

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 217/2015

In the matter between:

WOLFGANG HANS FISCHER

APPLICANT

and

HENNING ASMUS SEELNBINDER

FIRST RESPONDENT

FISCHER SEELNBINDER ASSOCIATES CC

SECOND RESPONDENT

Neutral citation: *Fischer v Seelenbinder* (A 217/2015) [2017] NAHCMD 323
(10 November 2017)

Coram: UEITELE, J

Heard: 5 July 2016

Delivered: 10 November 2017

Flynote: *Practice* – Applications and motions – Further affidavits – Court has discretion to allow filing of further affidavits - Court concluded that applicant has failed to establish that special circumstances exist for court to exercise its discretion in favour of permitting the filing of a supplementary founding affidavit – Consequently, court dismissed application to file supplementary founding affidavit with costs.

Contract — Consensus Contract comprising written minutes of a meeting of members of a close corporation — whether enforceable - In present matter, evidence demonstrating parties intended concluding contract, contract therefore valid.

Close Corporation – Retirement of member from close corporation - No agreement concerning the terms of retirement- retiring member entitled in common law principle of *actio communi dividundo* to claim halve of the value of the close corporation

Summary: The applicant and respondent are equal members in Fischer Seelenbinder Associates CC and have been so since 2006. The applicant now and for various reasons, including a purported oral agreement between the parties in terms of which the respondent apparently retired, an association agreement in terms whereof he could request the respondent to retire, applied to this court, for an order confirming these agreements and the respondent's retirement in terms thereof. Alternatively, he moved for an order in terms of s 36 of the Close Corporations Act, 26 of 1988. The applicant was also desirous of putting before this court a further supplementary founding affidavit.

Held, that generally a Court has a discretion, which is inherent to the just performance of its decision reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case.

Held, that the justification for the relief sought by the applicant (i.e. to file supplementary founding affidavit) must be evaluated against the evidence as they existed at the time when he approached Court. If evidence, which did not exist at the time the applicant launched his application, come into existence after the application is launched the best approach would be to withdraw the initial application, tender the respondent's costs and relaunch the application incorporating the new evidence that have come into existence in the intervening period. The court thus refused the application.

Held further that whether or not an agreement was concluded on 23 January 2015 between the applicant and the first respondent and if so what the terms of

that agreement were are issues that cannot be resolved on the papers, applicant should therefore have proceeded by way of summons.

Held further, that the parties' intention was to conclude an association agreement and the association agreement to be concluded had to, amongst other provisions, include a provision that deals with the duration of the association agreement.

Held further, that the evidence placed before Court in no uncertain terms tend to point to the fact that the applicant and the first respondent intended binding themselves to include the provision relating to the duration of their agreement in the envisaged association agreement. The court thus found that it was satisfied that the parties had agreed and intended to bind themselves to include a provision in their ultimate agreement that after the year 2011 the applicant was entitled to request the first respondent to retire from the close corporation by giving him six months' notice to so retire.

Held further, that the harmonious relationship that prevailed for approximately eight years between the applicant and the first respondent, no longer exists. It thus follows that the applicant and the respondent cannot be expected to remain co-members of the close corporation and the first respondent must retire from the close corporation.

Held further, that because of the vagueness of the parties' evidence of an actual or implied agreement as regards the terms on which the first respondent must retire the court was unable to find that the parties had agreed to the terms on which the first respondent must retire when called upon to so retire, but both the common law, by virtue of the *actio pro socio* or the *utilis actio conmmuni dividundo* and the Close Corporation Act, 1988 provide the Court with a discretion to make an equitable order.

