"*REPORTABLE*"

CASE NO.: (P) A 108/2005

SUMMARY

LORENZ ALEXANDER HERMANN BAHLSEN versus **MEES NEDERLOFF & MAHONDA HUNTING SAFARIS CC**

STATUTES CONSIDERED

- Agricultural (Commercial) Land Reform Act
- Close Corporations Act

DAMASEB, JP

09/11/2006

Considered:

- Sections 58, 59 and 60 of the Land Reform Act, i.e. circumstances in which 'foreign national' (close corporation) may or may not acquire agricultural land in Namibia.

- Sections 36 and 49 of the Close Corporations Act in light of relief seeking order of cessation of membership interest of a member for alleged fraudulent conduct. Scope of s36 remedy.

CASE NO.: (P) A 108/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LORENZ ALEXANDER HERMANN BAHLSEN **APPLICANT**

and

MEES NEDERLOFF **FIRST RESPONDENT**

MAHONDA HUNTING SAFARIS CC **SECOND RESPONDENT**

CORAM: DAMASEB, JP

Heard on: 2006.03.28

Delivered on: 2006.11.09

JUDGMENT:

Introduction

[1] **DAMASEB, JP:** The applicant, a German national who is covered by ss 58(1) and 59, read with s1 of the Agricultural (Commercial) Land Reform Act, no. 6 of 1995 (hereafter the Land Reform Act), entered into an agreement with a Namibian national (first respondent) in terms whereof they respectively hold 50% member's interest in a close corporation (the second respondent). In so far as it is relevant, s 58(1) states:

> "Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the commencement of this Part[1], without the prior written consent of the Minister[2], be competent-

[1]Part VI is the *'Restriction on Acquisition of Agricultural Land by Foreign Nationals'*
[2]Minister of Lands, Resettlement and Rehabilitation

(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry;

(2) If at any time after the commencement of this Part the controlling interest in any company or close corporation which is the owner of agricultural land passes to any foreign national, it shall be deemed, for the purposes of subsection (1) (a), that such company or close corporation acquired the agricultural land in question on the date on which the controlling interest so passed." (my emphasis)

[2] In terms of s1 of the Land Reform Act "*controlling interest*" in relation to a close corporation means more than 50% of the interest in the close corporation. Section 1 defines a close corporation as a 'foreign national' if the controlling interest in it is **not** held by Namibian citizens. The upshot of this is that a close corporation may not, without the consent of the Minister, by registration in the deeds office acquire agricultural land in Namibia if the controlling interest is not held by Namibian citizens.

[3] Section 59 states that *No person shall acquire and hold, as nominee owner, on behalf or in the interest of any foreign national any agricultural land if the Minister's written consent therefore has not been obtained* ..." Section 60 empowers the Minister to order the sale of or to expropriate agricultural land acquired in contravention of ss 58(1)(a) and 59 of the Land Reform Act.

Common cause facts

[4] In 2001 second respondent acquired two farms: Mahonda No. 39 and Mohlatetsi 40- both in the district of Windhoek. I am unable from the papers to tell the exact date on which the second respondent took transfer of the two farms: The deed of transfer in terms whereof it allegedly took transfer is in the Afrikaans language and is inadmissible as no sworn translation is provided therefor. Following that transaction and in April 2001, the applicant and the first respondent became members of the second respondent, each holding a 50% membership interest. Each paid a nominal amount of N$50.00 for his 50% interest. The amended founding statement in terms of which they

became such members is dated 12 April 2001. The earlier founding statement in respect of the second respondent (the one being amended by that of 12 April 2001) has not been annexed to the papers and I am unable to tell from the papers alone what the membership of the second respondent was at the time that it took transfer of the two farms. (In his answering affidavit all the first respondent says is that at the time of the transfer of the farms into the name of the second respondent, he was already an 'equal member of the 2nd respondent'.) He does not say equal member with whom. I am bound therefore to rely for these conclusions on the averments of the parties to this dispute. The applicant's case is that such transfer was in accordance with the law. I must therefore take it as established fact that there is no evidence from which I can draw the conclusion that the second respondent acquired the two farms as a 'foreign national' in contravention of ss58 and 59 of the Land Reform Act. I make this finding at this early stage more for convenience of exposition. The finding is relevant to the consideration of the point *in limine* taken by the first respondent which I deal with later on in my judgment.

