IN THE SUPREME COURT OF NAMIBIA

CASE NO: SA 14/2004

In the matter between:

A DOESEB	First Appellant
G RHEIS	Second Appellant
A BIKEUR	Third Appellant
M KAZENANGO	Fourth Appellant
J HARASES	Fifth Appellant
E UIRAS	Sixth Appellant
H NAMASEB	Seventh Appellant

and

BENJAMIN B KHEIBEB	First Respondent
OLD MAN FISHING CC	Second Respondent
BLUE OCEAN PRODUCTS (PTY) LTD	Third Respondent
BANK WINDHOEK LTD	Fourth Respondent
THE REGISTRAR OF CLOSE CORPORATIONS	Fifth Respondent
ESTATE E KHEIBES	Sixth Respondent

Coram: Kgomo, A.J.A., Mogoeng, A.J.A. *et* Snyders, A.J.A.

Heard on: 3 October 2005

Delivered on: 1 February 2006

A P P E A L J U D G M E N T

SNYDERS, AJA:

[1] On 14 July 2003 the appellants obtained an urgent, *ex parte* order against the respondents in the following terms:

> "***IT IS ORDERED***
>
> 1. *That the non-compliance with the Rules of this Honourable Court is condoned and the application is heard on an ex parte basis as is envisaged in rule 6 of the High Court.*
>
> 2. *That the application shall not be placed on the ordinary motion court roll, shall be heard in camera and shall not be made public until execution of the interim order set out below.*
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> 3. *That a Rule Nisi be issued calling upon respondents to show cause, if any, on Monday, 11 August 2003 at 10h00 by the above Honourable Court why the following order should not be made pending the determination of the principal application:*
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> 3.1 *That upon service of this order on first respondent, first respondent is ordered to forthwith hand over to the Deputy-Sheriff for the district of Windhoek the following assets, books and documents:*
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> (a) *all computers of second respondent used in the conduct of business of second respondent;*
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> (b) *all accounting records of second respondent, more particularly*
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> (i) *records showing second respondent's assets and liabilities, members' contributions, undrawn profits, re-valuations of fixed assets and amounts of loans to and from members as required to be kept by section 56(1)(a) of the Close Corporations Act, Act 26 of 1988 (hereinafter 'the Act'); and*

(ii) *the register of fixed assets of second respondent kept in terms of the provisions of section 56(1)(b) of the Act;*

(iii) *all records of second respondent containing entries from day to day of all cash received and paid out as is required to be kept by second respondent in terms of the provisions of section 56(1)(c) of the Act;*

(iv) *all records of all goods purchased and sold on credit and services received and rendered on credit, as is required to be kept in terms of the provisions of section 56(1)(d) of the Act;*

(v) *all vouchers supporting entries in the accounting records of second respondent, as is required to be kept in terms of the provisions of section 56(1)(f) of the Act;*

(vi) *all or any other books of account, including journal or general ledgers of second respondent;*

(vii) *all bank statements and records of bank reconciliation of second respondent in relation to the bank accounts held in the name of second respondent;*

(viii) *all correspondence and other documents relating to the business activities of second respondent.*

3.2 *That upon receipt of the aforementioned documentation, the Deputy-Sheriff for the district of Windhoek is directed to compile an inventory of all documents furnished to him by first respondent and that such documents then be handed over to first applicant;*

3.3 *That the signing authority of first respondent in respect of the cheque account of second respondent, Old Man Fishing CC, held at Bank Windhoek Ltd under account number 1229963501, be suspended with immediate effect upon service of this order on Bank Windhoek Ltd, being the fourth respondent in this application;*

3.4 *That third respondent, Blue Ocean Products (Pty) Ltd, be directed to cease making any payments due to second respondent, to first respondent or to any other address which first respondent has access to, but to pay any such amounts due to second respondent directly into the bank*

account of second respondent held at Bank Windhoek Ltd, account 1229963501;

3.5 *That first respondent is ordered to forthwith and upon service of this order upon him:*

(a) *to hand over to first applicant the keys of the postal P O Box 61221, Katutura, Windhoek, which post box is that of second respondent; and*

(b) *ordered not to attend to or do any administrative acts or financial transactions for and on behalf of second respondent; and*

(c) *to cease all acts performed on behalf of second respondent in the conduct of second respondent's business, be such acts performed as manager or member.*

