. Seemingly that was not opposed and is granted.

BRIEF FACTS

[3] The Respondent is a duly incorporated Company which practises as a firm of Attorneys. The Applicant and the other directors of the Respondent entered into a written memorandum of intent on 21 September 2004. On 1 October 2004 the Applicant became a director of the Respondent. On 6 December 2005 the Applicant and other shareholders of the Respondent entered into a written Shareholders' agreement with the effective date being 1 October 2004. Before the Applicant joined the other director's of the Respondent the name of the company was Corrie Nel Incorporated and the company traded as Nel Davel De Klerk. The name of the company after the Applicant joined the company became Davel.De Klerk.Kgatla Inc. and the company traded as " Davel.De Klerk.Kgatla Attorneys at 27 A Gen Joubert Street Polokwane". The name of the Respondent consisted of all the directors of the Respondent who each held 25% shares in the Respondent. The directors were each allocated duties. The Applicant was to be responsible for marketing and the image of the company. The Shareholders agreement would terminate if a party died or became permanently unable to practise as an

attorney or no longer wished to be a shareholder of the company in which case the provisions of clause 13.2 would apply. On 27 January 2009 the Applicant received a Notice in terms of clause 13.3 of the shareholders agreement dated 26 January 2009 notifying her that the remaining shareholders had unanimously decided that her conduct amounted to a serious and material breach of the provisions of their agreement and was not compatible with the terms of the agreement. Her shareholding and directorship in the Respondent was terminated with effect from 25 January 2009. The Applicant alleged that she was requested to vacate her office by 12h00 on 27 January 2009, the day on which she was informed of the termination of her shareholding and directorship. On 12 February 2009 the Applicant's attorney addressed a letter to the Respondent calling on it to remove the Applicants particulars from the Respondent's letterhead as, as it was put, failing to do so would confuse clients and create the impression that the Applicant or her firm was still part of the Respondent. On 13 February 2009 the Respondent responded and said:

> *" We have no intention of changing our firms name at this stage, so your clients demand cannot be adhered to. We have however instructed all our secretaries to delete your clients name at the bottom of our letterhead, as she is no longer a shareholder or director."*

The Applicant, from 25 January 2009, practises under the name and style of Kgatla Inc. at 3 Drakenstein 84 Hans Van Rensburg Street Polokwane, which is said to be less than 5 km away from the Respondent's offices. The response prompted the Applicant to bring this application which the Respondent opposed.

[4] The Applicant's case is that she is entitled to have her name removed from the registered name of the Respondent and that her name may not be used by the Respondent based on the fact that:

4.1. her rights to privacy, personality and identity are infringed by the Respondent

4.2. the Respondent is committing an offence of fronting by representing to prospective clients and the public at large that it is BBBEEE compliant.

4.3. the use of the name by the Respondent causes confusion to the members of the public

4.4. the use of the name " Kgatla " can only be authorised by the elders of the Bakgatla – clan. She alleged that she does not have such authority.

[5] It is the Rspondent's view that all the grounds that the Applicant relies on for its claim are baseless and without substance.

[6] **COMMON CAUSE FACTS .**

These are that:

6.1. The Respondent is a duly incorporated company which practises as a firm of attorneys at Watermelon Street, Platinum Park, Polokwane.

6.2. The name of the Respondent, when the Applicant joined it, was Corrie Nel Incorporated and, it at the time, traded as Nel Davel De Klerk.

6.3. On 21 September 2004 the Applicant and the shareholders of the Respondent entered into a written memorandum of intent to practise together as attorneys, notaries and conveyancers.

6.4. On 1 October 2004 the Applicant became a director of the Respondent.

6.5. On 6 December 2005 the Applicant and the then shareholders of the Respondent concluded a written shareholders' Agreement with the effective date being 1 October 2004.

6.6. The parties agreed that the name of the company would be changed to Davel. De Klerk. Kgatla Attorneys which would also be the company 's trading name. The company, at the time, traded at 27 A Gen Joubert Street, Polokwane.

6.7. In terms of clause 2.1.2. of the Shareholders' Agreement the word "company" is defined as Davel.De Klerk. Kgatla incorporated.

