`REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 246/2015

In the matter between:

1. **STEFAN GOIKE** **APPLICANT**

And

NATASCHA GESCHE VON ZELEWSKI **1ST RESPONDENT**
INSTINCT INVESTMENT CC **2ND RESPONDENT**
REGISTRAR OF CLOSE CORPORATIONS **3RD RESPONDENT**

Neutral citation: *Goike v Von Zelewski* (A 246/2015) [2017] NAHCMD 28 (07 February 2017)

Coram: UEITELE J
Heard: 01 June 2016
Delivered: 07 February 2017

Fly note: *Close corporation* - Members - Cessation of membership - Member relying on s 36 of Close Corporations Act, 1988 for such order bearing *onus* of proving entitlement to relief sought - Incumbent upon such member to place before Court necessary evidence.

Close corporation - Members - Unfairly prejudicial, unjust or inequitable conduct - Application for order in terms of s 49 of Close Corporations Act 36 of 1988 - Powers

of Court - Court given wide discretion and far-reaching powers.

Summary: During September 2015 the applicant commenced proceedings in this Court in which he applied, in terms of s 36 of the Close Corporations Act, 1988 for an order that the members' interest of the first respondent, in Instinct Investment CC be acquired, at an amount determined by this Court, by him. The first respondent opposed the application and simultaneously filed a counter application. In the counter application the first respondent seeks an order directing the applicant to render to her an account of all the transactions of the close corporation for the period 01 July 2011 to 29 February 2016 and a debatement of that account.

The applicant predicated the application, and the relief sought under the application, on the provisions of s 36(1)(c) and (d) of the Close Corporations Act, 1988 and in the alternative on the provisions of s 49 of that Act.

Held that the legal principles which will lead a court to exercise the discretion conferred on it by s 36 of the Close Corporation Act, 1988 is, first, the principle that, the conduct of the member whose membership is sought to be terminated must result in a 'justifiable lack of confidence in the conduct and management of the close corporation's affairs' and that conduct must be grounded on the conduct of the member, not in regard to his or her private life or affairs, but in regard to the close corporation's business.

Held further that lack of confidence will be justifiable if there is a lack of probity in the member's conduct of the close corporation's business, but the lack of confidence will not be justifiable if it springs merely from how a member of the close corporation conducts his or her private life.

Held further that the first respondent's conduct which the applicant complains of has nothing to do with the first respondent's management of the close corporation but is squarely within the realm of her private affairs.

Held further that s 49 of the Act deals with the situation where the conduct of the close corporation or of one or more of its members, or where the manner in which

the affairs of the close corporation are being conducted, is unfairly prejudicial, unjust or inequitable to a member of the close corporation. When this occurs the member who is prejudiced, by the conduct of the close corporation or the other member or members, may apply to the Court for an order that will have the effect of 'bringing to an end' the prejudicial conduct complained of.

Held further that it is in the court's view neither just nor equitable to dispossess the first respondent of her member's interest in the close corporation simply because she is alleged to have been unfaithful (in regard to a romantic relationship and not in regard to the conduct of the affairs of the close corporation) to the applicant.

Held furthermore that it is unfair and unjust to dispossess the first respondent of her member's interest in the close corporation because of her failure to make contributions towards the bond repayments, water and electricity charges, and body corporate levies, because on the applicant's own admission he also has since April 2015 ceased to effect payments in respect of the bond repayments, water and electricity charges, and body corporate levies.

Held furthermore that the practical and equitable solution in the circumstances, according to the substantive principles of law governing the *actio communi dividundo*, is for the Court to order the parties to appoint a referee who will determine the value of the close corporation and each member's loan account and once that is done the close corporation to be sold or liquidated and the net proceeds of the sale to be divided equally between the parties.

ORDER

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1 The application is dismissed.

2 The applicant and the first respondent must, not later than fourteen days from the date of this judgment, appoint a referee, who must determine the value of the Close Corporation and each party's loan account.

3 If the parties fail to appoint a referee as contemplated in paragraph 1 of this order then and in that event the President of the Law Society of Namibia must appoint not later than seven days from the date that the Law Society is informed of the failure, appoint the referee.