3.6 *That the Deputy-Sheriff for the district of Windhoek is hereby directed and authorized to forthwith attach and remove and store at a place of security:*

(a) *the Volvo sedan motorvehicle bearing the registration number N11703W;*

(b) *the Toyota Corolla motor vehicle bearing the registration number N42531W;*

(c) *the computers, furniture, fax machines, printers and cellular phone belonging to second respondent, which property is currently situated at the premises of first respondent at No. 136 Eros Road, Erospark, Windhoek.*

3.7 *Ordering first respondent, alternatively such further respondents in the event of them opposing the relief sought in this application, to pay the costs of this application, further alternatively ordering that the costs of this application shall be costs in the cause of the main application set out hereinafter.*

4. That the prayer referred to in paragraphs 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 operate as an interim interdict pending the outcome of this application.

5. Granting applicants leave to supplement their founding papers in the main application within such time as the court may deem necessary upon the interim order having been effected.

6. Further and/or alternative relief."

[2] On the return day of the *rule nisi* the appellants sought confirmation of the rule and relief in terms of section 36, alternatively section 49 of the Close Corporations Act No 26 of 1988 (hereinafter referred to as "the Act") with the effect of divesting (divest) the first respondent of his membership interest in the second respondent by compelling the first respondent to sell such interest to the appellants. The application for relief in terms of the Act was referred to during the proceedings in this Court as the main application and I will continue to refer to it as such, for the sake of convenience.

[3] Having heard argument in the matter on the return day from 12 to 14 January 2004, the Court *a quo*, on 18 May 2004, discharged the *rule nisi*, dismissed the main application, and ordered the applicants jointly and severally to pay the costs of the application on an attorney and client scale.[1]

[4] This is the appellants' appeal against the judgment and orders by the Court *a quo*, which appeal is opposed by the first respondent.

[5] The seven appellants together with the first and sixth respondents hold the entire members' interest in the second respondent. The first respondent incorporated the second respondent during 1999 and initially held the entire members' interest.

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[1] The first respondent brought a counter-application which was also dismissed with costs. No appeal has been noted against that order.

[6] The principal business of the second respondent is described in its amended founding statement[2] as "*fishing and processing of fish*". The only business conducted by the second respondent has been the leasing of fishing quotas and exploitation rights allocated to it.

[7] Soon after the incorporation of the second respondent it became clear that, in line with government policy to extend opportunities to as many of the members of the previously disadvantaged community members of Namibia as possible, to ensure that they benefit from the country's natural resources, that the second respondent's membership interest had to be spread between more members of the previously disadvantaged community. This resulted, in approximately February 2001, in the registration of the amended founding statement which reflects the current spread of the members' interest in the second respondent:

(a) First applicant	10%	(b) Second applicant	10%
(c) Third applicant	9%	(d) Fourth applicant	8%
(e) Fifth applicant	3%	(f) Sixth applicant	3%
(g) Seventh applicant	8%	(h) First respondent	44%
(i) Sixth respondent	5%		

[8] The affidavits disclose an unfortunate tale of discontent between the members of a long and ongoing nature. The dispute is about money and incidentally about the management of the second respondent which is

[2] Record page 37.

allegedly performed in a manner that prevents the money which flows into the second respondent from reaching the pockets of its members.

[9] Some of the members of the second respondent are elderly, some are illiterate, some are related to each other, but most seem to be unsophisticated and ignorant, to a greater or lesser extent, about business relations and management. Maybe as a consequence of that the affidavits filed are not models of clarity and disclose a vast array of disputes ranging from relevant to irrelevant aspects. In the absence of a clearly and succinctly stated case the issues and essence of the case are somewhat obscure.

[10] The Court *a quo,* as a result of the conclusion arrived at on the *rule nisi*, dismissed the main application without dealing with the merits thereof. As the *rule nisi* was sought and granted "*pending the determination of the principal application*" I proceed to deal with the merits of the main application first.[3]

[11] The appellants, on the strength of the provisions of section 36(1) of the Act asked relief in the following terms:

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[3] One of the grounds of the appellants' appeal is that the court *a quo* erred in not dealing with the main application. Reliance is placed, in my view correctly, on the matter of *Trakman NO v Livschitz and Others* 1995 (1) SA 282 (AD), particularly the *dictum* at 288E-H: *"It is trite law that in ex parte application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the court's discretion, to the dismissal of the application on that ground alone…..I know of no authority, and Mr Pincus was unable to refer us to any, which extends that principle to motion proceedings and would justify the dismissal of an opposed application)irrespective of the merits thereof) for the reasons given by the Judge a quo. Nor is there any sound reason for so extending the principle. Material non-disclosure, mala fides, dishonesty and the like in relation to motion proceedings may, and in most instances should, be dealt with by making an adverse or punitive order as to costs but cannot, in my view, serve to deny a litigant substantive relief to which he would otherwise have been entitled"*

