REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 615/2016

In the matter between:

PHILLIPUS JACOBUS HORN **1ST PLAINTIFF**

PLASTIC PRODUCTS CC **2ND PLAINTIFF**

and

PETRUS FRANCOIS HORN **1ST DEFENDANT**

MICHELLE JEANETTE HORN **2ND DEFENDANT**

Neutral Citation: *Horn v Horn* (I 615/2016) [2018] NAHCMD 3 (23 January 2018)

Coram: PARKER AJ
Heard: **30 November 2017**
Delivered: **23 January 2018**

Flynote: Vindication — *Rei vindicatio* — Requirements of — Plaintiff must prove ownership of thing — Plaintiff must also prove that defendant in possession of thing — Court held that on the evidence plaintiff proved his ownership of equipment he had purchased from a third party — Consequently, court ordered defendants to deliver the equipment to plaintiff.

Summary: Vindication — *Rei vindicatio* — Requirements of — Plaintiff must prove ownership of thing — Plaintiff must also prove that defendant in possession of thing — Court held that on the evidence plaintiff proved his ownership of equipment he had purchased from a third party — Consequently, court ordered defendants to deliver the equipment to plaintiff — Court accepted first plaintiff's evidence that he bought the equipment from Mr Harmse — Court found that that the equipment is in possession of defendants was not in dispute — Defendants failed to prove what they asserted that they are the owners of the equipment and from whom they bought the equipment.

Flynote: Close corporation — Fiduciary duty — To whom owed — In terms of the Close Corporation Act 26 of 1988, s 42 (1) — Each member stands in fiduciary relationship to corporation — Consequently, a member (in instant case first plaintiff in reconvention) not entitled to an order against the other member (defendant in reconvention) to render full account (supported by vouchers) for period of corporation’s founding to date, debatement of account, and payment of amount due to plaintiff in reconvention — Court held that plaintiff in reconvention entitled only to access to accounts of corporation.

Summary: Close corporation — Fiduciary duty — To whom owed — In terms of the Close Corporation Act 26 of 1988, s 42 (1) — Each member stands in fiduciary relationship to corporation — Consequently, a member (plaintiff in reconvention) not entitled to an order against other member (defendant in reconvention) to render full account (supported by vouchers) for period of corporation’s founding to date, debatement of account, and payment of amount due to plaintiff in reconvention — Court held that plaintiff in reconvention entitled only to access to accounts of corporation — First plaintiff in reconvention and first defendant in reconvention were the only members of close corporation — First plaintiff in reconvention left running of

corporation in the care of first defendant in reconvention — First defendant in reconvention rebuffed request of first plaintiff in reconvention to have sight of financial statements and to have share in profits — First plaintiff in reconvention sought an order directed to first defendant in reconvention to render full account, debatement and payment of amounts due to first plaintiff in reconvention — Court rejected that claim reasoning that first defendant in reconvention did not stand in fiduciary relationship to first plaintiff in reconvention and that remedies of first plaintiff in reconvention lay only in Act 26 of 1988 — Consequently, first plaintiff in reconvention only entitled to access to accounts of the corporation.

ORDER

(a) Judgment for the plaintiff Phillipus in his vindicatory claim (Claim 1). Defendants Petrus and Michelle must on or before **9 February 2018** deliver to Phillipus the following of his equipment:

1.1 1x Large Freezer Room 5.8m x 3.6m x 2.4m;
1.2 1x Gourmet Large Industrial Ice Machine;
1.3 1x Scotchman Cube Industrial Ice Machine;
1.5 1x Small Square Tube Machine;
1.6 3x Plastic Bins.

(b) Claim 2 of plaintiff Phillipus is dismissed.

(c) Judgment for Petrus and Michelle (plaintiffs in reconvention) in their counter claim — to this extent: Phillipus (1st defendant in reconvention) must on or before **9 February 2018** grant Petrus (first plaintiff in reconvention) access to the accounts of Plastic Products CC (2nd defendant in reconvention).

(d) Petrus and Michelle must pay 50 per cent of Phillipus's costs of his Claim 1, the one paying, the other to be absolved.

JUDGMENT

PARKER AJ:

Introduction

[1] On the pleadings, I find the following claim and counter claim. I find the claim by plaintiff for recovery of property by the owner (i.e. plaintiff) from defendants who are in possession of it. It is simply an *actio rei vindicatio*. What complicated an otherwise simple vindicatory action is plaintiff's reliance on the existence of a partnership between him and defendants under his Claim 2. A great deal of evidence was led to prove and disprove the existence of such contract of partnership. I shall consider the matter of partnership now in order to get Claim 2 out of the way right away. It is worth noting at the outset that Phillipus and Petrus are brothers.

