

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case No: HC-MD-CIV-ACT-CON-2017/04625

In the matter between:

**KURT BELLWINKEL**

**1<sup>ST</sup> PLAINTIFF**

**GUDRUN BELLWINKEL**

**2<sup>ND</sup> PLAINTIFF**

and

**LEON DAVID VAN NIEKERK**

**1<sup>ST</sup> DEFENDANT**

**AFRICAN ART JEWELLERS CC**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Bellwinkel v Van Niekerk* (HC-MD-CIV-ACT-CON-2017/04625)  
[2021] NAHCMD 310 (30 June 2021)

**Coram:** Oosthuizen J

**Heard:** 25 to 29 January 2021

**Delivered:** 30 June 2021

**Flynote:** Close Corporation — representation — authority — to bind CC — section 54(2)(a) of Act 26 1988 — unanimous assent.

**Summary:** The two members of a Close Corporation sold their total members' interest to first defendant. The two members simultaneously consented that the Close Corporation bought the assets of the one member's business. The written

agreement's signatory page read that first defendant sign on his own behalf acquiring the total members' interest in the Close Corporation and on behalf of second defendant (Close Corporation) and in his capacity as surety for the Close Corporation's debts arising from the agreement. Defendants raised the defence that first defendant could not represent second defendant as first defendant was not duly authorised and consequently second defendant was not authorised to incur the resulting debt. It was common cause that all parties were present during the signing of the agreement and that the plaintiffs, only members of Close Corporation, consented to second defendant buying assets of business of first plaintiff.

*Held*, that the simultaneous reciprocal mutual consent of all interested parties to be bound by the terms of the agreement, constitute not only the required representation but also the authority for second defendant to be bound by the agreement.

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## ORDER

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### IT IS ORDERED THAT:

Judgment is granted in favour of the plaintiffs against the defendants jointly and severally, the one paying the other to be absolved, in the following terms:

[1] Payment in the sum of **N\$2 730 945.55**;

[2] Payment in the sum of **N\$4 084 906.62**;

[3] Interest on the sum of **N\$2 730 945.55** calculated at the prime rates of First National Bank of Namibia less 2%, compounded monthly in arrears, as from 26 January 2021 to date of final payment.

[4] Interest on the sum of **N\$4 084 906.62** calculated at 2% per month (simple), as from 26 January 2021 to date of final payment and;

[5] Payment of plaintiffs' costs, such costs to include the costs of one instructing and two instructed legal practitioners.

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## JUDGMENT

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OOSTHUIZEN J:

### **Background**

[1] First plaintiff is a medical doctor who lived in Swakopmund, Namibia before retirement. First plaintiff held 50% members interest in African Art Jewellers CC and 50% shares in Namibia Fine Jewellery Manufacturers (Pty) Ltd.

[2] Second plaintiff is an adult female businesswoman and jeweller who resides in Swakopmund, Namibia. Second plaintiff held 50% member's interest in the aforesaid close corporation and 50% shares in the aforesaid company. In addition the second plaintiff was the sole proprietor of African Art Jewellers.

[3] First defendant is an adult male jeweller of South African origin and doing business in Swakopmund, Namibia and the purchaser of the total member's interest and all the shares of the aforesaid close corporation and the aforesaid company.

[4] Second defendant is African Art Jewellers CC, a Namibian registered close corporation based in Swakopmund, Namibia and the purchaser of the business of African Art Jewellers including the fixtures, fittings, workshop equipment, office equipment and other movable assets, stock in trade, name of the business and its goodwill.

### **Agreement**

[5] On 19 February 2012 and at Swakopmund, the parties concluded a written agreement of sale.

[6] In terms of the written agreement of sale the plaintiffs sold their entire membership and shareholding in the close corporation and company to the first defendant. Furthermore, the second plaintiff sold her business to the second plaintiff. *Vide* paragraph [4].

[7] The total purchase consideration was N\$9 million. N\$3 million was to be paid for the membership interest in the close corporation and the shareholding in the company. N\$6 million was to be paid by the corporation for the business of the second plaintiff trading as African Art Jewellers.

[8] The plaintiffs acted in person in selling their membership interest and shareholding and first plaintiff acting in person buying same from them.

[9] The second plaintiff acted in person in selling her business to the second defendant and the first defendant with the consent of the plaintiffs acted on behalf of the second defendant in purchasing the business from second plaintiff.

