REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: HC-MD-CIV-MOT-GEN-2020/00373

In the matter between:

ROBERT DOUGLAS WIRTZ	**1st APPLICANT**
WINDHOEK RENOVATIONS CC	**2nd APPLICANT**
LH EQUIPMENT SALES CC	**3rd APPLICANT**
and	
JOHANNES ERASMUS VAN WYK	**1st RESPONDENT**
HARDROCK EARTHWORKS CC	**2nd RESPONDENT**

Neutral citation: *Wirtz v Van Wyk (*HC-MD-CIV-MOT-GEN-2020/00373) [2020] NAHCMD 585 (20 November 2020)

Coram:	**Schimming-Chase, AJ**
Heard:	9 October 2020, 20 October 2020
Delivered:	**20 November 2020**
Reasons:	**8 December 2020**

Flynote: Interdict – Final Interdict – Requirements – Absence of other adequate satisfactory remedy – pending litigation between the parties amounted to a satisfactory remedy for applicant to pursue. All three

requisites for final relief not met.

Summary: The relationship between the first applicant and first respondent, both members of the second and third applicants has irretrievably broken down. First respondent instituted action against the applicants, seeking *inter alia* cessation of his membership in the second and third applicants in terms of section 49(2) of the Close Corporations Act, 26 of 1998. Applicants took a special plea of arbitration and pleaded on the merits. The action is pending.

The applicants launched an urgent application seeking wide ranging interim relief, essentially to stop the first respondent from removing property of the second and third applicants to new premises, and preventing the first respondent from competing with the applicants' business. The parties agreed to a final order in respect of the majority of the relief sought. What was left for the court to determine by agreement between the parties, was whether the applicant was entitled to an order preventing the first respondent from participating in the businesses of the second and third applicants in any way whatsoever, even though it was clear that the first respondent at all material times solely managed the business of the second and third applicants.

Held, the first two requirements for final relief were established by the applicants. The third requirement was not established. The pending case between the parties was an adequate and satisfactory remedy for the applicants in the circumstances. Final interdict refused.

ORDER

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1. The relief sought in paragraphs 3.1.1 and 3.1.2 of the notice of motion is dismissed.

2. Pending finalisation of the dispute between the parties in case number HC-MD-CIV-ACT-OTH-2020/02046, or of any arbitration proceedings to which the dispute between the parties may be referred, the first respondent is interdicted and restrained from making available to the second respondent, any information of whatsoever nature concerning the affairs of the second and third applicants, or their client information or operational statistics or data.

3. The first applicant is ordered to pay the first respondent's costs of the application (as it relates to the order sought in paragraph 3.1 of the notice of motion), such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

SCHIMMING-CHASE, AJ

[1] On 20 November 2020, the following order was made:

> '1. The relief sought in paragraphs 3.1.1 and 3.1.2 of the notice of motion is dismissed.
>
> 2. Pending finalisation of the dispute between the parties in case number HC-MD-CIV-ACT-OTH-2020/02046, or of any arbitration proceedings to which the dispute between the parties may be referred, the first respondent is interdicted and restrained from making available to the second respondent, any information of whatsoever nature concerning the affairs of the second and third applicants, or their client information or operational statistics or data.
>
> 3. The first applicant is ordered to pay the first respondent's costs of the application (as it relates to the order sought in paragraph 3.1 of the notice of motion), such costs to include the costs of one instructing and one instructed counsel.'

[2] The reasons for this order are now provided.

[3] The first applicant and the first respondent respectively own 51% and 49% member's interest in the second applicant. They also own equal member's interest in the third applicant. The main business of the second applicant is the provision of plant and machine hire, and engaging in earthworks contracts. The main business of the third applicant is the sale of "Liebherr" equipment and spare parts for such equipment in Namibia.

[4] The first respondent is the sole member of the second respondent.

[5] The first applicant and first respondent are in an acrimonious interaction relating *inter alia* to the control and management of the business of the second and third applicants.