"*7.1 That first respondent shall cease to be a member of second respondent in terms of section 36(1) of the Act;*

7.2 That the 44% members' interest owned and held by first respondent in second respondent be acquired and transferred in ownership to the applicants in the following ration:

(i) *to first applicant: 4% of the 44% so as to have a total of 14%*

(ii) *to second applicant: 4% of the 44% so as to have a total of 14%*

(iii) *to third applicant: 5% of the 44% so as to have a total of 14%*

(iv) *to fourth applicant: 6% of the 44% so as to have a total of 14%*

(v) *to fifth applicant: 7% of the 44% so as to have a total of 10%*

(vi) *to sixth applicant: 7% of the 44% so as to have a total of 10%*

(vii) *to seventh applicant: 6% of the 44% so as to have a total of 14%*

(viii) *to Estate E. Keibes[4]: 5% of the 44% so as to have a total of 10%*

7.3 *That an amount to be determined, if any, shall be paid to first respondent in respect of his members' interest or claims he has against second respondent, by applicants in proportion to the additional members' interest they will receive;*

7.4 *That fifth respondent be directed to amend the founding statement of second respondent which is registered with fifth respondent in order to reflect the terms of the order as set out in prayer 7.2[5];*

7.5 *An order that in the event of first respondent failing and/or refusing to give effect to the transfer in ownership of his members' interest in terms of what is set out in prayers 2 and 3 supra, that the Registrar of this Honourable Court be authorized and directed to effect transfer of first respondent's members' interest in second respondent to applicants against payment, if*

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[4] This is a reference to the sixth respondent.

[5] I replaced the obviously wrong reference to paragraphs 5.2 and 5.3 with a reference to paragraph 7.2.

any, to be determined, and for that purpose he is authorized and directed to sign all deeds and documents necessary in order to give effect to such transfer;"

[12] Section 36 of the Act provides:

"***36.*** *(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:*

(a) *Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his part in the carrying on of the business of the corporation;*[6]
(b) *that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;*
(c) *that the member so conducts himself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him; or*
(d) *that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:*

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

(2) *A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to –*

(a) *the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or*
(b) *the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made: or*
(c) *any other matter regarding the cessation of membership which the court deems fit."*

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6 This sub-subsection is not applicable on the facts of this matter.

[13] The aim of section 36 has been stated to be to avoid the winding-up of a close corporation in circumstances where there is an irresoluable dispute between the members.[7]

[14] The appellants allege that early in 2001 the first respondent was appointed as managing member of the second respondent and was given power of attorney to represent the second respondent.[8] There is no doubt that the members of the second respondent are now and have been for a considerable period of time locked into a variety of disputes regarding the management of the second respondent.

[15] The appellants' case is that the first respondent's conduct falls within the ambit of sub-subsections (b) and (c) of section 36 and that it is just and equitable in the circumstances that he should cease to be a member of the corporation in terms of sub-subsection (d) of section 36. The case on the facts is:

15.1 The first respondent during November 2000 bought a Volvo motor vehicle (hereinafter referred to as "the Volvo") and during June 2001 bought a Toyota Corolla motor vehicle (hereinafter referred to as "the Corolla") without the knowledge of the

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[7] *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SECLD) at 896D-E.

[8] It is also alleged that this power of attorney was subsequently revoked, however, no details are alleged of when the power of attorney was revoked or through what act of the second respondent or all of its members it was revoked.

appellants and without authority. Subsequently the members of the second respondent ratified these purchases. The appellants do not allege whether the purchase of these motor vehicles were outside the authority of the first respondent as managing member and/or outside the ambit of the power of attorney, if it still existed at the time. The first respondent denies the absence of authority to purchase these vehicles and alleges, by reference to the appellants' annexure to the founding affidavit, that the written suspensive sale agreement in respect of the Volvo was co-signed by the second, sixth and seventh appellants. In reply the appellants allege that they were presented with a *fait accompli* upon which they had no choice but to sign the relevant documentation. These allegations, in my view, do not advance the appellants' case at all. They ratified the purchases and they fail to allege that the first respondent, despite being the managing member and despite the power of attorney, had no authority to conclude the purchases. Furthermore, the appellants allege that during November 2001 they resolved their issues with the first respondent.

