REPORTABLE

CASE NO: SA 60/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THOMAS WYSS	**1st Appellant**
THOMAS WYSS N.O.	**2nd Appellant**
And	
LEEVI HUNGAMO	**1st Respondent**
TEREZA HUNGAMO	**2nd Respondent**
LACONIA CC	**3rd Respondent**
FNB TRUST SERVICES (NAMIBIA) (PTY) LTD	**4th Respondent**
MINISTER OF TRADE AND INDUSTRY, NAMIBIA	**5th Respondent**
ATTORNEY GENERAL, NAMIBIA	**6th Respondent**
MASTER OF THE HIGH COURT, WINDHOEK	**7th Respondent**

Coram: DAMASEB DCJ, SMUTS JA AND FRANK AJA

Heard: **9 April 2018**

Delivered: **23 April 2018**

Summary: The appellant (acting in both his capacities as the sole intestate heir and executor of his father's estate) brought an application against seven respondents in the High Court. The appellant sought an order declaring a portion of section 35 (a) and the

entire section 35(b) of the Close Corporations Act 26 of 1988 (the Act) to be unconstitutional. The appellant further prayed for an order declaring that he is entitled to be the full and unfettered owner of the 49% member's interest in the third respondent which was held by his late father, as the *ab intestatio* heir. Furthermore, the appellant sought an order directing the fourth respondent to transfer the 49% member's interest to him in winding up the deceased estate. Thus, the crux of the matter in the court *a quo* was essentially, (a) whether a deceased estate has constitutional rights; (b) whether the association agreement is illegal and invalid for being in contravention of the provisions of section 58 (1) (b) of the Agricultural (Commercial) Land Reform Act; and, (c) whether certain portions of section 35 of the Act are unconstitutional.

After hearing argument, the court *a quo* dismissed the application and held that a deceased estate is not a legal persona and therefore has no legal rights but enjoys statutory protection through the provisions of the Administration of Estates Act of 1965. The court *a quo* further held that the association agreement which gave the deceased rights of occupation without the ministerial consent, was illegal and void *ab initio* for contravening section 58 of the Land Reform Act. The judge *a quo* further reasoned that there was nothing which suggested that section 35 of the Act violated or limited the deceased's right to dispose property in terms of section 16 of the Namibian Constitution.

The court then held that the upon the deceased's death, appellant as the intestate heir, was not vested with the *dominium* of the member's interest which the deceased held in the Close Corporation. Appellant merely acquired a personal right against the executor for the transfer of such right or equivalent of the value of such right. The court concluded that the appellant as an intestate heir had no constitutional right to inherit a specific

asset, such as the deceased's member's interest in the instant matter.

Aggrieved by the order and judgment of the court a quo, the appellant launched an appeal to this court. On appeal, the issues for determination were fundamentally similar. The respondents also noted a counter appeal against a portion of the order of the High Court, but later elected to abandon the counter appeal.

In upholding the order of the court *a quo*, the Supreme Court found that the deceased knew when he acquired his membership interest that it came with restrictions, one of which was that it could not be freely bequeathed or transferred without the consent of his co-members. His right of disposal in respect of the property (his membership) was acquired with this limitation and hence can only be disposed within the confines of this limitation. Article 16 does not grant one the right to dispose without regard to the existing impediments inherent in the property when one bequeaths the property. Thus, this court found that the court a quo did not err in its findings that there was no breach of Art 16.

This court further found that section 35 of the Act simply ensures that the restriction on the disposal of membership interest is regulated upon death of a member. The deceased never had an absolute right to dispose of his membership during his life and this position is simply maintained. The restriction on disposal of the membership interest was part of the nature of the right acquired and s 35 imposes no further restrictions. It follows that there was no infringement of any right of the deceased, executor or the heir. As the appeal has failed, there were no good reasons why the costs should not follow the result. However, the appellant are also entitled to wasted costs of the abandoned counter appeal.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and SMUTS JA concurring)

Background

[1] Mr Kurt Wyss (the deceased), a Swiss national, died intestate on 30 January 2011. The deceased was, at the time of his death, married, and had four children. These persons were thus his intestate heirs. Apart from his one son, Thomas Wyss, the other intestate heirs renounced their inheritances. This meant that Thomas Wyss became the deceased's only intestate heir. Thomas Wyss has also been appointed as the executor of the deceased's estate.