[10] Clause 5.2 of the agreement provides for payment of a non-refundable deposit of N\$1 million on the signature date and against payment thereof the member's interest and the shareholding would be transferred to the purchaser on the effective date, together with the practical handover of the business. The sellers shall sign all forms and execute all necessary documents to give effect to the transfers on the effective date.

[11] Clause 5.3 provided that the balance of the purchase price, N\$8 million, shall become due on the effective date and together with interest thereon shall be paid in 6 agreed installments.

[12] Clause 5.3.1 provides that Van Niekerk and the Corporation will make their own arrangements regarding apportionment of the payments of the purchase price and that they shall be jointly and severally liable to make payments to the sellers.

[13] The balance of the purchase price from time to time shall bear interest from the effective date compounded monthly in arrears at 2% less than the prime rate

charged by FNB Namibia, from time to time, until date of payment. *Vide* clause 5.4 of the written agreement.

[14] In terms of Clause 5.7 of the agreement, if any payment which become payable, is not paid on or before its specified date the purchasers shall be liable to pay interest at the rate of 2% per month until date of actual payment in addition to the interest in para [13] before.

[15] In terms of Clause 6 of the agreement Van Niekerk bound himself to the sellers as surety and co-principal debtor in solidum with the corporation (second defendant) for the due and proper discharge and performance by the corporation of all its obligations under the agreement and for the due and punctual payment of any amount in terms of the agreement to the sellers by the corporation, arising from the agreement.

[16] Clause 23 of the agreement contains provisions concerning the agreement being the entire contract and complete recordal of the parties' consensus and that no representations or indulgences shall be seen as a variation, abandonment or waiver of any rights under the agreement.

[17] The effective date of the agreement was provided to be 1 April 2012.

[18] On 19 February 2012 the parties to the agreement were unanimous that the effective date of their transactions would be 1 April 2012.

[19] The members' interest, shares and business, according to Clause 2 of written agreement, were sold and purchased on 1 April 2012.

[20] It is common cause between all the parties that both plaintiffs executed the required forms to transfer the members' interest in the second defendant and the shares in the company to the first defendant on 1 April 2012.

[21] It is common cause between the parties that all assets in the business (African Art Jewellers) were transferred and received by defendants on 3 April 2012.

Second defendant acquired all assets of the business and first defendant became second defendant's sole member.

### **Pleadings and Evidence**

[22] Defendants, however, and specifically the first defendant, while taking under the written agreement what they bargained for, subsequently and in his plea took issue with the representation and authority of himself on behalf of the second defendant when signing the agreement.

[23] It is common cause that all signatories to the written agreement were in each other's presence when the sales agreement was signed and concluded.

[24] First defendant came to court and testified under oath on his own and on second defendant's behalf

[25] It is common cause that first defendant (and second defendant) eventually paid the whole capital amount of N\$9 million and started to do so by paying the agreed non-refundable deposit of N\$1 million (which was payable on 19 February 2012) in two installments on 20 March 2012 and on 30 March 2012.

[26] Constantly thereafter the defendants made incomplete capital payments and did so late. First defendant was clear in evidence that he did not intend to pay interest and only paid capital.

[27] Payments on the remaining N\$8 million started on 3 September 2012 and ended on 29 August 2016.

[28] It is not in dispute that the defendants caused the payments to be made.

[29] Mr Van Niekerk, according to himself, "operate and own the business African Art Jewellers CC (the second defendant) in Swakopmund" and "spend most of my time at this business and use a bi - annual work permit to visit Namibia" and "hold 100% of the members interest in the second defendant".

[30] Van Niekerk testified that although he had reservations subsequent to the signature date concerning the legality (authority to sign on behalf of second defendant, as purchaser), he decided prior to 1 April 2012 to leave the position as it was and to concentrate on the business he had to take over on 1 April 2012.

[31] In argument, counsel for defendants submitted that at the heart of defendant's defence is the question who represented the second defendant (corporation) at the conclusion of the contract (on 19 February 2012) and whether such person (found to have represented 2<sup>nd</sup> defendant) was duly authorized to represent the second defendant.

[32] Van Niekerk testified that during May/June 2012 he seriously contemplated to have the agreement cancelled although he still wanted the business, but that his new manageress convinced him to forget about the differences he had with the plaintiffs and to carry on with what he was doing.