[5] The principal business of second respondent is to own property and to conduct farming operations. In addition to an association agreement, the applicant and first respondent concluded a written option/ loan agreement in terms whereof the applicant would advance N$2 000 000.00 to the first respondent to enable the latter to pay for his 50% membership interest in the second respondent, and to make certain '*further investments*' which are not specified. The first respondent agreed to give applicant, or his nominee, an irrevocable right of option to, at any time, acquire first respondent's 50% membership interest in second respondent for the paltry sum of N$50,00- an option which, if exercised - would result in the loan of N$2 000 000.00 not being repayable. The agreement gives the applicant the right to cede first respondent's member's interest and claims in and against the second respondent, to any other person without first respondent's '*approval or authorization*'.

[6] The second respondent engaged the services of the first respondent as farm manager of the farms Mahonda and Mohlatetsi for a salary of N$3 000 per

month. This employment relationship could be terminated by either party on six week's notice. The loan amount of N$2 000 000.00 was, contrary to the written agreement between the applicant and first respondent, paid directly to the second respondent by the applicant. The first respondent therefore did not receive the loan.

[7] Mr. Frank SC appears for the applicant while Mr. Hinda appears for the first respondent.

The evidence of the applicant

[8] The applicant states that all the funds needed for the purchase of the farms, as well as the capital required to run the business of the second respondent, were provided by him. This totals N$7 000 000.00. The applicant concedes that the loan of N$ 2 000 000.00 was never paid over to the first respondent but that he is, regardless, entitled to enforce the 'option' which he says is still binding.

[9] The applicant's founding affidavit discloses the following salient allegations in support of the relief that he seeks: As farm manager the first respondent failed during 2003/2004 to account for Euro 500,000 belonging to the second respondent, and did not do the second respondent's bookkeeping which, on account of that failure, had to be done by a firm of auditors. First Respondent is also accused of not keeping any source documents to facilitate such book-keeping. In March 2004, the first respondent exceeded the budget set aside for the purchase of game for the second respondent by N$109 000 and thus placed second respondent in financial difficulties. An inspection by the applicant showed that the game purchased was not on the farm during the time that the first respondent remained in control of the farm. The applicant also alleges that the first respondent registered in his own name three vehicles belonging to the second respondent, whilst these vehicles were paid for with funds belonging to the second respondent. The first respondent, it is said, claimed the vehicles as his own resulting in criminal charges being laid against

him. Because of first respondent's refusal to allow access to the vehicles, there was cancellation of

the bookings of a group of hunting guests scheduled for 17th March and 29th March 2005, resulting in loss of revenue of N$46 900 in respect of both farms.

[10] It is further alleged that the first respondent denied the applicant access to the farms. This led to a letter of demand to first respondent resulting in first respondent agreeing to remove locks at certain gates to grant applicant and his agent access to the farms. This notwithstanding, from January 2005, the first respondent denied the applicant access to the farms and because of this the second respondent was unable to pay the farm workers' salaries on time. A successful spoliation order was then brought against the first respondent.

[11] It is further alleged that in October 2004, the first respondent shot certain game belonging to the second respondent, sold the hides and appropriated the proceeds (N$7000) for himself. A criminal complaint has been laid against the first respondent for this conduct. It is further alleged that the first respondent, together with one F Steinwender, offered hunting safaris on the two farms against payment into first respondent's personal account. First respondent is said to have received at least Euro 2000 into his personal account as a result. For this alleged conduct too, criminal charges have been laid against the first respondent.

[12] It is further alleged that the first respondent grossly overstated the number of blue wildebeest on the farms in applications for hunting permits to the Ministry of Environment & Tourism. The same Ministry also refuses to issue hunting permits in respect of the two farms unless both applicant and the first respondent consent thereto. Notwithstanding requests by the applicant, the first respondent refuses to give his consent and second respondent suffers damages as a result of this refusal.

[13] The applicant also alleges that the first respondent tried to extort Euro 100 000 from him under threat of facilitating the expropriation of applicant's 50% member's interest in the second respondent if the said amount is not paid on the

pretext, it seems, that as a foreign national the applicant improperly acquired an interest in agricultural land in Namibia, an allegation that the applicant denies.