[2] Part of the deceased's estate's assets is a 49% members' interest in a close corporation, Laconia CC. Laconia CC owns agricultural land; namely a farm called Laconia No 141, in the Otjiwarongo district, Namibia. The other members of Laconia CC, Mr and Mrs Hungamo, hold 49% and 2% respectively of the members' interest in the close corporation. (I refer to Mr and Mrs Hungamo in this judgment as 'the respondents').

[3] The members of Laconia CC entered into an association agreement. In terms of this agreement the deceased was given certain rights in respect of the occupation and use of the farm Laconia and certain conditions were agreed upon should the deceased wish to sell his membership including an agreement in respect of the price for such

interest. Clause 5.3 of the association agreement provided that upon the death of a member ‘his shares shall be bequeathed according to the testamentary dispositions made by the deceased member’.

[4] Legal representatives of the respondents wrote a letter to the agent of the executor to inform the executor that they exercised their right in the association agreement to purchase the interest of the deceased in Laconia CC. They further indicated that they would object to a liquidation and distribution account transferring the membership interest of the deceased to any person other than the respondents. In this regard, the respondents referred to section 35 of the Close Corporation Act, 26 of 1988 (the Act) in terms whereof their consent would be necessary to transfer the deceased’s interest in the corporation to someone else.

[5] As Thomas Wyss (in both his capacities) insisted that he is entitled to the membership of the deceased member’s interest, the matter ended up in the High Court. Thomas Wyss in both his capacities brought an application in that court to declare the requirement contained in s 35 of the Act referred to above unconstitutional, declaring that he personally is entitled ‘to be the full and unfettered owner’ of the deceased’s interest in the corporation and directing that the deceased’s interest be transferred to him and that this position be reflected in the liquidation and distribution account of the estate.

[6] The respondents’ stance in opposition to the relief claimed was that they will abide to the order of the court in respect of the question of the constitutionality of s 35 of the Act, but until it was declared to be unconstitutional they would rely on it. They also maintained the prayer to be transferred the ‘full and unfettered ownership’ of the membership was misconceived as the membership does not confer such benefit but only

a share of the surplus of the assets should the corporation be dissolved and that insofar as the association agreement conferred rights of use and occupation this agreement was void as it contrary to s 58(1) of the Agricultural (Commercial) Land Reform Act, 6 of 1995, granted to the deceased (a foreign national) an indefinite right of occupation of agricultural land without Ministerial consent.

Findings by the High Court

[7] The court *a quo* dismissed the application. It held that as a deceased estate was not a legal person, it had no constitutional rights. The heir likewise had no right to specific assets in an estate prior to the finalisation of the Liquidation and Distribution Account (LDA). It was also held that the association agreement was illegal and void for the reasons advanced by the respondents. On this aspect, the court *a quo* directed that a copy of its judgment be forwarded to the relevant Minister to take such steps and as the law may require in view of the contravention of s 58 of the Land Reform Act referred to above. As far as the executor was concerned it was held that, as he was dealing with an heir and not a legatee, he had no right to insist that a particular asset be transferred to an heir as the latter had no such right.

Arguments on appeal

[8] Thomas Wyss appeals this decision in both his capacities. For convenience sake, I shall refer to him in his personal capacity as the ‘heir’ and in his capacity as executor as the ‘executor’. In the heads of argument on behalf of the appellants the finding of the illegality of the association agreement is not placed in issue and it is thus not necessary to deal with this aspect any further. The respondents however did note a cross appeal against the directive of the court to refer the matter to the relevant minister in the terms

set out above. I point out in passing that, apart from the Mr and Mrs Hungamo, none of the other respondents participated in the proceedings *a quo* or in this appeal.