[33] I pause to note that the written agreement concluded on 19 February 2012 was admitted by defendants and relied upon concerning the issues raised by defendants in the pleadings concerning first defendant's lack of authority to represent the second defendant (corporation). The agreement does not explicitly deal with first defendants' authority to represent the second defendant.

[34] Defendants pleaded that first defendant "cannot be held jointly liable for the second defendant's debt on account of the fact that the second defendant was not duly represented during the conclusion of the agreement. The second defendant could therefore not have incurred liability in terms of the agreement and neither could the first defendant be jointly and severally liable for the second defendant's debt". *Vide* paragraphs 14.2, 17.2 and 18.2 of first and second defendants' plea.

[35] Defendants pleaded further that if it is found that second defendant was bound in terms of the agreement the amounts payable should have been apportioned to the separate purchases and as the apportionment was not done it is impossible to ascertain whether late payments were made and as a result whether

liability in respect of further interest accrued. *Vide* paragraphs 22.2 and 23.2 of the plea.

[36] According to the agreement the duty of apportionment was on defendants. *Vide* paragraph [12] and clause 5.3.1 of the agreement.

[37] The claim of plaintiff is essentially for payment of interest and additional interest as agreed. *Vide* paragraph [11], [13] and [14] and paragraph 10 of the particulars of claim.

[38] Second plaintiff testified that:

'I signed the agreement myself as seller. Dr Bellwinkel also signed the agreement as seller. Mr Van Niekerk signed the agreement as purchaser in his personal capacity and also on behalf of the CC and in his capacity as surety for the CC. Mr Van Niekerk did so with the consent and knowledge of Dr Bellwinkel and I. If the court does not accept Mr Van Niekerk's signature as aforesaid, Dr Bellwinkel and my signature should be taken as having represented the CC in having concluded the agreement.'

[39] During cross-examination of Gudrun Bellwinkel she testified to the following effect:

"My husband and I were present as members and Van Niekerk in his personal capacity and to be a member of the CC".

"My husband and I were in a position to accept Van Niekerk's signature as he wish to purchase."

"Our negotiations were done and he signed cause he wished to purchase it."

"We gave him permission to sign."

"We gave authority giving our business to Van Niekerk."

[40] During evidence Van Niekerk testified to the following effect:

"I wanted the business."

"I wanted Mr Pfeiffer to help me not to pay interest after I paid the capital."

"From day one I wanted to repay the capital, every payment intention was to pay the capital."

"The Bellwinkels were there, all members of the second defendant were there, they did not disapprove me signing, they did not disagree with what was happening when I signed."

[41] Van Niekerk did not dispute the evidence of second plaintiff as set out in [38] and [39].

[42] Van Niekerk accepted the calculation of Cilliers (expert witness) for the plaintiffs concerning the calculations of the normal and the penalty interest which was presented to court on 28 January 2021 and did not object to exhibits "G" to "K" being tendered in evidence by Mr Cilliers as a result of interest rate enquiries during cross-examination on 27 January 2021.

### **Summary, Applicable Law and Findings**

[43] During the course of case management the defendants filed a notice to amend their pleadings. Objections were raised and the Court ordered that the proposed intended amendment may be pursued during the hearing of the matter on the merits. Defendants however abandoned the proposed amendments and did not pursue same during the hearing.

[44] During December 2019 and subsequent to the Pre-Trial order after close of pleadings, the plaintiffs gave notice of proposed amendments to their particulars of claim in order to rectify amounts which was erroneously and inadvertently recorded in their particulars as was evident from annexure "B" to their particulars of claim. Defendants vehemently objected.

[45] A lock down and Covid-19 Regulations intervened in proper case management being conducted from 27 March 2020 onwards.

[46] On 20 April 2020 and in the absence of the parties, from chambers, the following Court order was issued:

- '1. The case is postponed to 01/06/2020 at 11:30 for a Status Hearing (Reason: Possible Amendment of Pleadings).
2. First defendant shall file his witness statements, duly signed by the witnesses, on or before 8 May 2020.

3. Plaintiffs shall file their application for leave to amend their particulars in terms of their notice of 13 December 2019 on or before 28 April 2020.
4. Defendants shall deliver their answering/opposing affidavits on or before 7 May 2020.
5. Plaintiffs shall file their replying affidavits and their notes on argument on or before 13 May 2020.
6. Defendants shall file their notes on argument on or before 18 May 2020.
7. The application for leave to amend shall be determined in chambers based on the documentation in the case file as on 19 May 2020 and a ruling shall be issued on or before 28 May 2020.
8. The joint status report filed by the parties on 18 April 2020 was duly considered in view of the fast approaching fixed trial dates and severe time constraints.'