4 For the purpose of giving effect to paragraph 1 or 2 of this order the referee:

4.1 Must be a person who holds a qualification in the field of accounting or auditing;

4.2 May call upon either party to produce any books or documents which the referee reasonably require to perform his or her duties. The books or documents must be delivered to the referee within the time period specified by him or her;

4.3 May engage the services of any suitably qualified person or persons to assist him in determining the proper value of any of the assets of the Close Corporation and to pay that person or persons the reasonable fee which may be charged thereof;

4.4 Must, if required, afford either party or their legal representatives, the opportunity to make representations to him or her about any matter relevant to his or her duties;

4.5 Must prepare the financial statements of the Close Corporation and determine the value of the Close Corporation not later than three months from the date of his or her appointment;

4.6 May apply to this Court for any further direction (s) that he or she considers necessary to give effect to his or her obligations in terms of this judgment and the law;

4.7 Is entitled to claim his costs of determining the value of the close corporation and the loan account of each member, from the close

corporation.

5 Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, he must liquidate the close corporation and pay to each party the value of his or her member's interest.

6 Each party must pay his or her costs of the application and the counter application.

JUDGMENT

UEITELE, J

Introduction

[1] The applicant in this matter is Mr Stefan Goike and the first respondent is Ms Natascha Gesche Von Zelewski, the second respondent is a Close Corporation, known as Instinct Investment CC in which the applicant and the first respondent hold equal (50% each) members' interest (I will in this judgment refer to the second respondent as the 'close corporation'). The only business which the close corporation' conducts is that of holding and letting immovable property.

[2] During September 2015 the applicant commenced proceedings in this court in which he applied, in terms of s 36 of the Close Corporations Act, 1988[1] for an order that the members' interest of the first respondent, in Instinct Investment CC be acquired, at an amount determined by this Court, by him. The first respondent opposed the application and simultaneously filed a counter application. In the counter application the first respondent seeks an order directing the applicant to

[1] Act No. 26 of 1988.

render to her an account of all the transactions of the close corporation for the period 01 July 2011 to 29 February 2016 and a debatement of that account.

[3] The applicant predicated the application, and the relief sought under the application, on the provisions of s 36(1)(c) and (d) of the Close Corporations Act, 1988 and in the alternative on the provisions of s 49 of that Act. I will in the course of this judgment return to the provisions of ss 36 & 49 of the Close Corporations Act, 1988.

Background

[4] The brief background to the dispute in this matter is as follows. The applicant and the first respondent were involved in a romantic relationship (the applicant alleging that the relationship started somewhere during 2007 while the first respondent alleges that the relationship started during 2005). During the subsistence of the romantic relationship (to be specific during the year 2011) the applicant and the first respondent (when necessary I will refer to the applicant and first respondent as the 'parties') decided to purchase an immovable property as their primary residence. They settled on purchasing a close corporation, which they did and changed the name of the close corporation to Instinct Investments CC in which they each hold a 50% members' interest.

1. [5] At the time when the parties purchased the close corporation, the close corporation was already the registered owner of certain immovable property being Units/Sections 34 and 35 of sectional plan No. 93/2007 in the building known as Avis Village, situated in Klein Windhoek and held by Sectional Title No. 93/2007 (34) (UNIT) and Sectional Title No. 93/2007 (35) (UNIT). (I will in this judgment refer to these Units as 'the property').
2.
3. [6] The property consists of a main residence which the parties utilized as their common residence; and two flats situated immediately adjacent to the main residence. The two flats situated on the property are being leased, respectively by certain Willie Sudwischer, for an amount of N$ 9,900.00 and to a certain Julian Michael Ademeyer, for an amount of N$ 4,200.00 per month respectively.

4.

5. [7] The purchase consideration for the property amounted to N$2,891,000.00 (Two Million Eight Hundred and Ninety Two Thousand Namibian Dollars) which was secured by Sectional Mortgage Bond Number 965 / 2011 (Unit) registered over both Units in favour of Nedbank Namibia Limited.

6. [8] When the parties acquired the close corporation, they amongst other things agreed that:

7.

(a) They would contribute equally (ie on a 50/50 basis) to all the expenses of the close corporation, including but not limited to bond repayments, insurance payments, water and electricity, rates and taxes, garden services and housekeeping services;

8.

(b) The two flats on the property would be leased out for the close corporation's benefit;

9.