[9] Counsel for the respondents contended that the heir cannot claim ownership of the deceased member's interest nor the transfer thereof to him as the LDA had not yet been finalised. This is based on the position prevailing when it comes to administration of estates which was quoted by this court[1] and which is to the following effect:[2]

> 'An heir does not automatically upon the death of the testator acquire ownership of his share of the residue. He merely requires a vested right (*dies cedit*) as against the executor for payment, delivery or transfer of the property comprising the inheritance. The right is enforceable (*dies venit)* only when the executor has drawn his liquidation and distribution account and when section 35 of the Administration of Estates Act, 66 of 1965 has been complied with. The heir, therefore, acquires the ownership (or other real right) in his share of the residue upon payment to him of money or delivery of movable property or transfer of immovable property. Similarly a legatee does not acquire ownership in the legacy bequeathed to him immediately upon the death of the testator: He requires a vested right (*dies cedit*) to claim from the executor at a future date (*dies venit*) delivery to him of his legacy.'

[10] Relying on the aforesaid principles, counsel for the respondents submitted that the application by the heir was premature. It is also submitted that as the heir is not entitled to a specifically identified asset/property but only to such property that forms the residue of the estate, an application to transfer specific property (here the membership interest of the deceased) cannot be brought prior to the finalisation of the LDA.

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[1] *Tjamuaha and Another v Master of the High Court and Others* (SA 63/2015) [2017] NASC (delivered on 26 October 2017).
[2] *Tjamuaha* case para 16 quoting from Lee and Honore: *Family Things and Succession* 2nd ed para 516.

[11] Whereas I have no quarrel with the general principles relied upon, the facts of this matter are such that the heir should not be non-suited as submitted on behalf of the respondents. It is clear that the residue of the estate will include the membership of the deceased in Laconia CC. There is no suggestion that the liabilities or other costs of the estate are such that this will necessitate a sale of the mentioned membership. It is also clear that a LDA reflecting that the deceased membership in Laconia is to be distributed to the heir would have been published but for the stance of the respondents that they would object thereto. The question that arises is whether the executor is expected, in these circumstances, to publish the account, await the objection, and then only approach the court for relief? In my view this would be an overly formalistic stance. Whereas it may be that the heir will not be entitled to the relief as currently framed as the LDA has not been finalised, it certainly would be a basis for the alternative relief in the form of a declaratory order that the intended distribution can be reflected in the LDA and failing other objections than those of the respondents, the estate could be finalised on this basis. This, of course, assumes that the application will succeed on the merits. This is the question I turn to below.

[12] It needs also to be stated that it is not only the position of the heir that must be considered, but also that of the executor. The executor must take possession of the deceased's estate, administer it and distribute it according to the will of the deceased or according to the law on intestate succession. In the present matter, it is alleged that the deceased did not make a will as he desired that his next of kin should inherit, ie, that he knew and wished his estate to devolve according to the rules relating to intestate succession.

[13] Article 16 of the Namibian Constitution, on which the heir and executor rely insofar as is relevant reads as follows:

> 'All persons shall have the right to . . . acquire, own and dispose of all forms of immovable and movable property . . . and bequeath their property to their heirs or legatees.'

The deceased obviously cannot enforce a right where it is averred to have been denied. So, it can only be the executor, heirs and legatees who can do so. As the reference to a legatee is not relevant to the present matter, it can be ignored. In my view, both the heir and the executor can do so in the present case as it is undisputed that the membership of the deceased in Laconia CC will be available for distribution, but for the provisions of s 35 of the Act.

[14] Counsel for the respondents submitted that it was not undisputed that the membership was available for distribution to the heir. He submitted that the heir and executor did not establish this as a fact. Thomas Wyss in his founding affidavit states that he seeks an order for the membership to be transferred to him. He says that he, as the executor, is 'in the position to simply direct that my late father's members' interest should be transferred to me'. He states that because of the threatened objection by respondents to this course of action, he is seeking the court order. He further submits that neither the association agreement nor s 35 of the Act 'precludes the transfer to me, . . . of the 49% members' interest'. None of the factual matters averred is placed in dispute. The inference is clear that the executor is in a position to transfer the membership to the heir but for the objection to this course of action by the respondents. There is no suggestion in the answering affidavit that the membership cannot be so transferred because of liabilities or costs in the administration of the estate. In these circumstances, it is not in

dispute that the membership interest is available for transfer to the heir.