[14] In November 2004, the applicant, purporting to act on behalf of the second respondent, terminated the services of the first respondent. The first respondent is disputing the validity of the termination and in fact brought a complaint for unfair dismissal in the District labour Court. In January 2005, the applicant gave notice to the first respondent that he is exercising his option to purchase first respondent's 50% interest in the second respondent for N$50, 00. The first respondent refused to comply on the basis that he did not conclude the loan agreement which gives rise to the 'option' and that he did not understand the agreement as it was in German. The applicant persists that the first respondent is fluent in German.

[15] In the present proceedings the applicant seeks the protection offered by ss 36 and 49 of the Close Corporations Act, No. 26 of 1988 (hereafter the Close Corporations Act) - inter alia on account of the alleged breach by the first respondent of his fiduciary duties in terms of s42(1) and (2) of the Close Corporations Act. The applicant alleges that first respondent's conduct has a prejudicial effect on the carrying on of the second respondent's business; alternatively that such conduct does not render it reasonably practical for him to carry on the business of the close corporation with the first respondent.

[16] The applicant seeks to be authorized by this court to transfer to another person, for the consideration of N$50, 00, the respondent's membership interest in the second respondent. In order to achieve this he cedes his option in respect of the first respondent's 50% membership interest to one Z Cooper who has also deposed to a supporting affidavit accepting the cession and undertaking to cooperate with the applicant.

[17] In so far as it is relevant s36 states as follows:

"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 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 paragraph (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 subsection (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."

[18] Section 49 states as follows:

"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 to some members including him, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him, or to some members including him, make an application to a Court for an order under this section.

(2) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in subsection (1), or that the corporation's affairs are being conducted as so contemplated, and if the Court considers it just and equitable, the Court may with a view to settling the dispute make such order as it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation."

First respondent's evidence

[19] The first respondent has deposed to an affidavit in opposition to the relief sought and denies that he made himself guilty of any conduct which justifies the protection afforded under s36 of the Close Corporations Act. First respondent avers that during 2004 a dispute arose between him and the applicant in respect of the management and control of the second respondent. He avers that it is just and equitable that equal distribution of the assets of the second respondent take place, if it is found that he and applicant cannot continue as members of the second respondent. He makes the assertion that it is the applicant who engaged in conduct which is prejudicial to the carrying on of the business of the second respondent. The first respondent resists being ordered to give up his membership of the second respondent.

[20] First respondent avers that the association agreement and the loan/option agreement are in German (a language he speaks although without formal tutelage) and were signed by him for the purpose of registering second respondent. (No suggestion is made that for this reason it is not binding, or that it was not intended to be binding.)

[21] First respondent relies on the admitted fact that he never received the loan of N$2 000 000.00 from the applicant to resist applicant's claim to be entitled to exercise the option of taking over his 50% membership interest. He maintains that the advancement of the loan was the precondition for the future exercise of the option by the applicant. The first respondent also maintains (contrary to the tenor of the agreement which he signed and from which he derived the benefit of being a member of the second respondent) that:

(a) the exercise of the option in terms of the loan/option agreement does not achieve a just and equitable consideration for the loss of his 50% member's interest in the second respondent;

(b) the agreement makes provision that his 50% member's interest may be ceded to anyone by the applicant without his approval. This, he says, is evidence of the applicant's "*devious scheme*" as that 50% interest has no value to the applicant. The first respondent also deposes that the applicant approached him to become an equal member in the second respondent with the sole purpose of circumventing ss58 and 59 of the Land Reform Act and that the applicant "*used*" him to acquire the farms in the name of the second respondent.

[22] The first respondent does not deny that the vehicles referred to belong to the second respondent and that he had them registered in his own name. He says he did so because of the salesman's concern that 50% interest in the second respondent was held by the applicant who is a foreign national and that the creditors would more readily get hold of the first respondent in the event that the second respondent became bankrupt.

[23] The first respondent alleges that on the contrary it was the applicant who engaged in activities prejudicial to the second respondent, and cites the following incidents: the applicant unilaterally registered a mortgage bond for N$7000 000 in his favour against the title deed of farm Mahonda. The applicant conveyed to the auditors that a member's meeting took resolutions about the financial affairs of the second respondent which were in fact not taken; in particular that the applicant's loan of N$6,325,606.00 was approved; that there were no accumulated profits to be distributed and that no member's emoluments be approved for a particular year. First respondent also avers that the applicant understated the income of the second respondent for the period ended March 2004.