ORDER

1. The application to adduce a further supplementary replying affidavit is dismissed with costs the costs to include the costs of one instructing and one instructed counsel.
2. It is declared that the applicant is entitled to request the first respondent to retire from the close corporation by giving him six months' notice to so retire.
3. The first respondent must retire from the close corporation by 31 March 2016.
4. 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.
5. If the parties fail to appoint a referee as contemplated in paragraph four of this order then and in that event the President of the Law Society of Namibia must, not later than seven days from the date that the Law Society is informed of the failure, appoint the referee.
6. For the purpose of giving effect to paragraphs four or five of this order the referee:
 - 6.1 Must be a person who holds a qualification in the field of accounting or auditing.
 - 6.2 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.
 - 6.3 May engage the services of any suitably qualified person or persons to assist him or 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.

- 6.4 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.
 - 6.5 Must prepare the financial statements of the Close Corporation and determine the value of the Close Corporation as at 31 March 2016, not later than three months from the date of his or her appointment.
 - 6.6 May apply to this Court for any further direction or directions that he or she considers necessary to give effect to his or her obligations in terms of this judgment and the law.
 - 6.7 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.
7. Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, the applicant must pay to first respondent 50% of the value of the close corporation and the value of the first respondent's loan account.
 8. The first respondent must pay 80% of the applicant's costs of this application. The costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE, J

Introduction

[1] The applicant is Wolfgang Hans Fischer, and the first respondent is Henning Asmus Seelenbinder. Both the applicant and the respondent are civil engineers. Prior to the year 2006, the respondent practised his professional career as a consulting engineer in association with four other civil engineers under a close corporation known as Seelenbinder Consulting Engineers Close Corporation known by the acronym 'SCE'.

[2] During July 2006 the applicant and the first respondent joined together and purchased an off - the shelf close corporation known as Norton Investments 23 CC for the purposes of conducting business. They each acquired a 50% member's interest in the close corporation and changed the name of the close corporation to Fisher Seelenbinder Associates Close Corporation known by the acronym 'FSA' which is the second respondent in this matter (I will, in this judgment, refer to the second respondent as the close corporation).

[3] Prior to them commencing business the applicant and the first respondent, on 8 July 2006, held a Board meeting where they amongst other things discussed the conclusion of an association agreement to govern the conduct of their business. To that extent they agreed that the SCE association agreement will serve as a temporary agreement between them and that they have to, over the following three months (that is by September 2006), draw up an association agreement that will govern their relationship.

[4] The parties furthermore agreed that the association agreement that they will draw up must include the provisions that are addressing the following issues; the duration of the agreement, the loan accounts, the members' annual and sick leave, the close corporations goodwill, the capital account the close corporation's financial year, insurances, the allocation of expenses, car expenses, workload and marketing. As regards the duration their agreement the parties agreed as follows (I quote verbatim from the minutes of the meeting of 8 July 2006):

'2.3.1 Duration of Agreement:

1. First three years (2006- 2009) fixed, thereafter HAS¹ entitled to retire by given 6

¹ HAS is the acronym for Henning A Seelenbinder (the first respondent).

months' notice.

2. After 5 years (2006- 2011) WHF.² entitled to request retirement of HAS by giving 6 months' notice.
3. In case of incapacity: an automatic notice of 6 months from date of incapacity, salary ceases 2 months after date of automatic notice. Date of incapacity determined by remaining member.'

[5] September 2006 came and passed without the parties drafting the association agreement that they agreed to draft. It appears that from its inception the close corporation was doing well and a harmonious relationship existed between the members. But all this changed during the year 2015, the harmonious relationship that prevailed for seven to eight years (that is between 2006 and 2015) is now history. This litigation between the parties is testimony of the fact that the relationship between the applicant and the first respondent is no longer a good one. Having said this, I proceed to deal briefly with the circumstances which have given rise to the proceedings before me.

Background

[6] As I have indicated above, the parties met during July 2006 and they agreed that their business relationship will be governed by an association agreement which had to be drafted by September 2006. As I also indicated that, the agreement to draft an association agreement did not come to fruition. Despite the failure to draw up an association agreement, the parties nonetheless conducted their business in a harmonious manner.