15. 2 The appellants allege that the first respondent failed to pay two cheques, respectively in the amounts of N$342 107.02 and N$62 327.57, drawn by the third respondent in favour of the second respondent, into the bank account of the second respondent. Consequently the appellants "*submitted that first*

respondent misappropriated both cheques for his own benefit and used the money as if it was his own. It is clear that such conduct is of a fraudulent nature and is highly prejudicial to second respondent and each of its members".[9] (My underlining)

15.3 The first respondent concedes that the two cheques were paid into his personal bank account. He alleges that it was done with the full knowledge of the appellants. He also relies on a resolution authorising him to do so which resolution is purportedly signed by the first respondent together with the sixth respondent, the fifth and sixth appellants. The first respondent further alleges that the bank account of the second respondent was closed by the relevant bank necessitating the payment of the cheques into another bank account.[10] The first respondent further alleges that he expended the proceeds of these cheques in the interests of the second respondent and he annexes to the answering affidavit a reconciliation of funds received and expenses of the second respondent paid.

15.4 The resolution relied upon by the first respondent is dubious because no allegations are made of its validity. For example that it was taken at a duly constituted meeting of the second respondent.

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[9] Record page 23 lines 21 to 25.

[10] The more accurate version appears to be the one alleged by the appellants in the replying affidavit that the second respondent's overdraft with its bank was in the order of N$125 000 and that the bank would have applied set-off in the event of any deposit made into that account.

15.5 In view of the allegations by the respondent and the submissions by the appellants it is not possible to conclude on the papers that the appellants made out a case that the first respondent has "*misappropriated both cheques*" and acted in a "*fraudulent nature*" which is "*highly prejudicial to the second respondent and each of its members*".

15.6 The appellants allege that the first respondent "*unlawfully and without any authorisation, and without the knowledge of the applicants*"[11], on 7 April 2003, withdrew an amount of N$68 180.69 from an investment of the second respondent with Channel Life Namibia Ltd. The appellants further alleged:

> "*Applicants furthermore do not know of any reason why such money was withdrawn, nor the purpose for which such money was used on behalf of second respondent.*"[12]
>
> "*In the circumstances, I have a well-grounded apprehension that first respondent used that money for his own benefit.*"[13]
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> "*Insofar as first respondent used the money referred to in paragraphs 20.3 and 20.4[14] supra for his own purposes, such conduct not only constitutes theft, it is also a contravention of section 52 of the Act, and possibly section 51 of the Act.*"[15]

15.7 The first respondent admitted withdrawing this amount of money from the investment of the second respondent, alleged that he had

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11 Record page 24 lines 7 to 9.
12 Record page 24 lines 13 to 16.
13 Record page 24 lines 19 to 21.
14 This is a reference to the two cheques and the investment at Channel Life Namibia Ltd.
15 Record page 24 lines 23 to 26.

authority to do so and that he utilised the funds in his capacity as managing member for payment of the expenses of the second respondent. The first respondent includes in the annexure to his answering affidavit the reconciliation of the funds received and the monies expended on behalf of the second respondent, this amount from Channel Life Namibia Ltd.

15.8 The allegations by the first respondent taken together with the speculative nature of the appellants' allegations do not justify a finding that the first respondent has committed a theft or has acted fraudulently or has contravened the provisions of sections 51 or 52 of the Act.

15.9 The appellants allege that the first respondent closed the offices of the second respondent and moved all the furniture and equipment, documents and accounting records of the second respondent to his private residence. In addition it is alleged that the first respondent has persistently denied the appellants' access to any of the documents and records of the second respondent and refuses any cooperation with the appellants in the management or the business activities of the second respondent.

15.10 The first respondent alleges that the closing of the offices of the second respondent was done with the knowledge and consent of the appellants. The first respondent further alleges that the second

appellant conducted the financial affairs of the second respondent until November 2001 when he resigned. In addition it is alleged that the second appellant was involved in the drafting of the financial statements of the second respondent after he resigned and after the first respondent appointed someone else to compile the financial statements of the second respondent.

15.11 In view of the respondents' allegations the factual finding is not justified that the first respondent was denying the appellants access to the second respondent's documentation and financial records.