6.8. The Applicant, in writing , agreed to the name change.

6.9. Each of the parties held 25% shares in the Respondent.

6.10. The Shareholders would act as directors of the company (the Respondent) while practising as attorneys for the benefit of the company, with each having official duties. The Applicant would be responsible for marketing and the image of the company.

6.11. The Applicant's shareholding and directorship in the Respondent were terminated with effect from 25 January 2009 and she was to vacate her office by 12h00 on 27 January 2009.

6.12. On 2 February 2009, about a week after the termination of her shareholding and directorship, the Applicant registered a company called Kgatla Incorporated.

[7] A COMPANY

"Associations which are of a character and fulfil the conditions provided for by the Act may become incorporated by taking the steps prescribed by the Act and being registered by the official registrar" **(Herbstein & Van Winsen: Civil Practice of the High Courts Of South Africa, Fifth Edition, Vol 1 at page 178 under general Acts) The Companies Act 61 of 1973 as amended** is the main Act which makes provision for the

registration of associations of natural persons. A registered association becomes a *legal persona* with life of its own. It is distinct from the natural persons who compose it. *(See Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530.* The *legal persona* is capable of suing and being sued in its own name. The Respondent is one such *legal persona.*

[8] **FORMATION OF THE RESPONDENT**

As shown above, when the Respondent was formed, a written memorandum of intent was entered into between the Applicant and the other directors of the Respondent. The Applicant, without any coercion, became one of the directors. The Applicant, on 6 December 2005 entered into a written shareholders' agreement which had an effective date of, 1 October 2004. the name of the then company, with the written agreement of the Applicant, was changed to Davel. De klerk . Kgatla Incorporated. The Applicant willingly became a shareholder and director of the Respondent and with her permission her name became part of the Respondent's name. The Respondent is a *legal persona* with life of its own and distinct from the natural persons composing it.

[9] As already shown above, it is the Applicants contention that the Respondent, by the non-removal of her name from the name of the Respondent infringes her right to privacy, personality and identity. She contends that the Respondent is committing the

offence of "fronting"; that the use of her name causes confusion to members of the public and that the use of the name requires special authority from the Bakgatla clan. The argument advanced, on behalf of the Respondent, is that the Applicant is not entitled to the relief that she seeks because the Respondent is not infringing any of her rights. It is further submitted that there is no basis in law which is supported by *facts in casu* on which the Applicant can rely for the relief that she seeks.

[10] The Applicant *in casu* has relied heavily on the case of **Grutter v Lombard and Another 2007 (4) SA 89 (SCA)** in support of her application. Ms Naudé submitted, on behalf of the Respondent, that the facts of **Grutter** matter **(supra)** are distinguishable from the facts *in casu*. The submission seems to have substance. Indeed, in the **Grutter** matter the court had to deal with a case where the facts did not disclose the features of a partnership. **Grutter and Lombard** had pursued their independent practices. They had their own clients, bore their own expenses peculiar to their practices and independently received the rewards of their own endeavours to the exclusion of the other. They only shared the premises and certain administrative facilities and the overhead expenses that that entailed. The name of their practice was found not to have been an asset that fell to be utilised and disposed of in accordance with the principles of partnership. The court in the matter found that Lombard and Grutter had merely

agreed " to associate with one another for the limited purpose of sharing facilities and expenses and to pursue their respective practices under their joint names. One can understand why the SCA found that **Grutter** was entitled to the order that he claimed.

[11] We are here concerned with an incorporated company and an entity which has life of its own. The entity was formed with the consent and permission of the relevant parties for the benefit of the Respondent and themselves. As Ms Naudè correctly submitted, we here are dealing with " *a legal entity that has a specific registered name recognised in law, that has traded with the specific name and that used a person's name as part of its registered name with her consent.*" The submission, indeed, has merit. The facts of the two cases are, indeed, distinguishable.