[7] During December 2014, the first respondent turned 74 years of age. The applicant, desirous to know what the first respondent's future plans were, arranged for a meeting for 23 January 2015 at '*Stellenbosch Market Restaurant*' in Windhoek, between him and the first respondent. What is not in dispute is the fact that at that meeting the first respondent's retirement from the close corporation was discussed.

² WHF is the acronym for Wolfgang H Fischer (the applicant).

[8] The meeting of 23 January 2015 is the source of the soured relationship between the parties. The outcome of that discussion is a point of conflicting versions between the parties. The applicant alleges that during that meeting, he gave the first respondent notice to retire and that the first respondent agreed to retire from the close corporation at the end of June 2015. The first respondent on the other hand denies that the applicant gave him notice to retire or that he agreed to retire from the close corporation by the end of June 2015.

[9] The applicant, labouring under the believe that he and the first respondent had reached an oral agreement that the first respondent would retire from the close corporation at the end of June 2015, proceeded to, immediately after the 23 January 2015 meeting, inform his brother a certain Jens Fischer and a friend of his by the name Stephen Hentzen about the perceived oral agreement. Applicant furthermore alleges that he, in order to give effect to their oral agreement, signed the financial statements of the close corporation for the year 2013/2014 on Monday 26 January 2015 and on the following day, that is, Tuesday 27 January 2015 arranged that the first respondent be paid the amount reflected in the 2014/2015 financial statements as his loan account.

[10] The applicant furthermore alleges that after their meeting of 23 January 2015 he discovered some disturbing information about the close corporation. The disturbing information that the applicant said he discovered amongst other things included a discovery that:

(a) The first respondent during February 2015 booked a business class return ticket to Germany for flight dates departing 10 July 2015 and returning on 9 August 2015. The flight ticket was paid for with the credit card of the close corporation.

(b) That there was an imbalance in the net payments received from work done by the applicant and the work done by the first respondent, the imbalance also related to the expenses incurred by the close corporation. The applicant alleges that the expenditure incurred by the close corporation in respect of the first respondent exceeded the net income generated by the first respondent by an amount of N\$ 3 297 450, while the expenditure incurred by the close

corporation in respect of the applicant was less than net income generated by the first respondent by an amount of N\$ 9 8868 596.

(c) That the vacation leave statistics of the parties also reflected a disparity in respect of what they had agreed upon. The applicant alleges that they agreed that a member is entitled to 24 days' vacation leave per annum, but over a period of three years the first respondent had taken 180 days' vacation leave whilst he had only 70 days' vacation leave.

[11] Applicant furthermore alleges that after discovering the 'disturbing information' he, on 22 February 2015, called a meeting with the first respondent at which meeting he presented the information to the first respondent. The first respondent's response to the information was to request for time to consider the information and they agreed to meet again on 1 March 2015. The applicant alleges that at the stage of these two meetings the first respondent indicated to him that in view of his retirement from the close corporation at the end of June 2015 he would prefer to receive a basic monthly drawing of N\$ 40 000 per month up to the end of June 2015.

[12] The first respondent on the other hand denies that he agreed or that he gave notice that he would retire from the close corporation at the end of June 2015. He states that he also did not agree to any change in their profit sharing *ratio* and insisted that the profit sharing *ratio* remained at 50/50 as they agreed. The first respondent furthermore states that what he indicated at the meeting of 1 March 2015 is that if he were to retire from the close corporation, he would insist that he be paid his good will.

[13] After June 2015, the first respondent did not give any indication that he has retired from the close corporation, he would as was the case in the previous eight years come and leave the office as normal. For the period 10 July 2015 to 9 August 2015 the first respondent was out of the country so nothing happened. Upon the return of the first respondent to the country in August 2015 the applicant, during September 2015, on an urgent basis approached this court seeking amongst other things an order:

'2. Confirming the agreement concluded between the applicant and the first respondent on 23 January 2015, that the first respondent shall retire/resign from the second respondent by 30 June 2015 against the payment to him of any amount outstanding and due to him on his loan account in the second respondent and declaring such agreement to be fully enforceable at the behest of applicant.