[16] I have merely summarised the disputes of fact above. The legal principles to be applied in the adjudication of a dispute of fact on affidavit, were authoritatively stated in the matter *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC)[16]. The following appears at 108G-J, with reference to the Heads of Argument of counsel for the respondent:

> "*It is trite law that any dispute of fact in application proceedings should be adjudicated on the basis of the facts averred in the applicant's founding affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise real, genuine or <u>bona fide</u> dispute of fact or a statement in the respondents' affidavit is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers … This approach remains the same irrespective of the question which party bears the <u>onus</u> of proof in any particular case …*"

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16 Also reported at 1995(1) SA 51 NmHC.

[17] When these principles are applied, it does not lead to the conclusion that the appellants have established that the first respondent has acted without authority, has committed fraud or theft or has refused the appellants access to the second respondent or any of its books. Furthermore, on the same test, the facts do not satisfy the provisions of section 36(1).

[18] The facts admitted by the first respondent, are such that one may justifiably have serious doubts as to the efficacy, competency and propriety with which the business of the second respondent is conducted, but that is not sufficient for finding in favour of the appellants. Furthermore, it is likely that the long and ongoing disputes between the members of the second respondent are prejudicial to the business of the second respondent. However the appellants have not put sufficient facts before the Court to show that it is just and equitable that the first respondent should cease to be a member of the second respondent.

[19] In addition to having failed to make out a case in terms of section 36(1) of the Act, there are no allegations in the founding affidavit that would enable a court to make an order in terms of subsection (2) of section 36 of the Act. The same dilemma presented itself in the matter of *De Franca v Exhaust Pro CC (De Franco Intervening)* 1997 (3) SA 878 (SECLD). The words of Nepgen J in that matter are apposite in the current case:[17]

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[17] At 896G-I.

> "*It is clear that this subsection*[18] *confers a discretion upon a Court to 'make such further orders as it deems fit' in regard to the matters referred to. Even if the discretion conferred upon a Court can be construed to be so wide as to enable a Court to decide to make no order whatsoever other than one in terms of ss (1) that a member cease to be a member of a close corporation (about which I have serious doubts), such discretion can only be exercised if there is sufficient information before the Court to enable it to decide whether or not to make any such orders. Having regard to what has already been set out above, I am obviously not in a position to consider this. I therefore cannot decide whether or how the discretion conferred upon me should be exercised.*"

[20] The appellants have failed to allege any facts that would enable the exercise of a discretion in terms of subsection (2) of section 36 of the Act. The facts alleged do not make out a case that the interests of the second respondent require that the first respondent ceases to be a member. After all, he was the founding member and it may be that once the membership of one or more of the other members ceases, that the fighting stops and that he ably manages and conducts the business of the second respondent, without any further issues. There are no allegations that any of the remaining members has the necessary acumen to secure business for the second respondent, nor of any plans to ensure adequate management of the second respondent. Furthermore, there are no allegations of the worth of the second respondent or the members' interest of the first respondent. Thus a court is unable to assess, if any membership interest is to cease, whether any payment should be effected in respect thereof and in what amount. The ability of the members of the second respondent to make payment in respect of the interest of any other member has also not been alleged. I do not propose that all these aspects constitute essential allegations in every case in which a court is called

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[18] This is a reference to subsection (2) of section 36 of the South African Close Corporations Act, 69 of 1984, which reads exactly the same as the Act.

upon to exercise a discretion in terms of section 36(2), but they constitute factors that may be relevant and, depending on the circumstances of a case, there may be many more that are relevant. I mention these factors in an attempt to illustrate the complete lack of relevant allegations in the founding affidavit.

[21] In view of the nature of the relief contained in section 36(1) I am of the view that, if a court grants an order in terms of section 36(1) it would be remiss in its duty if it did not consider section 36(2). Circumstances may arise in which it may not be appropriate for a court to make an order in terms of subsection (2), hence the Legislature left it in the discretion of the court to decide whether to make an order and what order to make. In the present case the appellants' failing is that this aspect has simply been disregarded.

[22] Apart from these difficulties the relief sought before the Court *a quo* in paragraph 7.3 of the Notice of Motion is clearly phrased in the vaguest possible terms making it impossible to grant relief in such terms.