[47] On 1 June 2020 the court made the following ruling and order in the face of an impending trial which was set to start on 15 June 2020 on the Action Fixed Roll:

'[4] The nature of the intended amendments in accordance with the plaintiffs is of such a nature and purpose to rectify an obvious error that was made in their letter of demand and subsequent particulars of claim. The error made by them was to include only the figure resembling "further interest" which they claimed as the penalty interest into paragraph 11 of their particulars of claim and prayer 1, instead of the figures for "further interest" and normal interest as portrayed in paragraph 10 of their particulars of claim read together with Annexure "B" of their particulars of claim. Annexure "B" of the particulars of claim clearly displays 2 columns of calculations. One for normal and one for "further interest" (penalty interest on top of normal interest levied on late payments as per the particulars of claim). Only the sub-total of the second column, to wit N\$2 380 818.34 appears in paragraph 11 and prayer 1 of the particulars of claim.

[5] Plaintiff have claimed in their particulars for "2. Interest on the aforesaid amount at the rate of 20% per annum calculated from 29 August 2016 until date of final payment;"

[6] What plaintiff's regarded as mere rectifications caused defendants to throw the proverbial book of objections to the plaintiffs.

[7] This being an interlocutory application at an advanced stage of litigation which prompted the vehement response by defendants, inclines the Court to approach the dispute (taking into account the written arguments of the parties together with the authorities cited) with wisdom and circumspection.

[8] The Court recognises that a mistake was made by the plaintiffs on the pleadings. The court is however mindful thereof that plaintiff's intended rectification very well might introduce proposed amendments which might not be due to mere mistakes previously made, but the fruit of careful reconsideration and rephrasing of relief to obtain a more advantageous position not previously introduced and prayed for, and not presently merited.

[9] In the circumstances of the case and due to the limited amendment the Court shall allow, and for the equality of success attained by each party, the Court order each party to bear its own costs.

[10] In the result the following orders are made:

[10.1] The amount in paragraph 11 of the particulars of claim, as well as in prayer 1, is substituted with "N\$4 401 889.38".

[10.2] The remainder of the contents of plaintiffs' Particulars of Claim and Prayers remain the same, without any amendments.

[10.3] No amendment other than contained in order [10.1] above is allowed and no further pleading or amendment to the pre-trial order apart from the substituted amount is necessary or required.

[10.4] Each party shall bear its own costs relating to the amendment proceeding.

[10.5] The case is postponed to 12 /06/2020 at 08h30 for Roll Call Hearing.'

[48] The trial dates were vacated due to Covid-19 restrictions and moved to January 2021.

[49] Neither in the un-amended plea of defendants, nor in their written argument of 17 February 2021, did the defendants pray for relief more than the dismissal of plaintiffs' claims and costs. They did not institute a counterclaim; they did not tender

restitution of the business and assets of African Art Jewellers; they are inclined to take and keep the business acquired from second plaintiff while pleading that they are not bound to the agreement between second plaintiff and themselves because, so they say, first defendant had no authority to represent and bound the second defendant (and first defendant for the N\$6 million jointly and severally with second defendant), but they in esse say they are entitled to keep those business assets second defendant has acquired and trade with and for which they paid, *sans* interest.

[50] The first defendant was designated by the written agreement to represent and to bind the second defendant when concluding (signing) the agreement. The members of the second defendant; and the first defendant who stood to acquire the full membership in second defendant who bought the business and assets of African Art Jewellers at the same time; were all present during the signing of the agreement. Second plaintiff (member) consented to the selling and both plaintiffs (full members of the corporation) assented to second defendant buying the business of second plaintiff through the representation of first defendant (who became the sole member of second defendant). Clause 23 of the agreement *in vacuo* does not exclude a sensible, businesslike interpretation which accommodates the context and purpose of the parties' agreement.

[51] The principle of unanimous assent is a sound principle, giving effect to the substance rather than the mere form of members' assent.<sup>1</sup>

[52] Nothing in the written agreement show anything but that all the parties concluded the agreement with the sincere intention to be bound by its terms. The contract itself evidence the common intention of the parties at the signature date to be reciprocally and mutually bound.