3 In the alternative to the above confirming and declaring that the applicant was entitled, in terms of the association agreement between the parties, to insist on the retirement or resignation of the first respondent from the second respondent upon six months' notice, and confirming and declaring that, such notice having been given on 23 January 2015, first respondent ceased to be a member of the second respondent on 23 January 2015, and in any event, by no later than 31 July 2015;

4 In the further alternative to the above, ordering and directing that first respondent shall cease to be a member of the second respondent, with immediate effect, against the payment to him of the balance (sic) his loan account in the second respondent in the amount of N\$ 27 503.00, on any one or more of the grounds recognised by s 36(1)(a), (b), (c) and /or (d) of the Close Corporations Act, 26 of 1988 . . .' (own emphasis)

[14] The urgent application was assigned to me on and I set it down for hearing on 15 September 2015. After hearing arguments I ruled that the applicant did not meet the requirements set out in Rule 73 of the Rules of this Court and I struck the matter from the roll and ordered the applicant to pay the costs of the urgent application. After the application was struck from the roll for lack of urgency, the applicant, in terms of Rule 73(5)³, re-enrolled the matter.

[15] After the matter was re-enrolled the first respondent applied for leave to file a supplementary answering affidavit. The applicant through his legal practitioner indicated that he will not oppose the application for the filling of the supplementary answering affidavit on condition that he is granted an opportunity to reply to the supplementary answering affidavit. Since the application to file a

³ Rule 73(5) provides as follows:

'(5) Where the urgent application is struck off from the roll for lack of urgency or condonation for non-compliance with rules of court is refused and the applicant wishes to continue to prosecute the application on the merits, the applicant must set down the application in the normal course as an opposed motion and in that case the rules of court or practice directions apply.'

supplementary answering affidavit was not opposed I granted the first respondent leave to file his supplementary answering affidavit, which he filed on 2 October 2015. The applicant on 29 October 2015 filed his supplementary replying affidavit.

[16] On 3 March 2016 the applicant launched an application seeking leave to file a further supplementary founding affidavit the respondent opposed the application. I did not hear that application separately, but set it down for hearing together with the merits of this application which I heard on 5 July 2016. I will therefore, before I deal with the merits of the application briefly deal with the application for leave to file a further supplementary founding affidavit.

The application to file a further supplementary founding affidavit.

[17] It is trite that in motion proceedings the ordinary rule is that three sets of affidavits are allowed, i.e. the supporting affidavits, the answering affidavits and the replying affidavit. In the matter of *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd*⁴, this Court stated that it may in its discretion permit the filing of further affidavit. Quoting from the South African case of *Juntgen T/A Paul Juntgen Real Estate v Nottbusch*⁵, it said:

‘Generally a Court has a discretion, which is inherent to the just performance of its decision reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case.’

[18] In the matter of *Maritima Consulting Services CC v Northgate Distribution Services Ltd*⁶, the Court held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering affidavits will be permitted where, for instance, ‘there is a possibility of prejudice to the respondent if further information is not allowed’.

⁴ 2007 (1) NR 222 (HC), Also see the matter of *Gabrielsen v Coertzen* Case No: (P) I 3062/2009 an unreported judgment of this Court delivered on 29 June 2011.

⁵ 1989 (4) SA 490 (W).

⁶ An unreported judgment of this Court Case No. (A 282-2014) [2015] NAHCMD 121 (delivered on 29 May 2015).

[19] In the instant case the applicant is seeking leave to supplement his founding affidavit, the basis on which the applicant seeks to file a supplementary founding affidavit is that a substantial period of time has lapsed between the initial period (that is September 2015) upon which the urgent application was launched and the date (that is on 5 July 2016) upon which the application will be heard. The applicant states that during that intervening period new developments, which have an impact on the relief sought, occurred.