(c) The parties' contributions as well as the monthly rental for the two flats were to be paid directly in the close corporation's 'MMI Account no. 11020009545', held with Nedbank Namibia Limited;

(d) The proceeds generated by the monthly rental received for the two flats together with the parties' contributions would be utilized to service the bond installments and pay all expenses in respect of the property in question;

(e) Any shortfall on monthly expenses after the rental income, would be contributed by the parties equally.

10.

[9] The relationship between the parties started to deteriorate towards the end of 2014 and matters reached a 'dead end' during March 2015 when the romantic relationship between the parties totally broke down. The applicant accuses the first respondent of infidelity and alleges that the first respondent's infidelity was the cause of the breakdown of the relationship. The first respondent on the other hand attributes the breakdown of the relationship between them on the applicant's alleged:

(a) failure to show her any love and affection;

(b) engagement in unmeritorious and prolonged quarrels and as such a failure to properly communicate with her;

(c) overly jealousness and possessiveness towards her to the point where he (without her knowledge) installed a tracking device in her motor vehicle for purposes of tracing her movements;

(d) occasional physical assaults on her; and

(e) illicit affairs with other women.

11. [10] During the evening of Tuesday 31 March 2015, matters got out of hand. On that evening the parties engaged in a discussion regarding the termination of the romantic relationship between them and the division of the joint estate. According to the applicant the discussion between them escalated to a point where the first respondent shoved him and in retaliation he slapped her. As a result of the applicant slapping the first respondent, she, on 8 April 2015 laid a charge of domestic violence against the applicant. The applicant was arrested on Friday the 10th of April 2015 and released on bail on Saturday 11 April 2015 on the conditions that:

12.

13. (a) he may not have any direct or indirect contact with the first respondent, except through a legal practitioner;

14.

15. (b) he may not come within 100 meters of the first respondent's place of work; and

16.

17. (c) he may not come within 100 meters of the first respondent's residence [that is, the property] in Avis.

18.

19. [11] Following his release from custody the applicant moved out of the parties' common residence. During the period between 15 April 2015 and 31 August 2015 the parties exchanged electronic correspondences and through

their legal practitioners attempted to agree as to what they must do with the property. When the parties could not reach agreement as to how to deal with the property, the applicant instituted these proceedings and as I have indicated above he seeks an order directing that the first respondent ceases to be a member of the Close Corporation. In the alternative the applicant seeks an order directing that he in terms of s 49 of the Close Corporations Act, 1988 purchases the first respondent's membership in and to the close corporation for an amount to be determined by the Court.

20.

21. The basis on which the applicant seeks the order

22.

23. [12] The applicant's application is grounded on the allegations that:

24.

25. (a) The first respondent has been guilty of such conduct, as taking into account the nature of the second respondent's business, is likely to have a prejudicial effect on the carrying on of the close corporation's business as contemplated by s 36(1)(b) of the Act;

26.

27. (b) The first respondent so conducts herself in matters relating to the close corporation's business that it is not reasonable for the applicant to carry on the business of the second respondent with her, as contemplated by s 36(1)(*c*) of the Act;

28.

29. (c) Circumstances have arisen which render it just and equitable that first respondent should cease to be a member of the close corporation as contemplated by s 36(1)(*d*) of the Act;

30.

31. (d) In the alternative the first respondent's actions or omissions are unfairly prejudicial, unjust or inequitable to the applicant as envisaged by s 49(1) of the Act.

The relevant provisions of the Close Corporations Act 1988.

[13] I have indicated above, that the application and the relief sought under that

application, were premised on s 36(1)(*b)*, *(c*) and (*d*) of the Close Corporations Act, 1988 and in the alternative on s 49(1) of that Act. I therefore find it appropriate to, as I promised, return to the provisions of s 36 and s 49(1) of the Close Corporations Act, 1988. Section 36 of that Act provides 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.'

[14] It is clear from the above wording of s 36(1)(*b*) - (*d*), that the Court may on application made by a member of a close corporation order that another member of that close corporation ceases to be a member of the close corporation if that other member is guilty of conduct likely to have a prejudicial effect on the carrying-on of the business of the close corporation, or conducts himself or herself in relation to the corporation's business such that it is not reasonably practicable for the other member or members (the applicant or applicants) to carry on the business of the close corporation with him or her; or it is in the circumstances just and equitable to order that the applicant or applicants or the close corporation acquire the other member's interest in the close corporation. The *onus* rests on the applicant/applicants to establish these jurisdictional facts.[2]

[15] In the matter of *De Franca v Exhaust Pro CC (De Franca Intervening)*[3] Nepgen J held that:

'The order that a Court can make in terms of s 36(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 s 36(2) of the Act.'