[12] The facts of this matter clearly demonstrate that none of the Applicant's rights were or are infringed by the Respondent as averred and submitted. The Respondent in the circumstances of this case cannot be said to be committing an offence of fronting. Neither can it be said that the use of the Applicant's name in the registered and trading name of the Respondent is causing confusion *"amongst members of the public"*. It must be borne in mind that the Applicant, indeed, when entering into the shareholders' agreement, consented to the registration of the

Respondents' name in its current format, and as a legal person, aware of the implications of what she was doing. Regarding the authority of the Bakgatla clan, there was no problem when the Applicant agreed to the use of the name. this did not seem to be an issue when the consent was given. The Applicant, at the time, did not disclose that the use of the name had been conditional or subject to a term or resolutive condition that the name of the Respondent would be changed as soon as a shareholder or director ceased to be such. It also does not appear from the papers that the Applicant, at any stage, disclosed that there would be problems with the name when she left the company. The issue of authority from the Bakgatla clan does not seem to have merit. There is nothing to support the mere allegation of the Applicant in this respect.

[13] Ms Naudé submitted, correctly in my view, that the shareholders' agreement clearly makes provision for the termination of a shareholder' s shareholding and directorship and that the following clauses are note-worthy.

"17.1 This agreement constitutes the sole and exclusive agreement between the parties relating to the subject matter hereof and no warranties, representations, guarantees, or other terms and conditions of whatever

nature, not contained or recorded herein shall be of any force or effect.

17.2. No variations, alterations, amendment, cancellation or waiver of the terms and conditions of this agreement including this clause shall be of any force or effect unless reduced to in (sic) writing and signed by the parties hereto, or their duly authorised representatives."

Ms Naudé further and correctly submitted that the contention by the Applicant that she only consented to the use of her name as part of the Respondent's duly registered name for the duration of her shareholding and directorship should be rejected. The Applicant seems to want to rely on what does not form part of the agreement when that is specifically excluded by the agreement.

[14] It is, indeed, correct that the Applicant willingly associated herself with the Respondent. She consented to everything that was necessary to bring the Respondent into being. She was aware of the implications of what she was involving herself in. She is indeed, a practising lawyer and was at the time of the formation of the Respondent. She duly considered what she was doing when she entered into the shareholders' agreement. She also must have sought and obtained legal advice before she committed herself as her actions involved her future.

[15] The submission by Mr Barnardt that the memorandum of intent and the shareholders' agreement do not provide that the name of the company would be changed in the event of any change of shareholders or directors does not help the Applicant if regard is had to clauses 17.1 and 17.2 referred to in paragraph 13 above. That the parties never contemplated that the Respondent would continue to use the Applicant's name after her departure does not help the Applicant either.

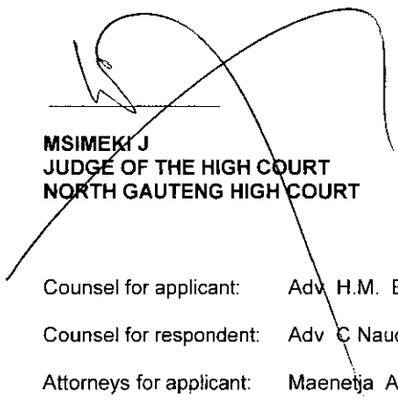
[16] The further submission by Mr Barnardt that the argument that the Respondent invested effort and money into ,marketing the Respondent under the name Davel. De Klerk. Kgatla Attorneys is not convincing cannot be correct. Evidence demonstrate the contrary. At any rate the Respondent has life separate from that of those who formed it. It is an independent entity which is entitled to keep its name. I have noted the excerpts that come from the **Grutter** matter that Mr Barnardt has referred the court to but those do not seem to assist the Applicant as the facts of that case and this case are, indeed, different and distinguishable.

[17] The facts of this case clearly demonstrate that the Applicant has not made out a proper case for the relief claimed and that the Respondent has every reason to continue to use the Applicant's name. the Applicant's application, therefore, stands to be dismissed with costs which include the reserved costs.

[18] I have, in the light, of the circumstances of this matter, found it unnecessary to deal with the issues pertaining to the rules of the Law Society.

[19] **I, in the result, make the following order:**

The application is dismissed with costs which costs include the reserved costs of 20 April 2010 and 21 February 2011.



MSIMEKI J
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

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Attorneys for applicant:	Maenetja Attorneys
Attorneys for respondent:	C/O Jacques Roets Attorneys
Date heard:	28/03/2011
Date of judgment:	