[20] In the matter of *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*⁷ Justice Strydom advised this Court to keep a firm hand on the reins of pleadings, and not to allow parties to roam at will. In as much as is it is necessary to enable the applicant to make a full representation of his true case that should not be a license for him to roam at will.

[22] The justification for the relief sought by the applicant must be evaluated against the evidence as they existed at the time when he approached Court. If evidence which did not exist at the time the applicant launched his application, come into existence after the application is launched the best approach would be to withdraw the initial application, tender the respondent's costs and relaunch the application incorporating the new evidence that have come into existence in the intervening period. In the instant case the applicant deposed to a supplementary replying affidavit during October 2015, I am of the view that giving him leave to file a further supplementary founding affidavit will be give him not a second, but a 'third bite a the cherry' and that will be prejudicial to the first respondent for that reason I will refuse the application to file a supplementary founding affidavit. I now proceed to consider the relief sought by the applicant. (own emphasis)

Did the applicant and the first respondent reach an agreement on 23 January 2015?

[23] A litigant desiring judicial relief can proceed to Court in one of two different ways. The litigant can issue an appropriate summons with particulars of

⁷ 2004 NR 194 (SC).

claim in which its case is set out and the defendant will have to file a plea to reply to the allegations in the particulars of claim. The plaintiff can, but rarely does, replicate to the plea. In any event the matter will then be set down for trial and both sides will call witnesses to give oral evidence. The witnesses are cross-examined and their credibility will be assessed by the court.⁸

[24] Another procedure to approach court is by way of notice of motion and affidavits. There can be no cross-examination of affidavits and therefore an assessment of credibility of witnesses is hardly possible. Consequently the procedure by way of summons is the only correct procedure where there is a genuine and substantial dispute of fact. If the matter proceeds by way of notice of motion and affidavits and a dispute develops (on the affidavits) the matter will be referred to trial for oral evidence. The net result is that very little, if any, time will be saved by initiating notice of motion proceedings. The judge said:

‘A principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he nevertheless proceeds by way of motion he runs the risk of having his case dismissed with costs.’⁹

[25] In the present matter the applicant has approached this Court seeking an order confirming the existence of an agreement allegedly concluded between the applicant and the first respondent on 23 January 2015, that the first respondent will retire from the close corporation by 30 June 2015 against payment to him of any amount outstanding and due to him on his loan account in the close corporation.

[26] Where the existence of an agreement is not in dispute, but there nevertheless is a dispute in respect of the interpretation of such an agreement, such dispute may involve a question of law and in such circumstances motion proceedings are permissible. But where the existence of an agreement is, however, in dispute, such dispute is a factual one and the party relying on the alleged agreement must place evidence before court to prove the existence of such agreement.

⁸ See the matter of *Mineworkers Union of Namibia v Rössing Uranium Ltd* 1991 NR 299 (HC).

⁹ *Ibid.*

[27] In the instant matter the meeting at which the alleged agreement was concluded was only attended by two people namely the applicant and the first respondent, there are no minutes of the discussions and decisions taken at that meeting. The applicant asserts that at that meeting the first respondent agreed to retire at the end of June 2015 the first respondent on the other hand denies that he agreed to so retire.

[28] In a letter dated 3 June 2015 and which is marked 'WF13' and annexed to the applicant's supplementary replying affidavit, the applicant wrote to the first respondent in which letter he reminded the first respondent that he had agreed to retire or resign from the close corporation by 30 June 2015. The applicant furthermore informed the first respondent that the agreement and the terms relating to the first respondent's retirement had to be reduced to writing and called on the respondent to forward his proposals for the contemplated retirement by 9 June 2015

[29] The first respondent replied to annexure 'WF13' by letter dated 4 June 2015 which is marked as 'HAS1' and annexed to the first respondent's answering affidavit. In that letter the first respondent denies that he ever agreed to retire or resign from the close corporation by the end of June 2015, and crisply replied that 'we can discuss the option and all its implications'. The applicant in his supporting affidavit furthermore indicates that, the first respondent as early as February 2015 started acting and making demands that were contrary to what he perceived as the agreement reached on 23 January 2015 and also indicated that when June 30, 2015 came, the first respondent acted as if he had not agreed to retire. I am therefore of the view that the applicant was forewarned and must have foreseen a dispute of fact arising.