[16] In the *Bahlsen* matter[4] Damaseb JP held that 'it is apparent that the enactment of s 36 was to empower the Court to dissolve the association between members without winding up the corporation on the grounds that such would be just and equitable in circumstances which, in the context of a partnership, would warrant its dissolution.'

[17] 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

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[2] *Bahlsen v Nederloff and Another* 2006 (2) NR 416 (HC).

[3] 1997 (3) SA 878 (SE) [1996] 4 All SA 503) at 893G.

[4] *Supra* footnote 2.

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, can 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.'

[18] Section 49 was interpreted and applied *in Gatenby v Gatenby & Others*[5] where Jones J stated that:

'The object of s 49 is to come to the relief of the victim of oppressive conduct. The section gives the Court the power to make orders "with a view to settling the dispute" between the members of a close corporation if it is just and equitable to do so. To this end the Court is given a wide discretion. It may "make such order as it thinks fit", within the framework of either "regulating the future conduct of the affairs of the corporation" or "the purchase of the interest of any member of the corporation by other members thereof or by the corporation". These are far-reaching powers. One member can be compelled to purchase the interest of another at a fair price, whether he wants to or not.'

[19] In the *De Franca* matter[6] Nepgen J held that

'. . . .Section 49 deals with the situation where conduct (an act or an omission) of the close corporation or of one or more of its members, or where the manner in which the affairs of the close corporation are being conducted, is unfairly prejudicial, unjust or inequitable to a member of the close corporation. When this occurs such member may make application to the Court for an order that will have the effect of "settling the dispute" (s 252 of Act 61 of 1973 provides for an order having the effect of 'bringing to an end the matters complained of') . . . The Court has a wide discretion with regard to the order that it decides to make to bring about the required result. . . Such order can, however, only be

[5] 1996 (3) SA 118 (E).

[6] *Supra* footnote.

made 'if the Court considers it just and equitable' to do so.'

Consideration of the relief sought by the applicant

[20] As I have indicated above the applicant in his main relief seeks an order terminating the first respondent's membership in the close corporation. Section 36 of the Act, confers on the court the power to decree such termination, but the court can only order such termination if the applicant places sufficient evidence before court which demonstrates that, the member whose membership is sought to be terminated:

(a) has, taking into account the nature of the corporation's business, conducted himself or herself in a manner that is likely to have a prejudicial effect on the carrying on of the business of the close corporation;

(b) has, conducted himself or herself in matters relating to the corporation's business, in such a manner that it is not reasonably practicable for the applicant to carry on the business of the corporation with that member; or

(c) that circumstances have arisen which render it just and equitable that that member should cease to be a member of the corporation.

[21] My understanding of the legal principles which will lead a court to exercise the discretion conferred on it by s 36 of the Close Corporation Act, 1988 is, first, the principle that, the conduct of the member whose membership is sought to be terminated must result in a 'justifiable lack of confidence in the conduct and management of the close corporation's affairs' and that conduct must be grounded on the conduct of the member, not in regard to his or her private life or affairs, but in regard to the close corporation's business.[7]

[22] In my view, the 'lack of confidence' will be justified if the applicant establishes a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play (in the

[7]See the English case of *Loch v John Blackwood*, 1924 A.C. 783 and also the South African case of *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 137H--138A.

management of the affairs of the close corporation) by the first respondent on which the applicant is entitled to rely.

[23] The second or the other principle is the principle, usually called the 'deadlock' principle. Trollip J[8] explained that the 'deadlock' principle:

> '. . . . is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly co-operation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership. . . .' [Underlined for emphasis]

[24] I come now to the facts of this matter. I may, at the outset, say that a perusal of the papers completely satisfies me that an unfortunate situation has arisen which is bound in the long run to prejudice the close corporation. The applicant and the first respondent are hopelessly at loggerheads, they are not even on speaking terms. The applicant says that he has lost confidence in the first respondent and I feel bound to accept that as a fact. Whether the loss of confidence is justifiable is of course another matter which I turn to consider now.