[24] The first respondent disputes that he denied the applicant, or his agent, access to the farms and says all he required was advance notice of such visits as the gates were locked due to security reasons. He however admits that a court order was obtained against him guaranteeing the applicant access. He says he has launched proceedings to rescind the order.

[25] First respondent admits selling game (zebra) for personal gain, suggesting he had to do that as he received no remuneration as farm manager. He also admits placing, together with F Steinwender, advertisements for hunting safaris for his own gain but says it was in order to maintain himself. First respondent denies refusing the applicant's agent access to the vehicles, or that he refused to consent to issuing of hunting permits by the Ministry; or that he denied guests access to the farms. He says he in fact sought an amicable solution of the problem.

[26] According to the first respondent, if the present application is dismissed, he "*will endeavour*" to bring an application for the winding up of the affairs of the second respondent for the just and equitable distribution of the second respondent's assets. (It was of course open to second respondent to bring a counter application for such relief so that the Court takes a holistic approach to the matter and not deal with it piece-meal.)

Reply

[27] The replying papers show that the first respondent's complaint of unfair dismissal was dismissed in the District Labour Court. It is further stated in reply that the first respondent never objected to the payment of the N$2 000 000.00 loan amount to the second respondent.

[28] In respect of the first respondent's averment that in the circumstances of the case winding up of the affairs of the second respondent is the equitable thing and that an equal distribution take place between members of second respondent, the applicant replies that all members' loans would have to be

redeemed in full prior to any such distribution of the second respondent's assets, and that in view of the first respondent's fraudulent activities, the appropriate relief is that provided for in s 36 of the Act.

[29] The applicant therefore seeks the Court's sanction to transfer first respondent's 50% membership interest to one Z Cooper, a Namibian citizen. Cooper has filed a supporting affidavit confirming his acceptance of the offer.

Requirements for a final interdict, and for resolving disputes of fact

[30] Since applicant is seeking a final interdict he must , first , establish a clear right , secondly that such right has been interfered with (i.e. that he suffered an 'injury') and, thirdly, that he has no other satisfactory remedy to protect himself from the unlawful infraction of his right. The Court retains the discretion, depending on the circumstances of a particular case, whether or not to grant a final interdict (see generally Van Winsen, L D V et al, The *Civil Practice of the Supreme Court of South Africa* 4th ed. Juta, 1997 at 1064-1068 .)

[31] Should disputes of fact arise on the papers the Court may still grant a final order if the facts deposed to by the applicant and admitted by the respondent, and the facts alleged by the respondent, justify such an order. *(Plascon - Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 at 634). Even if facts are not formally admitted but it is clear that they cannot be denied, the Court must regard them as admitted *(Stellenbosch Farmers*' *Winery Ltd v Stellenbosch Winery (Pty) Ltd* 1954 (4) SA 234 (C) at 235 E-G).In certain circumstances denial of a fact may not be such as to raise 'a *real, genuine or bona fide dispute of fact*': *Plascon -Evans supra* at 634-635. Should a genuine dispute of fact exist on the papers, and it was not referred to oral evidence, the Court must accept the version of the respondent unless it is so *far-fetched* that it can be rejected simply on the papers.

(Mostert *v The Minister of Justice* 2003 NR 11 at 21 G-I, and *Nqumba v The State President,* 1988 (4) SA 224 (A) at 259C - 263D).

[32] In this case there has been no resort to oral evidence by either party. I must accept the allegations by the first respondent which were quite pertinently conveyed in a letter to the applicant's lawyer and which had not even as much as been denied in these proceedings that the applicant registered a mortgage bond

of N$7000 000 in his favour against the title deed of the farm Mahonda without the fore-knowledge or consent of the first respondent. I must also accept that the applicant arrogated to himself the right, without the involvement of the first respondent, to order the 2004 financial statements of the second respondent in a manner which suited his interests without the involvement of the first respondent.