[6] The first respondent instituted action against the applicants on 2 June 2020 in case number HC-MD-CIV-ACT-OTH-2020/02046, claiming certain relief, including the cessation of membership of the first respondent, alternatively the first applicant, in the second and third applicants, in terms of section 49(2) of the Close Corporations Act, Act 26 of 1998.[1]

[7] In these proceedings, the first applicant delivered a special plea and a plea on the merits. In the special plea, the first applicant took the point that the dispute relating to the second applicant should be referred to arbitration in terms of the association agreement concluded between the parties. The action proceedings remain pending, the special plea not yet having been determined. There is no such association agreement relating to the third applicant.

[8] On 9 October 2020, the first applicant, in his own capacity and also representing the second and third applicants, launched an urgent

[1] Hereinafter referred to as the Close Corporations Act.

application[2] against the respondents for wide ranging relief (set out in full for context):

> '1. Dispensing with the forms, services and time periods provided in the rules of court and hearing this application as one of urgency.
>
> 2. Granting to the first applicant authority to launch this application on behalf of the third applicant in terms of the provisions of section 49(2) of the Close Corporations Act, 26 of 1998.
>
> 3. Directing and ordering that a rule nisi be issued calling upon the respondents to show cause on a date to be determined, why an order in the following terms should not be made, pending the final determination of the disputes between the parties in case number HC-MD-CIV-ACT-OTH-2020/02046, or in any arbitration proceedings to which the disputes between the parties may be referred to upon the dismissal and/or stay of such action:
>
> 3.1 Interdicting and restraining first respondent, with immediate effect, from:
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> 3.1.1 performing any action nor duty, of whatsoever nature, in his capacity as member of second and third applicant, and/or on behalf of the second and third applicant;
>
> 3.1.2 having any access to the premises or offices of the second and third applicants, or to any of the documents, records, data, client lists, and any further confidential data and/or information of the second and third applicants;
>
> 3.1.3 making available any information of whatsoever nature, concerning the affairs of second and third applicants, or any of their client information or operational statistics or date to second respondent;
>
> 3.2 Ordering and directing the first respondent to, within seven

[2] On 6 October 2020 for hearing on 9 October 2020, a 3-day period.

days of the date of this order, fully and comprehensively account for, and provide all details and particulars of any transactions, of whatsoever nature, involving the property of second and third applicants, from which first respondent received cash payments, whether personally or through the agency of a third party, irrespective of whether or not such payments were subsequently disclosed/declared to any of the applicants, over the last 12 months preceding the date of this notice of motion;

3.3 Directing and ordering the first respondent to, within seven days of the date of this order, repay to:

3.3.1 the second applicant the full and cumulative amount of N$2 million unlawfully transferred from its account to first respondent on respectively 25 and 30 September 2020;

3.3.2 the third applicant the amount of N$1 million unlawfully transferred from its account to first respondent on 22 September 2020;

3.4 Directing and ordering the first respondent, within seven days of the date of this order, return to the premises of the second applicant all the vehicles/machinery described as follows:

3.4.1 1 bulldozer vehicle;

3.4.2 1 Liebherr RP764 vehicle;

3.4.3 1 frontend loader Liebherr L580;

3.4.4 2 Bomag vibrating rollers (12 tons);

3.4.5 2 MAN water trucks;

3.4.6 1 Nissan UD58C diesel truck;

3.4.7 1 Hino 500 ST 4x4;

3.4.8 1 926 Liebherr excavator; and

3.4.9 1 Bell Grader 772D.

3.5 Directing and ordering the first respondent to, within seven days of the date of this order, reinstate the tracking service with Cell Stop Tracking Services, on all the vehicles reflected on the schedule set out in annexure “WR8” attached to the supporting affidavit of the applicants;

3.6 Directing and ordering the first respondent to, within seven days of the date of this order, return to the premises of the second applicant:

3.6.1 all the tools and machinery that had been removed from its premises, such as the “pipe fitting press”, workbenches, and fittings used in the pipe fitting processes;

3.6.2 all building materials so removed, such as roof sheeting, steel pillars, purlins and trusses from its premises;

3.6.3 all office furniture, computers, books and records of Windhoek Renovations so removed from its premises;

3.6.4 all the pickup “bakkies”, and double cab vehicles, and parts and spares for such vehicles, so removed from its premises.