[25] The applicant lays the blame for the loss of confidence in the first respondent on her 'door steps', he states that the sole reason for the deterioration in the relationship between him and the first respondent was the latter's illicit affair with a certain Dannie Wiese while she was in a romantic relationship (which is akin to a marriage) with him. He further ascribes his loss of confidence in the first respondent to the latter's alleged 'belated laying of criminal charges against him (applicant) with the intention to remove him from the property'.

[1.]

[8] *Ibid.*

32. [26] The applicant alleges further that for the period starting November 2014 up and until at the date of the hearing of this matter the first respondent made no contributions towards the close corporation's monthly expenses either as agreed or at all. He alleges that he continued to pay approximately N$30,000 per month towards the close corporation's monthly expenses, whilst the first respondent contributed nothing until end of March 2015. He states that at the end of March 2015 he moved out of the property due to the first respondent's failure to make contributions to the close corporation's obligations and the altercation (resulting in his arrest) which I referred to earlier.

[2.]

[3.] [27] The applicant alleges furthermore that as a direct result of the first respondent's failure to make contributions to the close corporation's obligations he has since April 2015 also ceased all further contributions. He states that 'as things stand' the first respondent and her current boyfriend are residing in the property to the exclusion of the applicant, while at the same time the first respondent does not honour the close corporation's obligations, by making the necessary bond, water and electricity and levy payments. The applicant alleges that as at the date of the hearing of this application the arrears in respect of the bond repayments were in excess of N$ 416,536 while the arrears in respect of water and electricity were close to N$ 10,000 and the arrears in respect of the levy payments were in excess of N$ 26,000.

[4.]

[28] The first respondent's opposition to the application is based on her denial that she had any illicit relationship with Dannie Wiese and she attributes the breakdown in the relationship to the applicant's alleged jealousness, overly possessive conduct and lack of love for her. I am of the view that it is not necessary for me to resolve the dispute as to who is the cause of the breakdown of the romantic relationship between the parties. I say so because I have, above, indicated that my understanding is that one of the principles guiding the court in the exercise of the discretion conferred upon it by s 36 is that, the conduct of the respondent which leads the applicant to lose confidence in the first respondent must be grounded on her conduct, not in regard to her private life or affairs, but in regard to the close corporation's business.

[29] Mr Schickerling who appeared for the applicant submitted that the

overwhelming body of objective evidence confirms that the first respondent is mainly to blame for the fact that the parties cannot remain co-members in the close corporation. It cannot be disputed that the first respondent's conduct which the applicant complains of has nothing to do with the first respondent's management of the close corporation but is squarely within the realm of her private affairs. I am accordingly of the view that the applicant has not discharged the *onus* resting on him to prove that his lack of confidence in the first respondent is justified.

[30] The further question which arises is whether there are circumstances which would render it just and equitable that the first respondent should cease to be a member of the close corporation, as is contemplated by s 36(1)(*d*). In my view, the applicant will succeed in proving that circumstances, which would render it just and equitable that the first respondent be dispossessed (against payment of a fair value) of her member's interest in the close corporation, exists if he places sufficient evidence before court which point to the fact that the first respondent unreasonably or dishonestly or both unreasonably and dishonestly conducted herself towards the applicant in regard to the company's affairs. The applicant must equally prove that the first respondent by her wrongful conduct destroyed the personal relationship of confidence that existed between them.

[31] I have referred to the fact that the applicant states that it was also the first respondent's failure to meet her obligations in respect of the close corporation which resulted in the relationship between them deteriorating. I cannot help but view the applicant's allegations in this regard with considerable scepticism. The applicant himself admits that he was 'infatuated' with the first respondent and did not mind to carry some of the first respondent's obligations towards the close corporation and he continued to do so until when the romantic relationship turned sour.

[32] In addition, the fact that the business of the close corporation appeared to be proceeding smoothly until March 2015 (when the first respondent indicated that she is terminating the romantic relationship between them) affords no support for the applicant's allegations of justifiable loss of confidence in the first respondent with regard to the affairs of the close corporation. I therefore cannot accept that the applicant's loss of confidence in the first respondent could have been caused by the

first respondent’s failure to meet the obligations of the close corporation.