First respondent's allegations which are far-fetched

[33] I find as far-fetched the assertion by the first respondent that he registered the second respondent's three vehicles in his own name on the advice of a salesman: Firstly, the applicant as a co-member of the second respondent and provider of its funds was not informed of the arrangement. Secondly, it stretches credulity to suggest that a salesman, not the credit provider (which I assume to be a bank) would be concerned about the solvency of the second respondent. No suggestion is made that the credit-giver put that forward as a precondition or that the salesman had authority to speak on behalf of the credit-giver. Besides, the undisputed allegation of the applicant is that the second respondent provided the funds for the purchase of the vehicles. I accept, therefore, that the first respondent fraudulently registered in his own name vehicles belonging to the second respondent - to the detriment of both the applicant and the second respondent. The insinuation that the first respondent does not understand the German language and therefore the import of the agreements he concluded is against the weight of evidence and stands to be rejected. It is also clear that the first respondent denied the applicant and or his agent access to the farms and that this had negative financial consequences for the second respondent's business.

Applicant's allegations against which only bare denials offered

[34] No genuine dispute of fact has been raised in respect of the allegation that the first respondent appropriated for himself about Euro 500 000 belonging to the second respondent; that he dissipated game belonging to the second

respondent and ran hunting safaris on the farms with an outsider for their gain at the expense of the second respondent and the applicant. The same is to be said for the fact that the first respondent failed to keep proper books of account for audit purposes, and his exceeding the budget for the purchase of game while he could also not account for game bought for the farm on his watch.

Points in limine

[35] I propose to first deal with the argument advanced by Mr. Hinda which, as he sees it, militates against the grant of the relief. It is the first respondent's case that the applicant, who is a foreign national, holds a *controlling interest* in the second respondent. It also seems to be the case of the first respondent that the farms were acquired by the second respondent while it was a foreign national as defined in s1 of the Land Reform Act without the consent of the Minister. Both these points *in limine* have no merit. Starting with the latter point, I have already stated that I find no evidence that the second respondent was a foreign national at the time that it took transfer of the two farms. I am therefore not in a position to say that the second respondent breached ss58 and 59 at the time of transfer.

[36] As far as the first point *in limine* goes, the applicant and first respondent respectively hold 50% membership interest in the second respondent. The law prohibits a foreign national from owning *more than* 50% interest in a close corporation that owns agricultural land. The way in which the first respondent has pleaded his case, although he makes half - hearted effort in that direction, does not lend itself to deciding, and I refrain from doing so, whether there has been such dilution of the 50% interest of the first respondent in the second

respondent as to make it meaningless, and whether, if such were the case, it would fall foul of the definition of *controlling interest* in a close corporation in terms of s1 of the Land Reform Act.

Factors counting against grant of the relief:

[37] The applicant's failure to extend the loan amount of N$ 2 000 000.00 to the first respondent in terms of their written agreement, on the face of it, points to 'dirty hands'. On the same footing is his raising of a mortgage bond against the second respondent's property without the knowledge of the first respondent, and his unilateral and improper handling of the 2004 financial statements of the second respondent.

Factors favouring grant of the relief

[38] The allegations against the first respondent, the raft of which remain unchallenged, are very serious and *prima facie* involve theft of the assets of the second respondent. All the second respondent says is that the allegations do not justify the relief in terms of s 36. I do not agree. The first respondent secured a 50% interest in the second respondent which must be taken to have been duly paid for in view of the fact that the loan of N$2 000 000.00 was paid over directly to the second respondent by the applicant, instead of to him. One would have expected the first respondent to say clearly than he has now what proportion of the N$2m was to have been used to pay for his interest in the second respondent and what the balance of the loan was to be applied towards. The precise nature of the prejudice he has suffered as a result of the non-payment of the loan is therefore left to conjecture. If it were for a purpose other than investment in the second respondent, his silence on the issue is even more confusing. I bear in mind that the loan was repayable in full on demand in the event that the option was not exercised by the applicant.

[39] It is common cause that the relationship between the applicant and the first respondent deteriorated sometime in 2004.The conduct the first

respondent is accused of largely relates to or was felt in that year and seems, on balance of probabilities, to be the cause of the breakdown in the relationship of the parties. I also find on balance of probabilities that the applicant has been the sole provider of the funds sustaining the operations of the second respondent. Even if

one discounts the N$2 000 000.00 representing the unpaid loan to the first respondent, he still provided N$ 5m. for the operations of the second respondent. If anyone stood to lose everything in the event of the second respondent falling on hard times, it is the applicant. For this reason the fact that he had a mortgage registered in his favour, without the consent of the first respondent, and ordered the financial statements of the second respondent in a fashion which sought to protect his interests, although improper in the sense that it lacked consensus of both members, is to be seen against the need for the applicant to protect his investment. In the circumstances, this conduct of the applicant is not of the character as will induce me not to come to his assistance should he be able to bring himself within the protective shield of s36 of the Close Corporations Act.