Claim 2

Existence or non-existence of a partnership between 1st plaintiff (Phillipus) on the one hand and defendants (Petrus and Michelle) on the other

[2] As I have intimated previously, a great deal of evidence was led on this issue of partnership unnecessarily. It was labour lost. I fail to see what that has got to do with the vindicatory relief sought by 1st plaintiff and resisted by defendants.

[3] On the totality of the evidence, leaving nothing out, I make the following factual findings.

[4] The 1st plaintiff and 1st defendant had a family meeting in the defendants' home in Swakopmund on 22 August 2015, i.e. the critical date. Their mother, Ms Glaudina Maria Horn, a defence witness, sat in the meeting, although the evidence is not clear if she participated in the meeting. The second defendant could hear what the two brothers were discussing as she watched a TV show nearby. According to 1st plaintiff, it was at that meeting on the critical date that he and 1st defendant entered into a contract of partnership.

[5] The 1st plaintiff, in his testimony, gave me the impression that he was either not telling the truth or was mistaken about the sense of the meeting and what the two brothers decided at that meeting. Three important pieces of evidence, which I accept, debunk 1st plaintiff's assertion respecting the two brothers entering into a contract of partnership.

[6] First, this is an Afrikaans-speaking family, as I gathered from the proceedings. The 1st plaintiff and 1st defendant have always conducted their conversations in Afrikaans. The 22nd August 2015 meeting ('the meeting') was not an exception. The court asked 1st plaintiff what word in Afrikaans 1st plaintiff used to propose to 1st defendant, and 1st defendant accepted, according to 1st plaintiff, when he and 1st defendant (according to 1st plaintiff's assertion) entered into a contract of partnership. 1st plaintiff's response was that he and 1st defendant had been conversing in Afrikaans, but when it came to the relationship they had agreed, he used the English word 'partnership'. His testimony is fallacious and self-serving. I cannot accept that. It cannot possibly be true.

[7] Second, the evidence of mother Maria, which stood unchallenged at the close of the defence case, was that '[N]ot once during their (i.e. 1st plaintiff's and 1st defendant's) discussion was there any mention made of a partnership between the first plaintiff and the first defendant.

[8] Third, 1st plaintiff was not clear in his own mind as to what date the contract of partnership was entered into. He was torn between 22 August 2015 and 1 October 2015. In our law, there must be an identifiable and a clear date on which parties entered into their contract.

[9] On these findings, I conclude that while 1st plaintiff and 1st defendant discussed ways and means of cooperating in their individual ice business on the critical date: there is not one shred of evidence tending to prove the existence of a contract of partnership with 1st plaintiff, 1st defendant and 2nd defendant as the partners. On the contrary, as I have held previously, the three pieces of evidence discussed in paras 6, 7, and 8 (above), debunk any assertion that a contract of partnership came into existence on the critical date or at all. Accordingly, I reject 1st plaintiff's assertion that a contract of partnership existed – with 1st plaintiff and 1st defendant and 2nd defendant as partners. Accordingly, I dismiss 1st plaintiff's Claim 2. Having dismissed Claim 2, it is otiose to consider paras 2-4 of 1st plaintiff's prayer (respecting Claim 2). I now proceed to consider Claim 1, i.e. the vindicatory relief.

Claim 1

[10] Although a great deal of evidence was led on both sides of the suit, the matter turns on a very short and simple compass as to what the court should determine. The court should determine the following: (a) Is plaintiff the owner of the equipment ('the Harmse equipment') and (b) are the defendants in possession of the equipment? The Harmse equipment are listed under 1st plaintiff's prayer in respect of his Claim 1 (p. 7, para 1 of the consolidated particulars of claim). They are the following, apart from the item under para 1.4 (i.e. item 1.4):

1.1 1x Large Freezer Room 5.8m x 3.6m x 2.4m;
1.2 1x Gourmet Large Industrial Ice Machine;
1.3 1x Scotchman Cube Industrial Ice Machine;
1.5 1x Small Square Tube Machine;
1.6 3x Plastic Bins;

[11] In order to succeed, as Mr Olivier, counsel for plaintiffs, submitted, plaintiffs (1st plaintiff in particular) must prove that (a) he is the owner of the Harmse equipment, and was so, when summons was served on defendants, and (b) defendants are in possession of the equipment (bar item 1.4). I shall consider item (b) first, because the issue of possession is not in dispute.

(b) Are defendants in possession of the Harmse equipment?

[12] As I have said previously, that the Harmse equipment (apart from item 1.4) are in defendants' possession is not in dispute. I now pass to consider the issue of ownership.

(a) Is Phillipus (plaintiff) the owner of the Harmse equipment?