3.7 Directing and ordering the first respondent to, within seven days of the date of this order, reinstate all the employees of the second applicant, dismissed on 5 October 2020, to their positions of employment with the second applicant as such positions existed immediately prior to their unlawful dismissals, on such date;

3.8 Directing and ordering the respondents, jointly and severally, to pay the costs of this application on the scale as between attorney

and own client.

4. Directing and ordering that, pending the finalisation of this application, the rule nisi reflected in paragraphs 3.1 to 3.7 above shall act as an interim interdict with immediate effect;'

[9] At the hearing of the application on 9 October 2020, the parties by agreement, requested that the following order be made:

'1. The forms, service and time periods provided in the rules of court are dispensed with and this matter is heard as one of urgency.

2. The first applicant is hereby granted authority to launch this application on behalf of third applicant in terms of the provisions of section 49(2) of the Close Corporations Act, 26 of 1988.[3]

3. The application is postponed to Tuesday, 20 October 2020, at 09h00 for purposes of dealing with any issues between the parties that are still alive and have to be dealt with. Such hearing shall not impact upon any of the issues set out under paragraph 4 below, which are finally and conclusively settled between the parties upon the basis as so set out in paragraph 4.

4. A final order is granted:

4.1 The first respondent is hereby directed to, within seven days of the date of this order, fully and comprehensively account for, and provide all details and particulars of any transactions, of whatsoever nature, involving the property of second and third applicants, from which first respondent received cash payments, whether personally or through the agency of a third party, irrespective of whether or not such payments were subsequently disclosed/declared to any of the applicants, over the last 12 months preceding the date of this notice of motion;

[3] The main differences between the order sought and the order made by agreement on 9 October 2020 are underlined for ease of reference.

4.2 The first respondent is directed to, within seven ordinary days of the date of this order, repay to:

4.2.1 the second applicant the full and cumulative amount of N$2 million unlawfully transferred from its account to first respondent on respectively 25 and 30 September 2020;

4.2.2 the third applicant the amount of N$1 million unlawfully transferred from its account to first respondent on 22 September 2020;

4.3 The first respondent is directed to, within seven ordinary days of the date of this order, return to the premises of the second applicant all the vehicles/machinery described as follows:

4.3.1 1 bulldozer vehicle;

4.3.2 1 Liebherr RP764 vehicle;

4.3.3 1 frontend loader Liebherr L580;

4.3.4 2 Bomag vibrating rollers (12 tons);

4.3.5 2 MAN water trucks;

4.3.6 1 Nissan UD58C diesel truck;

4.3.7 1 Hino 500 ST 4x4;

4.3.8 1 926 Liebherr excavator;

4.3.9 1 Bell Grader 772D;

4.3.10 Toyota 4.5 tone forklift;

4.3.11 MB 2628 tipper tuck 10 m3;

4.3.12 LH A924B excavator;

4.3.13 LH A904C excavator;

4.3.14 2 x MAN 10 m3 tippers; and

4.3.15 Bomag 17 tone vibrocontrol roller.[4]

4.4 The first respondent is directed to, within seven ordinary days of the date of this order, reinstate the tracking service with Cell Stop Tracking Services, on all the vehicles reflected on the schedule set out in annexure "WR8" attached to the supporting affidavit of the applicants;

4.5 The first respondent is directed to, within seven ordinary days of the date of this order, return to the premises of the second applicant:

4.5.1 all the tools and machinery that had been removed from its premises, such as the "pipe fitting press", workbenches, and fittings used in the pipe fitting processes;

4.5.2 all building materials so removed, such as roof sheeting, steel pillars, purlins and trusses from its premises;

4.5.3 all office furniture, computers, books and records of Windhoek Renovations so removed from its premises;

4.5.4 all the pickup "bakkies", and double cab vehicles, and parts and spares for such vehicles, so removed from its premises.