[15] 'The term "close corporation" is derived from the expression "closely held corporation". This refers *inter alia* to the limited number of members of the corporation and the closeness of their relationship. The term "close corporation" was used by company lawyers at least as far back as the previous century and internationally it is a widely accepted concept.'[3]

[16] Close corporations cater for smaller businesses which would otherwise probably operate as partnerships.[4] It however, has benefits that partnerships do not offer namely it provides perpetual succession and for limited liability of its members. A close corporation may not have more than 10 members who must all be natural persons.[5] The membership interest is regarded as movable property.[6] A member cannot freely dispose of his or her membership. As a general rule, when a member wants to dispose of a membership interest it can only be done with the consent of the other members who, in certain cases, have a right of pre-emption.[7] Thus, during his or her life the consent of co-members is required for a disposition[8] and upon death s 35 provides a right of pre-emption to the other members. This (together with s 36 where the court can order changes to the membership without liquidating the corporation) underscores the position that in close corporations members cannot be forced to accept persons as co-members with whom they do not wish to be associated with. It must be borne in mind further that, as a general rule, all members are entitled to participate in the management of the

[3] 4 *Lawsa:* 2 ed para 414.
[4] *Northview Shopping Centre (Pty) Ltd v Revclas Properties Johannesburg CC and Another* 2010(3) SA 630 (SCA) para 25.
[5] Section 29 of the Act.
[6] Section 30 of the Act.
[7] Sections 35 and 36 of the Act.
[8] Section 37 of the Act.

corporation.[9] Thus, in principle, there is no separation between ownership and control like in other forms of corporations such as companies.

[17] Some of the consequences of membership set out above can be changed by way of an 'Association Agreement' between the members. Therefore, when it comes to s 35 of the Act which provides for the disposal of a membership interest of a deceased member, the section provides for a right of pre-emption to surviving members but it makes it expressly 'subject to any other arrangement in the association agreement'. As pointed out above, the association agreement in the present matter expressly provided that a members' interest could be 'bequeathed' according to testamentary dispositions made by the deceased member'. The point is that a member's interest represents a bundle of rights and obligations which regulates the relationship between the members on the one hand and between the members and the corporation on the other hand. This is the nature of the 'property' under consideration.

[18] The restrictions imposed on dealing with an interest in a corporation is not unique to close corporations. This is what lies at the core of the difference between private companies and public companies. Thus, s 22 of the Companies' Act defines a private company as one which by way of its articles of association 'restricts the rights to transfer its shares', which restrictions virtually invariably involves the creation of the right of pre-emption in favour of co-shareholders.[10] Private companies which operate in the area of professional services, such as lawyers, engineers and architects have even more onerous restrictions in respect of the transfer of shares. Here the shareholders must be members of the profession and the disposition of shares may take place only to persons

[9] Section 46 of the Act.
[10] Act 28 of 2004.

who are members of the same profession. In these companies (which must use the words 'Incorporated' in its name) directors are jointly and severally liable for the debts and liabilities of the company.[11]

[19] As with ownership of physical objects, membership in a corporation does not give the owner absolute power over or in respect of what is owned. It is limited by restrictions imposed by the law.[12] Those restrictions may arise in public law, eg something may only be done with a permit or a licence, or as a result in the interest of neighbour relationships such as the common law relating to nuisance, or by way of individual restrictions pursuant to personal obligations restricting one to freely dispose of one's property or not to deal with it in a certain way, eg the granting of an option or right of pre-emption.[13]