[40] I have given careful consideration to the applicant's failure to pay the loan to the first respondent as agreed. The evidence shows though that the first respondent accepted the arrangement, I suspect because it was to be paid over in any event to the second respondent for his membership. The fact that he denies it now is inconsistent with his failure to have pursued the matter and to enforce his rights.

Consideration of the relief sought

Section 49

[41] I take the view that reliance on s49 (2) of the Close Corporations Act for transfer to Cooper of second respondent's membership interest in second respondent, is misconceived. Cooper was not a member of the second respondent at the time the application was brought. The section envisages such transfer to an existing member.

Section 36

[42] In *DeFranca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) 878 G-H Nepgen J held at 893 that:

> "The order that a Court can make in terms of s36 (1) of the Act is circumscribed, namely an order that a member shall cease to be a member of the close corporation. Once a Court decides that an order for such cessation of membership should be made, it has a discretion to make further orders as referred to in s36(2) of the Act."

[43] The question that arises in the case before me is whether the further orders contemplated by subsection (2) of s36 include an order that a membership interest which has been denuded may be transferred to a person who is not a member of the close corporation. I will return to this issue presently.

[44] In terms of s36(1) (b) -(d), the Court may on application made by a member of a close corporation order a member to cease to be a member if he is guilty of conduct likely to have a prejudicial effect on the carrying on of the business of the close corporation, or conducts himself in relation to the corporation's business such that it is not reasonably practicable for the other member to carry on the business of the close corporation with him; or it is in the circumstances just and equitable to so order. The onus rests on the applicant to establish these jurisdictional facts. The applicant also bears the onus to adduce enough evidence to justify the Court making any of the further orders envisaged under subsection (2): *(Kanakia v Ritshelf 1004 CC t/a Passage to India* 2003(2) SA 39 at

48E.)

In *Passage to India,* Jali J observed (at 48F) as follows:

> ''It is apparent that the enactment of [s36] was to empower the Court to dissolve the association between members without winding up the close corporation on the grounds that such would be just and equitable ...in

circumstances which, in the context of a partnership , would warrant its dissolution''.

[45] I have found that the first respondent has engaged in conduct which amounts to theft from the second respondent. The sums of money which are unaccounted for are huge. There are potential claims against him. The fact that

he registered in his own name vehicles belonging to the second respondent (although now reversible) must have been obvious to him would have a prejudicial effect on the carrying on of the business of the second respondent, as indeed was his exclusion of the applicant (the provider of the funds) from the farms resulting, for example, in employees not being paid for a certain period. His failure to keep proper books of account; and his purchasing of game in amounts in excess of what was budgeted for, further operate prejudicially on the second respondent. This, in my view, is the sort of conduct that would have resulted in the dissolution of a partnership on the just and equitable ground. It would not be reasonably practicable for the applicant to be expected to carry on the business of the second respondent with the first respondent in these circumstances. It is clear, and that much seems admitted by the first respondent who says that the second respondent should instead be wound up (although no such relief is sought), that the relationship between the two members of the corporation has broken down.

[46] I am satisfied that the applicant has discharged his onus in respect of paragraphs (b), (c) and (d) of s36 (1). I am satisfied that the applicant, as a member of the second respondent, has established a clear right to expect of his co-member to comply with his fiduciary duties in terms of s42(1) and (2) of the

Close Corporations Act. The second respondent has clearly acted in breach of those fiduciary duties and the applicant is entitled to the protection of s36. In view of the breakdown in the relationship, it would be moot to say they should give it another chance; and not ordering dissolution of their association will have only deleterious consequences for the carrying on of the business of the second respondent. I accordingly come to the conclusion that the second

respondent ought to be ordered to cease being a member of the second respondent.