4.6 The first respondent is directed to, within seven ordinary days of the date of this order, to notify all the suppliers to whom he had sent the notice to close the account of Windhoek Renovations, that the notice had been sent in error and that it should be

[4] Additional vehicles and machinery made final by agreement between the parties.

disregarded;

4.7 The first respondent is directed to, within seven ordinary days of the date of this order, reinstate all the employees of the second applicant, who were dismissed/directed to go home on 5 October 2020, to return to the employment and/or their positions of employment with the second applicant as such positions had existed immediately prior to their unlawful dismissals, on such date;

4.8 The respondents are directed, jointly and severally, to pay all the costs of this application up to Friday, 9 October 2020, on the scale as between party and party, such costs to include the cost of one instructed and one instructing counsel. The parties reserve the right to make further submissions upon the cost order to be made in these proceedings, in relation to the proceedings subsequent to Friday, 9 October 2020.

5. Concerning the relief sought in prayer 3.1 of the applicants' notice of motion, an interim order is granted in the following terms:

5.1 As from Monday, 12 October 2020 the first applicant and the first respondent shall jointly discharge the duties of managing member in respect of both second and third applicants, and for such purpose the first applicant shall be entitled to unlimited access to the offices of the second and third applicants, and all sites where work on behalf of the second and third applicants are performed;

5.2 The first applicant shall be entitled to demand from first respondent to be placed in possession of all information, documents, and/or other material, relating to the past, present, and/or future affairs of the second and third applicants, and the first respondent shall be obliged to provide such information, documents, and/or other material, to the first applicant;

5.3 The above interim relief is granted to be operative until Tuesday, 20 October 2020, when the parties will be at liberty to make submissions upon the question whether such relief should be

made final, or be replaced with relief as proposed by either the applicants or the respondents.

6. Concerning the payment of N$100 000,00 from the account of second applicant to the account of second respondent made on 1 October 2020, the relief sought by the applicants in respect thereof, i.e. repayment of such sum to the account of second applicant, shall be determined as part of the proceedings on Tuesday, 20 October 2020.'

[10] It is apparent from the order made by agreement between the parties,[5] that the only aspect for the court to determine on the return date of 20 October 2020, was whether or not the relief sought in paragraph 3.1 of the notice of motion should be made final, namely, whether the first respondent should be interdicted

10.1. from performing any action or duty, of whatsoever nature, in his capacity as member of the second and third applicants, and/or on behalf of the second or third applicant;

10.2. from having any access to the premises or offices of the second and third applicants, or to any of the documents, records, data, client lists, and any further confidential data and/or information of the second and third applicants;

10.3. from making available any information of whatsoever nature, concerning the affairs of the second and third applicants, or any of their client information or operational statistics or date to the second respondent.

[11] Although the relief is effectively pending finalisation of the action, the effect of the relief and its import, is final in nature. This is not in dispute between the parties.

[5] In particular paragraph 5 of the order.

[12] To this end, the first respondent delivered answering papers (dealing mainly with his opposition to the final relief sought) together with a counter application for specific relief in terms of section 49(2) of the Close Corporations Act[6]. The first applicant delivered a replying affidavit.

[13] The dispute giving rise to the urgent interdictory relief sought (resulting in the order granted by agreement between the parties on 9 October 2020) is said by the first applicant to have started:

> 'Because of difference in opinion between Van Wyk[7] and me, and since Van Wyk refuses to accept that I hold the majority members' interest in Windhoek Renovations,[8] which fact affords me certain rights in such capacity, the relationship between us deteriorated, giving rise to Van Wyk instituting action against all three of the current business applicants in June 2020, for certain relief relating to the determination of our business relationship.'