[23] The appellants have had due and ample opportunity to place sufficient facts before the Court *a quo* to enable the exercise of a discretion in terms of section 36(2). In terms of the *rule nisi* that was issued the appellants were not only given access to all the relevant documentation of the second respondent, but possession thereof. The appellants have not supplemented their papers, despite them having sought and obtained leave to supplement their founding papers.

[24] In this Court it was argued on behalf of the appellants that paragraph 5 of the *rule nisi* does not permit the appellants to supplement their papers until the Court has set a time-period within which that needs to be done. This interpretation of paragraph 5 of the rule *nisi* gives rise to the absurdity that the appellants were waiting for the Court to take the initiative and set a time by which to supplement the papers. The wording of paragraph 5 of the order follows the wording of the Notice of Motion which is unfortunate, but does not take the responsibility away from the appellants to supplement their papers and to approach the Court to set a time-period within which to supplement. No other interpretation of paragraph 5 of the rule *nisi* is a tenable one.

[25] For these reasons the appellants could not be granted relief in terms of section 36 of the Act.

[26] In terms of paragraph 8 of the Notice of Motion the appellants sought relief in terms of section 49 of the Act in the alternative to section 36. Paragraph 8 reads:

> "*That the above Honourable Court makes an order in terms of section 49 of the Act that first respondent sells some or all of his members' interest to the other members of second respondent, Old Man Fishing CC, at such price or valuation as the court deems reasonable.*"

Again the relief is extremely vague in its terms. It remains uncertain whether the Court is asked to order some or all of the members' interest of the first

respondent to be sold, what percentage is asked to be sold, to whom it is to be sold, at what price or valuation.

[27] Accepting for the moment that the appellants have factually established an act or omission on the part of the first respondent that is "*unfairly prejudicial, unjust or inequitable*" to any of the appellants the Court has to exercise a discretion firstly whether relief under section 49 would be just and equitable and secondly, what order would be necessary "*with a view to settling the dispute*" between the parties. The appellants have not placed relevant facts before the Court that would enable the exercise of such a discretion. The facts required would be similar in nature to those required for the exercise of a discretion in terms of section 36 of the Act.

[28] The appellants have also failed to establish the jurisdictional requirement of section 49, that the first respondent conducted himself in a way that is unfairly prejudicial, unjust or inequitable to any or all of the appellants. Although, by the first respondent's own admission his conduct of the business of the second respondent is undesirable and may ultimately result in prejudice, the appellants have not alleged facts of such prejudice.

[29] Consequently the appellants have failed to make out an entitlement to the relief in the main application. The main application was correctly dismissed with costs. It follows that upon failure of the main application the rule *nisi* had to be discharged.

[30] The court *a quo* came to the conclusion that the rule *nisi* had to be discharged on considerations independent from the considerations in the main application, namely that the appellants failed to meet the standard of utmost good faith[19] required of an applicant in an *ex parte* application. Following upon this factual conclusion the Court *a quo* dismissed the application with costs.

[31] The factual conclusion that the appellants failed to make material disclosures of fact to the Court motivated the granting of a punitive costs order against the appellants.

[32] In view of the conclusion that I have reached on the main application it is not necessary for the determination of the merits of this appeal to scrutinise the reasons by the Court *a quo* except for the purpose of deciding the appellants' appeal against the punitive cost order.

[33] The court *a quo* found that the appellants, in putting their version before court regarding the first respondent's purchase of the Volvo and the Corolla, failed to disclose that these issues were settled between the parties[20] or that the second appellant made use of the Corolla.[21]

[34] Close scrutiny of the appellants' version illustrate that the allegations about the Volvo and the Corolla serve to illustrate alleged past behaviour by

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19 *Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 (2) SA 934 (T) at 960B-961B; *Commercial Bank of Namibia v Myburgh and Another* 1996 (NR) 330 (HC) at 336C-E.

20 Record page 288.

21 Record page 289.

the first respondent and do not constitute supporting facts for the relief sought as the appellants themselves allege in the founding affidavit that they ratified the purchase of the two vehicles and that the issue between them and the first respondent about the purchase of the vehicles was subsequently resolved.

[35] As such the facts disclosed by the first respondent in relation to the purchase of the two motor vehicles are not material to the relief sought in the application and would not have influenced the Court granting the *rule nisi* to come to a different conclusion.

[36] The Court *a quo* also concluded that the appellants should have disclosed the resolution annexed to the answering affidavit, on which the first respondent relies for his allegation that he was authorised to pay the two cheques into his personal banking account.