[47] The applicant seeks a further order that the 50% membership interest in the second respondent held by the first respondent be transferred to Cooper for the sum of N$ 50.00 in terms of the 'option'. Paragraph (c) of subsection (2) of s36 empowers the Court ordering cessation of membership "if it deems fit", to make an order in regard to 'any other matter regarding the cessation of membership

which the Court deems fit'. This is a very wide discretion given to the Court. I think the discretion given in paragraph (c) is wide enough to pass transfer to a person who is not a member of the second respondent. Even if I am wrong in this, my exercise of the discretion in this way *in casu* is made possible by the fact that the parties themselves had agreed that the applicant could cede the 50% membership of the first respondent to a non-member.

[48] It is not satisfactorily explained by the applicant why, if they both became members of the second respondent for the nominal value of N$50,00, a further loan was to be given to the second respondent to pay for his interest in the second respondent. It appears more likely that the N$2 000 000.00 was seen as funds to be contributed by the first respondent as working capital of the second respondent. To the extent that it was directly paid over to the second respondent, it is only logical that the amount of N$2 000 000.00 be treated as second respondent's loan account in the second respondent. In the absence of clear evidence as to the precise details of the parties' respective loan accounts in the second respondent, I do not feel it is just and equitable that the second respondent be ordered to part with his 'other claims' in the second respondent for only N$50 000. I come to this conclusion also because of the applicant's admitted failure to pay the N$2 000 000.00 to the second respondent. I do not know how different the picture would have looked today had the loan been paid as agreed. It is not difficult to surmise though that it is a factor which affected the respective bargaining strengths of the parties in the conduct of the business of the second respondent.

The special costs order

[49] The applicant asks for a special costs order. He does not set out in detail the circumstances he relies on for such an order. It seems to be assumed that if the Court finds that the first respondent was guilty of the conduct complained of, such an order should follow. As the history of the correspondence between the parties shows, their relationship is an acrimonious one. The second respondent seems to have felt genuinely that he was being done in by the applicant and his

actions may have been clouded by that. Besides, the applicant himself engaged in conduct which detrimentally affected the rights of the second respondent. I do not think this case justifies a special costs order such as is sought.

Conclusion

[50] In conclusion, I wish to mention something which concerns me. The applicant was extremely evasive in his pleadings in respect of the ownership of the second respondent at the time that it acquired the farms. If the applicant held 50% membership interest in the second respondent when the transfer of the farms was taken, s58(2) of the Land Reform Act may have been breached, entitling the Minister to act in terms of s60 of that Act as the entire transaction would have been in *fraudum legis.* On the papers I found no such breach although I have my suspicions. It is for this reason that the Registrar of this Court is directed to send a copy of this judgment to the Minister of Lands, Resettlement and Rehabilitation, and the Attorney-General to consider if ss 58 and 59 of the Land Reform Act had not been breached.

[51] In the result I make the following order:

a) The first respondent shall cease to be a member of the second respondent with effect from 10th November 2006 in terms of Section 36(1) of the Close Corporations Act, 1988 (Act 26 of 1988);

b) The 50% members' interest owned and held by first respondent in second respondent is hereby transferred in ownership to Mr. Zane Dirk Cooper against payment of an amount of N$50.00.

c) The first respondent is ordered to, within 10 days from date of this order, sign all documents necessary in order to effect transfer of his 50% member's interest in the second respondent to Z D Cooper. Should he fail to do so the Deputy Sheriff for the district of Windhoek is hereby authorized to sign all documents to give effect to the transfer of the first

respondent's member's interest in the second respondent to Z D Cooper;

d) First respondent is ordered to complete and sign and deliver to applicant or his legal representatives all necessary forms in order to cause the registration of the following vehicles into the name of the second respondent:

i) one Toyota Land Cruiser with registration number N79684W;
ii) one Toyota Land Cruiser with registration number N77024W;
iii) one Toyota Land Cruiser with registration number N12334W.

Should he fail to do so, the Deputy Sheriff for the District of Windhoek is hereby authorized to complete and sign such documents.

e) The first respondent is ordered to pay the costs of this application, including the costs of two instructed counsel.

f) The Registrar is directed to send a copy of this judgment to the Minister of Lands, Resettlement and Rehabilitation, and the Attorney-General.

DAMASEB, JP

ON BEHALF OF THE APPLICANT: Mr T Frank, SC

Assisted By: **Mr J Strydom**

INSTRUCTED BY: DIEKMANN & ASSOCIATES

ON BEHALF OF FIRST RESPONDENT: Mr G Hinda

INSTRUCTED BY: TJITEMISA & ASSOCIATES