[13] On the totality of the evidence placed before the court, I conclude — and in that regard, I accept Mr Olivier's submission — that as to a consideration of ownership of the Harmse equipment, what is the determinant is the 'Contract for Purchase of Equipment' (i.e. 'the Harmse contract') (at pp 307-308 of the bundle of documents (Bundle Document 'A')).

[14] That the Harmse contract must be the determinant in determining ownership is based on the following crucialities:

> (i) The 2nd defendant is the one who generated a proforma contract. It was this proforma contract that Harmse completed in material parts and Harmse qua seller and 1st plaintiff qua purchaser signed in order to bring a contract of sale, the Harmse contract, into existence.
>
> (ii) Between 2nd defendant and 1st defendant (her husband) respecting their business operations and financial matters, the former was the major domo. The 2nd defendant's evidence was that she had sight of the settled and signed Harmse contract before the present proceedings. The 1st defendant, who by all standards was very conversant with written contracts of sale of goods, had also had sight of that contract of sale. But not one iota of evidence was placed before the court that tended to establish that the defendants had complained about the Harmse contract and its terms or at all.

Not a phantom of evidence was placed before the court to persuade the court to adjudge the Harmse contract invalid and unenforceable for one legal reason or another.

(iii) Thus, there is nothing on the evidence and there is nothing in the bundle of documents that can entitle this court to find the Harmse contract to be invalid and unenforceable and so hold that 1st plaintiff did not purchase the Harmse equipment, as he asserts, making 1st plaintiff the owner of the Harmse equipment.

[15] Have the defendants alleged and established any defence known to the law (see LTC *Harms, Amler's Precedents of Pleadings*, 4th edn. pp323-324)? The defences that are available to the defendants are:

(a) a denial of ownership;
(b) a denial of possession;
(c) pleading that, if defendant was in possession, he or she had returned the property in question to plaintiff;
(d) the *bona fide* disposal of possession;
(e) allegation and proof of a right to possession; e.g. on the bases of a lease agreement;
(f) estoppel;

[16] The defendants deny that 1st plaintiff is the owner of the Harmse equipment (i.e. defence (a) in para 15, above) and they plead on top of their denial that they are the owners, having bought the Harmse equipment. The denial alone would have drawn no onus because 1st plaintiff has to prove his ownership of the equipment and on the basis also that the burden of proof lies with him or her who asserts (*Pillay vs Krishna* 1946 AD 946). However, since the defendants have not only denied that 1st plaintiff is the owner of the Harmse equipment, but have also set up a special defence, namely, that they bought the Harmse equipment with a loan advanced by 1st plaintiff, defendants bear the onus of proving that defence which they raised. (PJ Schwikkard, et al, *Principles of Evidence* (1997), pp400-401; and the case there cited). On the totality of the evidence, I conclude that defendants have not proved

that defence. In that regard, account should also be taken of what I have said in paras 18-20 below.

[17] In any case, based on the aforegoing crucialities discussed in para 14 (i), (ii) and (iii), above, I am satisfied that 1st plaintiff has established that he bought the Harmse equipment from Harmse. Accordingly, I conclude that 1st plaintiff has proved his ownership of the Harmse equipment, apart from item 1.4.

[18] At the other side, I find that defendants have not proved a contract of sale of equipment whereby they bought the Harmse equipment. 'The three essentials of contract of sale', wrote GRJ Hackwill, *Mackeurtan's Sale of Goods in South Africa*, 5th edn, para 2.0; and the case there cited, 'are agreement (consensus ad item); a thing sold (*mex*); and a price (*pretium*), with a view to exchanging the thing for the price.'

[19] In the instant case, there is no proof of a contract of sale of the Harmse equipment either between Harmse and defendants or indeed, between 1st plaintiff and defendants. 'There can be no sale without genuine intention on the one hand to buy and on the other to sell.' (*McAdams v Fiander's Trustee* 1999 AD 207)

[20] The evidence adduced by defendants does not establish a genuine intention on the part of defendants to buy the equipment and on the part of Harmse to sell the equipment to defendants, or on the part of 1st plaintiff to sell the equipment to defendants after he had bought them from Harmse, as I have found previously. The defendant's assertion that they borrowed N$130 000 from 1st plaintiff 'for the purpose of buying' the Harmse equipment is of no moment. What defendants 'aver is not established; it becomes a mere irrelevance'. (See *Klein v Caremed Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC))

[21] Mr Wylie, counsel for defendants, submitted that if I found that no partnership existed, as I have found, then, according to Mr Wylie, 1st plaintiff's averment that he was the owner of the Harmse equipment 'did not make sense'; and on that basis, I should dismiss 1st plaintiff's claim. I do not agree. I decline Mr Wylie's invitation. In fact, I hold that my finding that there was no partnership does not weaken but does

strengthen 1st plaintiff's ownership claim. It establishes that 1st plaintiff, and 1st plaintiff alone, has property in the Harmse equipment (apart from the aforementioned item 1.4) to the exclusion of all others, including defendants.