[37] The first respondent's allegation about the relevant resolution is[22]:

> "*However, the fifth and sixth applicants and the sixth respondent (duly represented by their authorised representatives) and myself, specifically resolved that:*
>
> > *'The usage fees owed to Old Man Fishing Close Corporation to be paid into the account of Mr Benjamin Kheibeb.'*"

The first respondent fails to allege that this resolution was taken at a duly constituted meeting of the second respondent. The allegation that the resolution was taken by the fifth and sixth appellants, the sixth respondent and the first respondent suggests that the resolution was taken contrary to the

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[22] Record page 91 lines 4 to 10.

provisions of the Act.[23] There is considerable doubt whether this is a proper resolution, therefore the failure to disclose such resolution to the Court in seeking *ex parte* relief did not amount to a non-disclosure of a material fact.

[38] The Court *a quo* found that the appellants were not frank by failing to disclose that on 22 November 2002 a resolution was taken that the fifth appellant, one Thomas Lombard and the first respondent would be the authorised signatories to conduct the second respondent's bank account. This alleged resolution is an annexure to the first respondent's answering affidavit[24] alleged by him to have been signed by himself, a duly authorised representative of the fifth appellant, a duly authorised representative of the sixth appellant and the sixth respondent. The facts and circumstances of the resolution, *i.e.* that it was taken at a duly constituted meeting of the second respondent, are not alleged. The conclusion therefore is inevitable, the resolution has not been proven and consequently is not a material fact that the appellants needed to disclose.

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[23] Section 48: *"(1) Any member of a corporation may by notice to every other member and every other person entitled to attend a meeting of members, call a meeting of members for any purpose disclosed in the notice.*

(2) Unless an association agreement provides otherwise –

(a) a notice referred to in subsection (1) shall, as regards the date, time and venue of the meeting, fix a reasonable date and time, and a venue which is reasonably suitable for all persons entitled to attend the particular meeting;

(b) three-fourths of the members present in person at the meeting, shall constitute a quorum; and

(c) only members present in person at the meeting may vote at that meeting.

(3) (a) A corporation shall record a report of the proceedings at a meeting of its members within fourteen days after the date on which the meeting was held in a minute book which shall be kept at the registered office of the corporation.

(b) A resolution in writing, signed by all members and entered into the minute book, shall be as valid and effective as if it were passed at a meeting of the members duly convened and held"

[24] Record page 192.

[39] The first respondent annexes to the answering affidavit another resolution taken by the appellants, to the effect that the first respondent's membership interest is to be reduced to 14% whilst 30% thereof is to be redistributed amongst the appellants. This annexure records[25]:

> "*Benjamin Kheibeb was the only one who voted against the resolution on the ground that he should be compensated. He was prepared only to forsake 10% of his interest in order to boost those of his aunties Uiras and Harases, to 8% each. This, of course is a subterfuge to keep the majority of the shares in the Kheibeb family;*"

On the strength of this the Court *a quo* found:[26]

> "*To my mind, had this ongoing dispute regarding compensation been disclosed to the Judge before whom the ex parte application came, it may be that he would have exercised his discretion not to make the order that he made or he may have ordered that the matter should proceed as an opposed application. Further the failure to disclose this dispute seems to lend credence to the first respondent's surmise that this application is a guise to get rid of him in an unlawful manner from the close corporation.*"

[40] Disclosure was not made by the appellants of the full extent of the dispute between them and the first respondent regarding the redistribution of the membership interest. This is a relevant fact to the application, however one that would probably have strengthened the appellants' case for relief in terms of the *rule nisi* as well as the main application. The purported resolution illustrates the very lack of sophistication and ignorance that I have referred to earlier in this judgment. The Court *a quo* was correct in concluding that it illustrates a desire on the part of the appellants to get rid of the first

[25] Annexure "K19". Record page 181.
[26] Record page 291 lines 13-19.

respondent. That desire is also clear from the founding papers. In addition the resolution discloses that the appellants were at a complete loss as to how to resolve the issue with the first respondent. It does not indicate that they were prepared to employ unlawful measures to remove the first respondent as a member.