[53] When the agreement was concluded the owners of the shareholding and members' interest and owner of the business were together and present with the purchaser of the shareholding, members' interest and assets of the business and consented that the corporation simultaneously bought the assets of the second plaintiff. The second defendant (corporation) was authorised by the members of the

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<sup>1</sup> *Gohlke & Schneider v Westies Minerale BPK* 1970(2) SA 685 (AD) at 694 B.

corporation to purchase, and represented by the first defendant, who became the sole member of the corporation and who would benefit from the purchase of the business assets. The conclusion of the agreement was a simultaneous consensual act between individuals representing themselves and the corporation. All interests were represented and a binding agreement came into existence. Additionally and if at all necessary the plaintiffs and in particular the defendants ratified the acquiring by second defendant (of the business of the second plaintiff) by the takeover on 3 April 2012. I repeat that Clause 23 of the agreement *in vacuo* does not exclude a sensible, businesslike interpretation which accommodates the context and purpose of the parties' agreement.

[54] From the reading of the agreement as a whole (and from the evidence presented) there are nothing ambiguous concerning the contract. The representation and authority of the parties to the contract, seen in context and as a whole together with the purpose of the agreement do not pose difficulties. The Court, objectively, should interpret the agreement in a sensible and businesslike way not to undermine the purpose of the agreement.<sup>2</sup>

[55] Section 54(2)(a) of the Close Corporations Act, Act 26 of 1988 clearly stipulates that any act of a member shall bind the corporation, if such act is expressly or impliedly authorised by the corporation, or is subsequently ratified by it. In this matter, the sellers representing 100% of the members' interest consented and bound the corporation and in addition the corporation (if it was necessary) subsequently ratified through first defendant taking over the assets of second defendant representing second defendant.

[56] Second defendant purchased the business and assets of the second plaintiff and has been trading therewith since 3 April 2012. None of the parties has claimed restitution. The sale and purchase was effective. In the circumstances of this case the first defendant was indeed authorized to act on behalf of the second defendant by unanimous consent of the members which bound the second defendant.

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<sup>2</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 SC, paragraphs [23] and [24].

[57] Defendants breached their contractual obligations by paying the capital of the purchase price late and by not paying interest and penalty interest at all.

[58] It was never put to the second plaintiff that the last payment on 29 August 2016 was made in full and final settlement and was so accepted by plaintiffs.

[59] Despite first defendants current complaints that he never received any invoices/accounts, the agreement's payment terms regarding capital payments and interest, constitute the demand for payment thereof.

[60] The representation/authority point taken by defendants was a red herring and a straw clawing to escape their liability under the agreement.

[61] In reconsidering the likely monetary prejudice to the defendants in the event of the Court Order of 1 June 2020 being left unaltered, the Court shall order as proposed by the plaintiffs.

[62] The likely prejudice surfaced in the following fashion. The amount of N\$4 395 851.67 on 29 August 2016 shall attract 20% interest per annum a *tempore morae*. That would be N\$879 170.33 x 4, plus a further approximate N\$366 321 for the 5 months since end August 2020 to 25 January 2021. A total of N\$8 278 854 (before further interest) whereas, on Cilliers calculations the amount outstanding on 25 January 2021 would be N\$6 815 852.16 (before further interest).<sup>3</sup>

[63] Costs shall follow the result.

[64] Therefore and in the premises the following orders are made:

Judgment is granted in favour of the plaintiffs against the defendants jointly and severally, the one paying the other to be absolved, in the following terms:

[64.1] Payment in the sum of **N\$2 730 945.55**;

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<sup>3</sup> Exhibits "H" and "J".

[64.2] Payment in the sum of **N\$4 084 906.62**;

[64.3] Interest on the sum of **N\$2 730 945.55** calculated at the prime rates of First National Bank of Namibia less 2%, compounded monthly in arrears, as from 26 January 2021 to date of final payment.

[64.4] Interest on the sum of **N\$4 084 906.62** calculated at 2% per month (simple), as from 26 January 2021 to date of final payment and;

[64.5] Payment of plaintiffs' costs, such costs to include the costs of one instructing and two instructed legal practitioners.

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G H Oosthuizen  
Judge

APPEARANCES:

PLAINTIFF(S): Mr Heathcote SC, with Ms De Jager  
Instructed by Francois Erasmus & Partners

DEFENDANT(S): Mr Wylie  
Instructed by Ellis Shilengundwa Inc.