[14] The first applicant attached a copy of the particulars of claim and the special plea (with plea on the merits) filed in the action. In the particulars of claim it is alleged by the first respondent that the relationship has irretrievably broken down (for the reasons advanced in the particulars of claim) resulting in the first respondent seeking an order that he ceases to be a member of the second and third applicants, alternatively that the first applicant ceases to be a member of the corporations, against payment of a fair price.

[15] The first applicant submitted that it was apparent from the pleadings that the finalisation of the action instituted by the first respondent is not imminent and, because of the arbitration clause in the association agreement governing the relationship between the members of the second applicant, could probably be dismissed, with the disputes between the parties being referred to arbitration as contemplated and required by the association agreement. [9]

[6] The relief sought in the counterapplication is identical to the relief sought in the particulars of claim dealt with below.
[7] The first respondent.
[8] The second applicant.
[9] It is common cause that in terms of the association agreement governing the relationship between the members of the second applicant that the management of the business of the

[16] The first applicant alleged further that he in the recent past established that the first respondent had without his authority or consent;

16.1. made substantial withdrawals from the bank account of the second applicant in the sum of N$2 million (in the last 2 weeks of September 2020) for his personal benefit and use and for the purposes of furthering the interests of the second respondent (that according to the first applicant, undertakes business in competition with the second and third applicants);

16.2. made a withdrawal from the bank account of the third applicant in the sum of N$1 million on 22 September 2020;

16.3. engaged in the sale of movable property of the second applicant in transactions where the purchase prices were divided in part as invoiced amount as indicated on the relevant invoice, and in the remaining part, for a cash portion received by the first respondent;

16.4. removed vehicles belonging to the second applicant to premises rented or owned by the first and/or second respondent, for no ostensible purpose other than using such vehicles in the business of the third respondent;

16.5. cancelled the tracking devices installed in all the vehicles and machines of the second applicant, so as to make it impossible for the first applicant to check where such vehicles are being used and for what purposes they are moved between Windhoek and other locations;

16.6. undertook cash transactions on behalf of the second applicant that are nowhere reflected in the records / books of the second

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second applicant shall be vested in the members collectively, and neither of the members shall have authority to represent the second applicant without the authority of a resolution of the members.

applicant, and receiving and appropriating the proceeds of these transactions for his own personal benefit;

16.7. removed tools and machinery from the premises of the second applicant to other premises rented by the second respondent;

16.8. removed building materials, such as roof sheeting, steel pillars, purlins and trusses from the premises of the second applicant;

16.9. removed all spare keys of the trucks and machines, computers, books and records of the second applicant from its premises;

16.10. unlawfully dismissed all the employees of the second applicant on 5 October 2020;

16.11. removed all the pick-up bakkies and double cab vehicles and parts and spares for such vehicles from the premises of the second applicant.

[17] The first applicant also alleged that the first respondent commenced doing busines through the second respondent (which he is a 100% owner of) in competition with, and to the detriment of the third applicant, by selling and doing business in Bell products. The first respondent also through the second respondent, commenced selling and supplying Liebherr products, in competition with the third applicant whilst the first respondent was, and at the present juncture, continues to be a member of the third applicant.

[18] The applicant alleged that these actions would, unless restrained by interdict, lead to irreparable harm suffered by the close corporations, being the second and third applicants, and to the first applicant in his capacity as member of both applications.

[19] The first applicant pointed out that the principal business of the third

applicant is the selling of Liebherr equipment. Its principal business accordingly involves the sale of new Liebherr heavy machinery used for excavation, earthmoving and general earthworks, and spare parts for such vehicles and/or machines. The third applicant does such business in terms of an arrangement with the Namibian agency of Liebherr Africa (Pty) Ltd. In this regard the first applicant alleged that such relationship is therefore of significant importance and value to any agency, such as the third applicant.

[20] According to the first applicant, when it became clear that litigation between the parties became unavoidable, the first respondent decided to adopt a dual approach for purposes of achieving his objectives:

20.1. the first leg thereof was the legal action that he launched;

20.2. the second leg was to register a close corporation (the second respondent) for the purpose to compete with and dilute the business of the second and third applicants. The main business of the second respondent is alleged by the first applicant to have been intended to be the establishment of a business relationship with IA Bell Equipment Company Namibia Ltd, as well as incorporation in its new business, the sale and renting out of Liebherr products in competition with the third applicant.