[41] The first respondent raised an issue in the answering affidavit that certain of the appellants still owed him the full payment for the membership interest that he transferred from himself to them. The Court *a quo* concluded that this was another incident of non-disclosure of material fact. The first respondent's case for payment is wholly unconvincing as clearly illustrated by a typical letter of demand written by his attorney of record on his behalf to the relevant appellants[27]:

> "*We act on behalf of Mr Benjamin Kheibeb, the founding member of the abovementioned Close Corporation.*
>
> *Our instructions are that during or about September 2000 our client offered you eight (8) percent interest in the abovementioned Close Corporation.*
>
> *We are advised that aforementioned offer was tendered and accepted by yourself, without the involvement of the remaining members of the CC, nor has any consideration or purchase price to date been paid by yourself in respect of such interest as such was to be discussed at a later stage when the CC was to be operational.*
>
> *We attach hereto a valuation certificate reflecting the current value of such shares in respect of which no consideration has been paid.*
>
> *Our instructions are that the aforementioned allocation of interest to yourself by client was goodwill gesture with no insistence on any compensation at the time, as the allocation of the quota to our client was still awaited.*

[27] Record page 123 and 124. The share allocation varied as shown in paragraph 7 above.

> *In the light of the above and considering the current operational stage of the Corporation, our instructions are to formally record our client's demand for remuneration in respect of the interest allocated that is N$127 253.44, in the alternative to above, our instructions are that 50% (fifty) of your interest in the Corporation be re transferred to our client in which event arrangements be made with our client for the payment of the remaining balance within 5 (five) working days from date of receipt hereof.*"

The letter speaks for itself. No purchase price was discussed at the time that the offer was made and accepted for the transfer of a percentage of the shares and it was seen as a goodwill gesture. Factually the necessary amendments to the founding statement had been made and the founding statement indicates that each and every one of those appellants had made a contribution in respect of the interest that they hold. As such the substance of the first respondent's case in this regard does not constitute material facts to the application that had to be disclosed. Insofar as the existence of the dispute about payment for the members' interest are concerned, knowledge of such a dispute in my view would not have moved the Court granting the *rule nisi* to come to a different conclusion.

[42] The Court *a quo* found that the appellants' behaviour towards the first respondent was disquietingly inconsistent and something which should have been brought to the attention of the Court in the *ex parte* application as it created doubt as to whether the Court would have granted "*the orders if this erratic trend in the conduct of the second respondent's members was brought to its attention*".[28] This finding arose from the acceptance of the allegations that, on the one hand, the appellants were part of the decision in December

[28] Record page 292 lines 20-22.

2000 to appoint the first respondent as managing member until 31 December 2007, on the other hand, he was allegedly stripped of his managing powers by the appellants in October 2001 but in November 2002 they granted him authority to conduct the bank account of the second respondent. This factual finding is based on the resolution that I have discussed and in respect of which there is a complete lack of allegations establishing its validity. Therefore these are not facts which would have been material to the *ex parte* application.

[43] The Court *a quo* found that the appellants failed to disclose that the monies which the first respondent paid into his own account were utilised "*prima facie, for legitimate expenses and debts of the second respondent*". There is no indication on the papers that the appellants knew what the first respondent utilised the funds for.

[44] I consequently come to the conclusion that the Court *a quo* erred in deciding the matter on the basis of material non-disclosures of fact which amounted to a breach of the duty of an applicant in an *ex parte* application to maintain the utmost good faith.

[45] Consequently the following conclusion by the Court *a quo* was not justified on the facts of the case:

> "*It follows from my findings above that the order made by court on 14 July 2003 should be set aside on the ground of the non-disclosure, misstatements and misrepresentation of facts in that ex parte application.*"

[46] In the light of this finding there was no basis on which a punitive cost order could or should have been made against the appellants. Consequently I make the following order:

46.1 The appeal in respect of the punitive costs order made by the Court *a quo* is upheld.

46.2 The costs order by the Court *a quo* is set aside and replaced by an order of costs of suit.

46.3 The remainder of the appeal is dismissed with costs.

_____

S SNYDERS
ACTING JUDGE OF THE
SUPREME COURT OF NAMIBIA

I agree:

_____

F D KGOMO
ACTING JUDGE OF THE
SUPREME COURT OF NAMIBIA

I agree:

_____

M T R MOGOENG
ACTING JUDGE OF THE
SUPREME COURT OF NAMIBIA

Legal practitioner for the appellants:	Andreas Vaatz & Partners
Counsel for the appellants:	Adv T J Frank SC
Legal practitioner for the first respondent:	Van der Merwe-Greeff
Counsel for the first respondent:	Adv R Heathcote
Date of the hearing:	3 October 2005
Date of judgment:	