[20] The restrictions do limit the owner's powers in dealing with or disposing of the property. If an owner grants a servitude of right of way over property he cannot bequeath it free of the right of way. Where a lessee with a long-term lease, of say 50 years, assigns it after 25 years, he cannot assign 50 years, but only 25 years; and assuming the lease would survive the death of the lessee, the lessee who dies after 25 years cannot bequeath more than 25 years to an heir, and where a lifelong usufruct is acquired this can be disposed of during the life of the usufructuary but not thereafter. One cannot under the concept of freedom of testation seek to exercise powers never possessed or contractually disposed of while alive. The property that one bequeaths assumes that one has the power to bequeath and can only affect the rights to and in the property one possesses at the time of one's death. Hence, a shareholder of an 'Incorporated' company cannot bequeath his shares in that company to his child who is not a member

[11] Section 22 read with section 55(4) and 60 of Act 28 of 2004.
[12] *Gien v Gien* 1979(2) SA 1115(T) at 1120.
[13] Lawsa: Things; Vol 27 paras 107 – 109.

of the relevant profession. This is not because he was not the owner of the shares, but because he as shareholder never had that power. His power as shareholder (owner of the shares) was restricted by the articles of association of the company he voluntarily decided to become a shareholder of and thus knew or should have known from the outset that his powers in respect of the shares had limitations imposed by the Companies' Act. In short, one can only bequeath property to the extent that the nature of the property permits this.

[21] Similarly, the deceased in the present matter knew when he acquired his membership interest that it came with restrictions, one of which was that it could not be freely bequeathed or transferred without the consent of his co-members. His right of disposal in respect of the property (his membership) was acquired with this limitation and hence can only be disposed within the confines of this limitation. This is the nature of the property in question. Article 16 does not grant one the right to dispose without regard to the existing impediments inherent in the nature of the property when one bequeaths the property. It allows one to bequeath what is at one's disposal and in respect whereof a right of disposal exists. Thus, even assuming that Art 16 is relevant to intestate succession the attack on s 35 cannot succeed. Section 35 of the Act simply ensures that the restriction on the disposal of membership interest is regulated upon the death of a member. The deceased never had an absolute right to dispose of his membership during his life and this position is simply maintained. This is logical for it would indeed be anomalous if he never had such right during his life but acquired it upon his death and it would be contrary to the whole concept of close corporations.

[22] In short and in the words of Art 16 of the Constitution, the deceased 'acquired' a

membership in a close corporation which he could only dispose of with the consent of his co-members. This was the extent to which the nature of his right permitted its disposal. This right is in no way diminished or abridged by s 35 of the Act. Section 35 regulates the manner in which this right is to be exercised in circumstances where the membership needs to be disposed of as a result of the death of a member. It must be pointed out that the member can in advance obtain permission from co-members to dispose of his or her membership to specifically mentioned persons or classes of persons by incorporating this in an association agreement. This is what the deceased could have done but decided not to. Section 35 of the Act in no manner curtailed, abridged or imposed a limitation on the existing rights of the deceased. It thus follows that the appellants have not established a breach of a constitutional right.

[23] In the result, the attack on the constitutionality of s 35 of the Act cannot be upheld. The deceased members' interest in Laconia CC will thus have to be dealt with in accordance with the provisions of s 35 of the Act.

[24] This leaves the cross appeal to be dealt with. Counsel for the respondents indicated that it was not persisted with. It follows that appellants are entitled to the wasted costs in this regard. I can just indicate that as a result of the cross appeal not being persisted with very little time (I estimate not more than 10 minutes) was spent on this aspect at the hearing of the appeal.

[25] In conclusion , I make the following order:

1. The appeal is dismissed with costs.
2. The wasted costs of the abandoned cross appeal is to be borne by the

respondents.

3. The costs order above shall include the costs of one instructed and one (or two) instructing counsel (where two were engaged).

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FRANK AJA

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DAMASEB DCJ

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SMUTS JA

APPEARANCES:

APPELLANTS:	T Barnard Instructed by Mueller Legal Practitioners
2ND RESPONDENT:	Andrew Corbett with him Beatrix de Jager Instructed by Ellis Shilengudwa Inc. (ESI)