[33] I have, indicated above, that the authorities are clear that s 49 of the Act deals with the situation where conduct of the close corporation or of one or more of its members, or where the manner in which the affairs of the close corporation are being conducted, is unfairly prejudicial, unjust or inequitable to a member of the close corporation. When this occurs the member who is prejudiced, by the conduct of the close corporation or the other member or members, may apply to the Court for an order that will have the effect of 'bringing to an end’ the prejudicial conduct complained of.

[34] The order 'bringing to an end’ the prejudicial conduct complained of by the applicant can, however, only be made 'if the Court considers it just and equitable' to do so. It is in my view neither just nor equitable to dispossess the first respondent of her member’s interest in the close corporation simply because she is alleged to have been unfaithful (in regard to a romantic relationship and not in regard to the conduct of the affairs of the close corporation) to the applicant. It is furthermore, in my view, unfair and unjust to dispossess the first respondent of her member’s interest in the close corporation because of her failure to make contributions towards the bond repayments, water and electricity charges, and body corporate levies, because on the applicant’s own admission he also has since April 2015 ceased to effect payments in respect of the bond repayments, water and electricity charges, and body corporate levies.

[35] The applicant prayed for an order which in effect is 'for the purchase of the first respondent’s interest' in the close corporation by the applicant. I am asked to order that such interest be acquired 'at a fair price'. In the matter of *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*[9] Holmes JA held that:

> 'Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner.'

[9] 1976 (1) SA 441 (A) held at 452A.

[36] It is for that reason that a member of a close corporation who invokes s 36 or s 49 of the Close Corporations Act, 1988 must set out all the relevant facts to place the Court in a position to carry out its functions in terms of ss (2) of s 36 and, in particular, to decide what financial adjustments should be made. There is no credible evidence (in the form of financial statements) on the papers before me as to what the financial position of the close corporation is nor is there evidence before me of what the value of the close corporation is. It is correct that the applicant attached a valuation report by a sworn valuer as to the value of the immovable property owned by the close corporation. The value of the immovable property and the value of the close corporation are two separate issues.

[37] For the reasons set out in the foregoing paragraphs I am of the opinion that the applicant has not made out a case to defeat the first respondent's right to remain a member of the close corporation. The application must accordingly fail.

<u>First respondent's counter application</u>

[38] I now turn to the counter application filed by the first respondent. I have indicated above that the first respondent in her counter application seeks an order directing the applicant to render to her an account of all transactions of the close corporation for the period 1 July 2011 until 29 February 2016, and for the debatement of the account. She further more seeks leave to, once the account has been delivered and debated, approach this court on the same papers duly amplified, if necessary, for an order also dispossessing the applicant of his member's interest in the close corporation on the grounds contemplated in ss 36 or 49 of the Close Corporations Act, 1988.

[39] I have, found that there is insufficient financial evidence before me for me to make an order as regards the value of the close corporation. The parties have also not placed evidence before me as to who is responsible for the management of the affairs of the close corporation. It thus follows that the responsibility to prepare the financial statements of the close corporations rests both on the applicant and the first respondent.

[40] I furthermore find it appropriate to state that my finding, that the lack of

confidence that exists between the applicant and the first respondent is not attributable to the conduct of either the applicant or the first respondent with regard to the business of the close corporation, but is attributable to the conduct of the parties with regard to their private affairs will also not assist the first respondent with her invocation of ss 36 or 49 in her quest to dispossess the applicant of his member's interest in the close corporation.

[41] As I indicated earlier on in this judgment, I have found that an unfortunate situation has arisen which is bound, in the long run, to prejudice the close corporation and that the applicant and the first respondent are hopelessly at loggerheads. It thus follow that the applicant and the respondent cannot be expected to remain co-members of the close corporation.

[42] In my view, the applicant and the first respondent are for all intents and purposes in the same position as partners in or the co-owners in undivided shares of immovable property who are no longer able to work amicably together. The common law principle of *actio communi dividundo* provides a solution to deadlocks between partners or co-owners in undivided shares of immovable property.[10]

[43] In the matter of *Gatenby v Gatenby and Others*[11] Jones J held that both s 49 of the Close Corporations Act, 1988 and the common law gives the Court the power to make orders 'with a view to settling the dispute' between the members of a close corporation if it is just and equitable to do so. To this end the Court is given a wide discretion. It may 'make such order as it thinks fit'. In the *Robson v Theron*[12] matter Joubert JA describes the common-law remedies available to a co-owner of immovable property in the following terms:

> '1. No co-owner is normally obliged to remain a co-owner against his will.
>
> 2. This action is available to those who own specific tangible things (*res corporales)* in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property.