[22] Based on these reasons (in paras 12-21), I conclude that 1st plaintiff has proved his ownership of the Harmse equipment, which are in the possession of defendants, apart from, as I have said more than once, item 1.4. It follows inevitably that I should find for 1st plaintiff in respect of the vindicatory claim. The 1st plaintiff (Phillipus) is therefore entitled to recovery of the Harmse equipment, which are in defendants' possession (apart from item 1.4). In the result, I grant plaintiff's Claim 1. I pass to consider defendants' counter claim.

Counter claim

[23] It is important to note at the outset two things. First, the relief claimed in the counter claim is absolutely unrelated to the relief claimed in the claim in convention; and what is more, Ms Michelle Jeanette Horn (2nd defendant in the action in convention), is described in the papers as 2nd 'plaintiff in reconvention', but her name does not feature anywhere else in the rest of the process respecting the counter claim. Indeed, why the vindicatory action was consolidated with an action for an account and debatement in relation to an incorporated association that did not concern Michelle surprises me. Not only does it obfuscate a trial action which by any standard, as I have said before, should have been simple and uncomplicated, it also complicates the issues which are also straightforward.

[24] Be that as it may, on the evidence, I draw the following conclusions; and in doing so I shall refer to the parties by their names in order not to complicate the matter further. Petrus Francois Horn (1st Plaintiff in reconvention) and Phillipus Jacobus Horn (1st defendant in reconvention) are the only members of Plastic Products CC (2nd defendant in reconvention), which was founded on 25 June 2008. Petrus, apart from six months in February to August 2012, did not play any active role in the operations of the CC. Petrus left the running of the CC in the hands of Phillipus. Petrus did not see any financial statements of the CC or any profit sharing.

His demand to see the former was rebuffed by Phillipus, who was of the view that Petrus was not entitled to the financial statements.

[25] The purpose of seeing the financial statements was to enable Petrus to determine what amount of money was due to him from the CC. It is not explained satisfactorily why Petrus would lie supine for a considerable length of time when he failed to receive that which he thought he was entitled to and only wake up suddenly in December 2016 to act to vindicate his entitlement.

[26] Howsoever that may be, I accept Mr Olivier's submission that while Petrus is entitled to some relief, Petrus is not entitled to the relief he now prays for. The relief is too overbroad, considering the fact that Petrus is only entitled to that which the Close Corporation Act 26 of 1988 (as amended) ('the Act') gives him; and further that, in terms of s 42 (1) of the Act, Phillipus does not stand in a fiduciary relationship to Petrus, contrary to what Petrus avers.

[27] I have considered the evidence, the relevant provisions of the Act, the law (see *Amler's Precedents of Pleadings*, ibid. p4), and Mr Wylie's submission that the court, in its discretion, is entitled to grant alternative relief that is just and equitable in the circumstances. Having done that, I am disinclined to grant the relief Petrus seeks in paras 1, 2 and 3 of the prayers of the counter claim. What Petrus is entitled to (as Mr Olivier submitted) is that which, upon demand, Phillipus had refused to give him; that is, an access to the accounts of the CC. Petrus can then take it from there to pursue any avenue that is open to him in law, e.g. debatement of account.

[28] What remains is the matter of costs. Phillipus has been successful in his vindicatory claim (Claim 1), but unsuccessful in the claim concerning the partnership (Claim 2) and so, he is entitled to only a part of his costs. Petrus, on the other hand, has not gained substantial success in his counter claim. Indeed, from the submission made by Mr Olivier, I can see that it is probable that if Petrus had only sought an order for access to the accounts of the CC, which he was entitled to, as Mr Olivier concedes, that might not have been resisted. By asking for the relief in paras 1, 2 and 3, I would say, Petrus dragged Phillipus to court unnecessarily; and so, Petrus

must be denied his costs respecting the counter claim, even though I have granted to him an alternative relief.

[29] In the result, based on all the aforegoing considerations and conclusions, I make the following order:

(a) Judgment for the plaintiff Phillipus in his vindicatory claim (Claim 1). Defendants Petrus and Michelle must on or before **9 February 2018** deliver to Phillipus the following of his equipment:

1.1 1x Large Freezer Room 5.8m x 3.6m x 2.4m;
1.2 1x Gourmet Large Industrial Ice Machine;
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(d) Petrus and Michelle must pay 50 per cent of Phillipus's costs of his Claim 1, the one paying, the other to be absolved.

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C Parker

Acting Judge

APPEARANCES

Plaintiff:	J Olivier of Jan Olivier & Co
Defendant:	T Wylie of Kinghorn Associates