[30] Whether or not an agreement was concluded on 23 January 2015 between the applicant and the first respondent and if so what the terms of that agreement were, are issues that cannot be resolved on the papers. Had the applicant not known that a dispute of fact on the papers was likely to arise, I would have referred this matter to trial the affidavits to stand as pleadings. However, as it is clear from what I said above the applicant knew full well that

there was a dispute prior to the issue of the notice of motion, applicant should have proceeded by way of summons. In the circumstances, I have no alternative but to refuse the order confirming that an agreement was concluded between the applicant and the first respondent on 23 January 2015.

Is the applicant entitled, to insist that the first respondent must retire from the close corporation upon six months' notice?

[31] The applicant in the alternative seeks an order declaring that he is entitled, in terms of the association agreement between him and the first respondent, to insist on the retirement or resignation of the first respondent from the close corporation upon six months' notice.

[32] The basis on which the applicant is seeking such an order is the agreement reached at the meeting of 8 July 2006. The applicant alleges that at the time that the close corporation was formed the first respondent and he, amongst other matters, agreed that from 2009 to 2011 the first respondent could retire from the close corporation upon six months' notice to the applicant and to the close corporation. Applicant further asserts that they furthermore agreed that from 2011 onwards the applicant was entitled to demand that the first respondent retire from the close corporation upon six months' notice to him.

[33] The first respondent resists the granting of an order declaring that the applicant is entitled, to demand the retirement or resignation of the first respondent from the close corporation. The first respondent's opposition is grounded on the argument that he and the applicant 'discussed the specific requirements as set out in the minutes of 8 July 2006 however, nothing came of those discussions, as no agreement as envisaged in the minutes was ever concluded.' The first respondent further denies, that the minutes do provide that the applicant may demand that the first respondent retire from the close corporation. He alleges that the minutes were ignored and not even contained in the close corporation's minute book.

[34] The first respondent admits that he and the applicant held a 'Board Meeting' on 8 July 2006 where they agreed that they must draft an 'association

agreement' that will govern their business relationship. He however asserts that, the terms of the association agreement of 2006 were not given effect to and that the parties conducted their business on a trust basis, dictated by expediency.

[35] The first respondent furthermore admits that he and the applicant agreed that the 'SCE association agreement' will form the basis of their 'association agreement' and will be their temporary agreement. He thus asserts that, the period within which they envisaged the drafting of an association agreement lapsed without them drafting the association agreement and as such there is no association agreement governing their business relationship.

[36] The facts that are not in disputed or which cannot be disputed in this matter are the following:

- (a) The applicant and the first respondent held a members' meeting on 8 July 2006.
- (b) That at the members' meeting of 8 July 2006 the parties amongst other matters agreed that:
 - (i) the "SCE association agreement" would serve as a temporary 'association agreement' between the applicant and the first respondent;
 - (ii) a new 'association agreement' between the applicant and the first respondent must be drawn up and that "SCE association agreement" will form the basis on which the a new 'association agreement' will be based;
 - (iii) certain clauses must be included in the new 'association agreement' to be drafted. One of the clauses that must be included in the new association agreement is the duration of the agreement; and
 - (iv) the association agreement must be drafted by September 2006.

[37] Mr Heathcote who appeared for the first respondent argued that the wording of the alleged association agreement relied upon by the applicant is destructive of the case of the applicant and at the very least supports the case of the first respondent. He argued that:

‘The wording of the minute, annexure “WF2” unequivocally states that it would serve as a temporary agreement only and that by the end of September 2006 a new agreement is to be drawn up. This wording objectively evaluated is destructive of the contention that the parties agreed that the temporary agreement would become a permanent agreement.’