[10] *Robson v Theron* 1978 (1) SA 841 (A).

[11] 1996 (3) SA 118 (E).

[12] *Supra* footnote 10.

3. Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division. Since a partnership asset is joint property which is held by the partners in co-ownership, it follows that a partner may as a co-owner bring this action for the division of a partnership asset where the co-partners cannot agree to the method of its division. This would obviously cover the position where, after dissolution of a partnership, a continuing partner as a co-owner retains possession of an undivided partnership asset. A retiring partner as a co-owner would accordingly be entitled to institute this action against the continuing partner as co-owner to compel a division of the partnership asset in question.

4. It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or only one of them is in possession thereof.

5 …

6. A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by Pothier.'

[44] The Court, in the *Robson v Theron* matter, went on to comment that there is a common feature in the legislation relating to companies and close corporations which is also to be found in the common law namely:'. . . . the acknowledgement of the underlying equitable principle that no co-owner, no partner, no shareholder and no member is normally obliged to remain a co-owner, partner, shareholder or member against his will in circumstances where this is unfair or oppressive to him.'

[45] I am therefore of the view that the practical and equitable solution in the circumstances, according to the substantive principles of law governing the *actio communi dividundo*, is for the Court to order the parties to appoint a referee who will determine the value of the close corporation and each member's loan account and once that is done the close corporation to be sold or liquidated and the net proceeds of the sale to be divided equally between the parties.

[46] The question of costs must now be considered. Mr Schickerling who appeared for the applicant implored me to make an order that the costs incurred by the applicant be paid by the first respondent personally. I have decided to resist Mr Schickerling's invitation. Mr Strydom's, who appeared for the first respondent, approach was different, his attitude being that whatever the outcome of this application and the counter application is a fair order that would be that each party bears its own cost. While I have a discretion insofar as costs are concerned, it is a discretion that must be exercised judicially.

[47] The general rule is that costs follow the costs, except where exceptional circumstances exist to depart from that rule. In my view neither the applicant nor the first respondent were successful in the main application or the counter application. I am therefore of the view that each party must pay its own costs.

[48] In the result, I make the following order:

1. The application is dismissed.

2. The applicant and the first respondent must, not later than fourteen days from the date of this judgment, appoint a referee, who must determine the value of the Close Corporation and each party's loan account.

3. If the parties fail to appoint a referee as contemplated in paragraph 1 of this order then and in that event the President of the Law Society of Namibia must appoint not later than seven days from the date that the Law Society is informed of the failure, appoint the referee.

4. For the purpose of giving effect to paragraph 1 or 2 of this order the referee:

4.1 Must be a person who holds a qualification in the field of accounting or auditing;

4.2 May call upon either party to produce any books or documents which the referee reasonably require to perform his or her duties. The books

or documents must be delivered to the referee within the time period specified by him or her;

4.3 May engage the services of any suitably qualified person or persons to assist him in determining the proper value of any of the assets of the Close Corporation and to pay that person or persons the reasonable fee which may be charged thereof,

4.4 Must, if required, afford either party or their legal representatives, the opportunity to make representations to him or her about any matter relevant to his or her duties;

4.5 Must prepare the financial statements of the Close Corporation and determine the value of the Close Corporation not later than three months from the date of his or her appointment;

4.6 May apply to this Court for any further direction (s) that he or she considers necessary to give effect to his or her obligations in terms of this judgment and the law;

4.7 Is entitled to claim his costs of determining the value of the close corporation and the loan account of each member, from the close corporation.

5. Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, he must liquidate the close corporation and pay to each party the value of his or her member's interest.

6. Each party must pay his or her costs of the application and the counter application.

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APPEARANCES

APPLICANT:	J. SCHICKERLING (assisted by S.J JABOBS) Instructed by Neves Legal Practitioners, Windhoek
FIRST RESPONDENT:	J.A.N STRYDOM Instructed by Erasmus & Associates Legal Practitioners, Windhoek