[21] The first applicant stated that it is also evident from the activities of the first and second respondents, that they intended to operate and are operating the busines of the latter in direct competition with the main business of the second applicant, namely the provision of plant and machine hire and engaging in earthworks contracts. Furthermore, Bell being a serious rival of Liebherr, the sale and distribution of the products of the latter, in Namibia, are direct competition to the business of the third applicant.

[22] Based on the receipt by the first applicant of an appointment letter of IA Bell Equipment Namibia (Pty) Ltd it became clear to him that the first and second respondents intend competing “in a fully confrontational manner”

with the third applicant, not only in selling and supplying Liebherr products but also by selling and supplying Bell products which will dilute the market of the third applicant.

[23] According to the first applicant the actions of the first respondent are unlawful and contrary to the provisions of sections 42(1) and 42(2)(a) and (b) of the Close Corporations Act that in general require a member of the close corporation to act honestly and in good faith and in accordance with his fiduciary relationship to the close corporation of which he is a member. Further, he submitted that the unlawful actions of both the first and second respondents, not only jeopardise and prejudicially affect the interest of the members of the third applicant, such as the first applicant but also jeopardise the interests and financial wellbeing of the third applicant.

[24] The first applicant further contended that the first respondent is currently conducting the affairs of the third applicant as a spring board for the launching and advancing of the business affairs of the second respondent, concerning the promotion, business and sales of both Bell and Liebherr equipment. This, according to the first applicant, constituted acts of unlawful competition engaged in by the respondents. In similar fashion, the first applicant alleged that the latter two also unlawfully compete with the second applicant whilst the first respondent is the managing member of the latter but simultaneously promoting the interests of the second respondent.

[25] The first respondent delivered an answering affidavit dealing (amongst other) with his opposition to the final relief sought subsequent to the order made by agreement on 9 October 2020.

[26] Before dealing with the first respondent's allegations, it is apparent from the papers filed that the following is not in dispute[10] between the parties:

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[10] The well-known Plascon-Evans rule, summarised in *inter alia* Republican Party of Namibia and Another v Electoral Commission of Namibia and Others 2010 (1) NR 73 (HC) at 108C-D; See also Clear Channel Independent Advertising Namibia (Pty) Ltd and another v Transnamib Holdings Ltd and others 2006 (1) NR 121 (HC).

26.1. the first applicant and the first respondent started out as business partners when the second and third applicants were formed;

26.2. the first respondent has been running the affairs of the second and third applicants on his own for at least the past 5 years. For the last 12 months, the first respondent has run the business without any input from or discussions with the first applicant;

26.3. the first applicant is not and has not actively been involved in the business for some time. The first respondent made all the business decisions while the first applicant went about his private business and his farming activities;

26.4. there has been no communication between the first applicant and the first respondent since September / October 2019 despite attempts from the first respondent to do so;

26.5. the first applicant has little or no knowledge of the operation and financial affairs of the business;

26.6. the first respondent has operated the business of the corporations successfully making a profit of in excess N$13 million for the period October 2019 to May 2020;

26.7. the first applicant and the first respondent have not seen eye to eye since September 2019 and there has been no meaningful communication between the parties since that date. In fact, the first applicant refuses to communicate with the first respondent;

26.8. the first applicant refuses to sign all financial statements or documents relating to the business. This has caused problems with the Receiver of Revenue;

> 26.9. the first respondent no longer wishes to be associated with the first applicant because the he verbally abused and swore at the first respondent's mother in a profoundly offensive manner. From that day on the personal relationship between the first applicant and the first respondent deteriorated to such an extent that normal communication was no longer possible. The first respondent continued to run the business and since October 2019 had sought to resolve matters. However, this proved fruitless until the first respondent had no option but to institute action;
>
> 26.10. there have also been numerous letters and correspondence between attorneys of the various parties in an effort to settle matters, positive results.[11]

[27] The first respondent stated that he continued to run the business and since October 2019 had sought to resolve matters. He wished to resign as member and offered the first applicant the opportunity to buy his membership in the close corporations alternatively the first respondent offered to buy his membership. Other alternatives had also been discussed without the parties reaching any consensus.