[38] Before I evaluate the soundness of Mr Heathcote’s argument, I pause here and restate the approach adopted by the Supreme Court and this Court when interpreting written documents. My understating of the pronouncements by the Supreme Court is that the interpretation of written documents (be it legislation, some other statutory instrument, or contract) is not a process that takes into account only the objective (if that is ascertainable), meaning of the words, but is a process of attributing meaning to the words used in a written document, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.¹⁰

[39] In the matter of *Novartis SA (Pty) Ltd and Another v Maphil Trading (Pty) Ltd*¹¹, the South African Supreme Court of Appeal remarked that commercial contracts must be interpreted not only in the context of the contract as a whole, but must be interpreted so as to give the contract a commercially sensible meaning. Relying on *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*¹², Lewis JA said:

‘A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see *Murray &*

¹⁰ See the pronouncement of O’ Regan AJA *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) at paras 18 & 23.

¹¹ 2016 (1) SA 518 (SCA).

¹² 2010 (2) SA 498 (SCA) at para 13.

Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A) ([1991] ZASCA 130) at 514B – F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* 147 LTR 503 at 514:

“Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.” . . .¹³

[40] With those remarks I return to the facts of this matter and pose the question what is the context and circumstances that led to the parties to record the agreement of 8 July 2006 and what is the commercially sensible construction that can be placed on the minutes of 8 July 2016?

[41] The circumstances leading to the agreement of 8 July 2008 are that the plaintiff and the first respondent were desirous to do business together through the vehicle of a close corporation and they wanted their relationship to be governed by an association agreement. They accordingly agreed that the SCE association agreement will, for a period of three months, be their association agreement after which they will have to draft an association agreement of their own, with the SCE association agreement informing their association agreement.

[42] It is correct that the parties did not, as they have agreed to do, draft and sign an association agreement. But does that mean, as was contended [that the ‘wording of the agreement of 8 July 2006 objectively evaluated] by Mr Heathcote, that the agreement reached by the parties on 8 July 2018 has become irrelevant? I do not think so.

[43] In my view the parties’ intention was that they had to conclude an association agreement and the association agreement to be concluded had to, amongst other provisions, include a provision that deals with the duration of the

¹³ *Novartis SA (Pty) Ltd and Another v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 31.

association agreement (this much is clear from the formulation of the minutes which provides for specific clauses that must be included in the association agreement that was still to be drafted).

[44] The provision dealing with the duration of the association agreement had to provide that:

- (a) For the first three years (2006- 2009) of the subsistence of the agreement, the agreement was fixed it could not be terminated. But after the first three years, the first respondent was entitled to retire by giving the applicant 6 months' notice of his intention to retire.
- (b) After 5 years (2006- 2011) of the subsistence of the agreement the applicant was entitled to request the first respondent to retire by giving him 6 months' notice to so retire.

[45] I agree with Mr Heathcote when he argued that, the fact that the parties had agreed that the 'SCE association agreement' would form the basis of the temporary agreement does not mean that that temporary agreement would become a permanent agreement. But what Mr Heathcote loses focus of is the fact that the parties have agreed to some of the provisions that must form part of, or that must be included in the association agreement they ultimately intended to conclude. The crucial question is whether the applicant and the first respondent intended binding themselves to include the provision relating to the duration of their agreement in the envisaged association agreement.

[46] The evidence placed before me in no uncertain terms tend to answer the crucial question in the affirmative. I am therefore satisfied that, the parties had agreed and intended to bind themselves to include a provision in their ultimate agreement that, after the year 2011, the applicant was entitled to request the first respondent to retire by giving him 6 months' notice to so retire. The only question that remains is whether the notice had to be in writing or not and on what terms the first respondent had to retire from the close corporation.