[28] The first respondent states that in order to try and find a resolution to the matter, he did take some of the actions complained of against him in the founding affidavit.[12] He moved from the premises of the second applicant to the premises in Maxwell Street and entered into a lease agreement in respect of such premises for an initial period of 2 years. He thought it best to move from the premises of the first applicant to start the business of Bell equipment which consists of sales only.

[29] The first respondent thought it would be more convenient to conduct second and third applicants' business from there because in his mind, there

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[11] The answers to these allegations made by the first respondent in his answering papers have essentially either been admitted or have been barely denied without any substantiating allegations.

[12] He disputes the unlawfulness of his claims.

would be no conflict to do so. He further stated that he had no intention other than to continue with business for the second and third applicants as this would continue to benefit him, as well as starting the business of the second respondent.

[30] The first respondent alleged further that the second respondent was registered by him during 2019 with the sole purpose of establishing a business, once the first applicant and he had parted ways. The second respondent had been dormant until the first respondent was able to obtain the Bell agency when he used the second respondent to enter into the agency agreement with Bell Equipment. The second respondent's business is alleged to be in no way whatsoever, in competition to either the second or third applicants.

[31] The first respondent in the answering papers indicated that he was instituting a counterapplication, seeking relief in terms of section 49(2) of the Close Corporations Act. The basis of the counterapplication was the irretrievable breakdown in the relationship between the parties and the conduct of the first applicant. In the counterapplication[13], the first respondent applied for exactly the same relief that he seeks in the particulars of claim in the pending action, namely an order that:

> 31.1. the first applicant and the first respondent must, not later than 14 days from the date of judgment, appoint a referee, who must determine the value of the two close corporations and each parties' loan accounts;
>
> 31.2. if the parties failed to appoint a referee as contemplated above, then and in that event the President of the Law Society of Namibia must not later than 7 days from the date that the Law Society is informed of the failure, appoint the referee;
>
> 31.3. for purpose of giving effect to the above paragraphs the

[13] In terms of section 49(2) of the Close Corporations Act.

referee:

31.3.1.must be a person who holds a qualification in the field of accounting or auditing;

31.3.2.may call upon either party to produce any books or documents with the referee reasonably requires 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;

31.3.3.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 corporations and to pay that person or persons a reasonable fee which may be charged;

31.3.4.must, if required, afford either party or their legal representatives, the opportunity to make representatives to him or her about any matter relevant to his or her duties;

31.3.5.must prepare the financial statements of the close corporations and determine the value of the close corporations as at 30 October 2020, not later than 3 months from the date of his or her appointment;

31.3.6.may apply to the 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;

31.3.7.is entitled to claim his or her costs of determining the value of the close corporations and the loan account of each member of the close corporations;

31.4. once the referee has determined the value of the close

> corporations and has determined the loan account of each of the parties, he must liquidate the close corporations and pay to each party the value of the members' interest.

[32] At the hearing of the matter for purposes of determination of the final relief sought, the first applicant, through Mr TA Barnard (representing the applicants), took the point that the counter application is not achievable in law and incompetent, in particular because the counter application was not requested to be determined on an urgent basis. This resulted in Mr PCI Barnard appearing for the respondents withdrawing the counter application and titling the document as "settlement proposals", being proposals which the parties should have put forward to court in terms of the order made on 9 October 2020. He further argued that there is a clear deadlock between the parties and it was opportune to consider the relief proposed on behalf of the first respondent by virtue of the wide discretion afforded to this court under the provisions of section 49(2).