[47] I am of the view that it is not necessary for me to decide the question of

whether or not the notice to retire had to be in writing. My view is based on the fact that the notice of motion constitutes the written notice to the first respondent to retire. I indicated earlier on in this judgment that, the harmonious relationship that prevailed for approximately eight years between the applicant and the first respondent, no longer exists. It thus follows that the applicant and the respondent cannot be expected to remain co-members of the close corporation and the first respondent must retire from the close corporation.

[48] As regards the terms on which the first respondent must retire, I am, because of the vagueness of the parties' evidence of an actual or implied terms of an agreement, unable to find that the parties had agreed to the terms on which the first respondent must retire when called upon to so retire, but in my view both the common law, by virtue of the *actio pro socio* or the *utilis actio communi dividundo* and the Close Corporation Act, 1988 provide the Court with a discretion to make an equitable order.

[49] In my view, the applicant and the first respondent are for all intents and purposes in the same position as partners 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.¹⁴

[50] In the matter of *Goike v Von Zelewski*¹⁵, I remarked 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'. I further remarked 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-

¹⁴ The common law principle of '*actio communi dividundo*' was discussed in the matter of *Robson v Theron* 1978 (1) SA 841 (A).

¹⁵ An unreported judgement of this Court Case Number (A 246/2015) [2017] NAHCMD 28 (delivered on 07 February 2017).

owner, partner, shareholder or member against his will in circumstances where this is unfair or oppressive to him.'

[51] 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 that the terms on which the first respondent must resign or retire from the close corporation, is for the parties to appoint a referee who will determine the value of the close corporation and each member's loan account as at 31 March 2016. I have taken the date of 31 March 2016 as the date on which the first respondent would have retire seeing that the notice of motion was first served on the first respondent during September 2015, a period of six months' notice would thus run until March 2016. Once the value of the close corporation and each member's loan account is determined the applicant must then pay to the first respondent 50% of the value of the close corporation and the value of his loan account.

[52] In view of my finding that the appellant was entitled to request the first respondent to retire by giving him 6 months' notice to so retire, I find it unnecessary to deal with the further alternative relief sought by the applicant, which relief is based on s 36 of the Close Corporations Act, 1988.

[53] The question of costs must now be considered. While I have a discretion insofar as costs are concerned, it is a discretion that must be exercised judicially. The general rule is that costs follow the course, except where exceptional circumstances exist to depart from that rule. In my view the general must apply. The applicant has failed in his claim for a declarator that the parties reached an agreement on 23 January 2015 that the first respondent will retire from the close corporation by the end of June 2015. In my view that failure constitutes 20% of the claim and the costs award must take that into account.

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

- 1 The application to adduce a further supplementary replying affidavit is dismissed with costs the costs to include the costs of one instructing and one instructed counsel.

- 2 I declare that the applicant is entitled to request the first respondent to retire from the close corporation by giving him 6 months' notice to so retire.
3. The first respondent must retire from the close corporation by 31 March 2016.
4. 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.
- 5 If the parties fail to appoint a referee as contemplated in paragraph four 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.
6. For the purpose of giving effect to paragraph four or five of this order the referee:
 - 6.1 Must be a person who holds a qualification in the field of accounting or auditing.
 - 6.2 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;
 - 6.3 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.
 - 6.4 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.

- 6.5 Must prepare the financial statements of the Close Corporation and determine the value of the Close Corporation as at 31 March 2016, not later than three months from the date of his or her appointment.
- 6.6 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;
- 6.7 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.
7. Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, the applicant must pay to first respondent 50% of the value of the close corporation and the value of the first respondent's loan account.
8. The first respondent must pay 80% of the applicant's costs of this application. The costs to include the costs of one instructing and one instructed counsel costs to include, the costs of one instructing and two instructed counsel.

SFI UEITELE
Judge

APPEARANCES

APPLICANT: TA Barnard
Instructed by Behrens & Pfeifer,
Windhoek

FIRST RESPONDENT: RAYMOND HEATHCOTE
Instructed by Van Der Merwe-Greef
Andima Inc, Windhoek