[33] In this regard Mr TA Barnard submitted that the court was not in a position to consider the relief sought by the first respondent, because of the withdrawal of the counterapplication. No application for relief as "proposed by the first respondent" was therefore before court for it to consider, and the applicants' rights to ventilate their opposition to the relief sought at the arbitration or the trial remained.

[34] It is correct that the counterapplication, specifically referred to as such in the answering papers, was formally withdrawn. Therefore the only aspect for determination is the final relief, and the court will determine whether the final relief should be granted.

[35] To recap the final relief sought is an order interdicting the first respondent from:

> 35.1. performing any action or duty, of whatsoever nature, in his capacity as member of the second and third applicants, and/or on

behalf of the second or third applicant;

35.2. having any access to the premises or offices of the second and third applicants, or to any of the documents, records, data, client lists, and any further confidential data and/or information of the second and third applicants;

35.3. making available any information of whatsoever nature, concerning the affairs of the second and third applicants, or any of their client information or operational statistics or date to the second respondent.

[36] The requisites for final relief are well established in our courts. They are a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.[14]

[37] The first applicant as member of the second and third applicants has a clear right as member of the second and third applicants. This cannot be in doubt.

[38] The second question, being an injury actually committed or reasonably apprehended, is also in the circumstances of this matter to be resolved in favour of the applicants. The order made by agreement is also a consideration. There is also a clear unresolvable deadlock between the applicant and first respondent, the acrimony between the two being palpable.

[39] Also, the first respondent that has at all material times been running the business of the second and third applicants without the presence of the first applicant, who was not actively involved in the business for some time.

[40] Given the success of the business of the second and third applicants as a result of the first respondent being at the helm of operation, it stands to

[14] The oft quoted words of Innes J in Setlogelo v Setlogelo 1914 AD 221 at 227; quoted with approval in Naango and others v Katekela and others 2017 (1) NR 66 (HC) at par [40]

reason that the second and third applicants, and therefore the first applicant would suffer injury if the first respondent started to run a business in competition with these corporations.

[41] It bears mentioning that, although it is disputed by the first respondent that second respondent was set up in competition to the second and third applicants, first respondent also averred that second respondent was registered by him "… during 2019 with the sole purpose of establishing a business once the first respondent and I had parted ways." The second respondent's company profile also shows that it engages in business similar to that of the second and third applicants.

[42] The first respondent should accordingly be prevented from sharing any information about the business and affairs of the second and third applicants with the second respondent pending finalisation of the action proceedings.

[43] The third requirement for interdictory relief must also be considered. The applicant argues that from the facts and evidence presented, there is no similar protection by any ordinary remedy other than a final interdict. This is not the case. The ordinary remedy is the finalisation of the pending action instituted between the parties, which the first applicant is defending. The matter may also be determined by arbitration as specifically pleaded by the first applicant, or it may be remedied at the hearing of the action through a counterclaim to be instituted by the applicant.

[44] The applicant has therefore not shown on a balance of probability that there is no similar protection by any other ordinary remedy. He has accordingly not made out a case for the relief sought (apart from the order preventing the dissemination of information of the business affairs of second and third applicants). On the contrary, preventing someone who has built the business from participating in its day to day management for an extended period of time would be prejudicial to the second and third applicants. This is in spite of the deadlock between the parties, for which

both first applicant and first respondent are by their conduct, responsible for. In this regard, first applicant may well consider acting in terms of Rule 19(1) (b) of the High Court Rules in the pending action, which would result in same being finalised sooner.

[45] On the question of costs, the first respondent is substantially successful in its opposition to the final relief sought. Furthermore, the first and second respondents also bore the costs of the interim relief sought by agreement. The court therefore exercises its discretion to award costs in the manner set out in paragraph 3 of the order.

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EM SCHIMMING-CHASE

Acting Judge

APPEARANCES:

1st, 2nd and 3rd APPLICANTS:	Advocate T A Barnard Instructed by Dr Weder, Kauta & Hoveka Inc Windhoek
1st and 2nd RESPONDENTS:	Advocate PCI Barnard Instructed by Erasmus & Associates Windhoek