CASE NO.: A 261/10
A 292/10

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THOMAS JOHAN BROWN VAN WYK **APPLICANT**

vs

FOUR WHEEL DRIVE MEGASTORE CC **1ST RESPONDENT**

DANIEL CHRISTIAAN JORDAAN **2ND RESPONDENT**

CORAM: MILLER, AJ

Heard on: 20 October 2011; 20 February 2012

Delivered on: 20 March 2012

JUDGMENT:

MILLER, AJ: [1] The applicant and the second respondent are both medical practitioners practicing as such in Windhoek. They practised in partnership from the year 2003, until the year 2007, when the partnership was terminated.

[2] It is apparent that the erstwhile relationship between them had deteriorated without any hope that it may be restored in future.

[3] The first respondent is a Close Corporation of which the applicant and the second respondent, each hold 50 percent of the membership of the first respondent. The applicant in fact acquired his membership during June 2005.

[4] Two immovable properties are registered in the name of the first respondent. They are:

1) Erf 558, Olympia held by Deed of Transfer 4964/2003 dated 15 August 2003 and
2) Erf 225, Erospark held by Deed of Transfer 5177/2006, dated 25 July 2006.

[5] It is thus apparent that Erf 558 was acquired at a time when the applicant did not hold any members' interest in the first respondent. Erf 225 on the other hand was acquired when both the applicant and the second respondent were members of the first respondent.

[6] Since the dissolution of the partnership the applicant and the second respondent have been unable to unravel the affairs of the partnership and as is after the case in matters like these a process of litigation in this Court was resorted to.

[7] On 3 December 2008 the second respondent issued summons against the applicant claiming payment from the applicant, as defendant, of the sum of N$493, 965.19 together with interest thereon and costs. The cause of action relates to an acknowledgement of debt the second respondent and the applicant had signed on 13 April 2007 in favour of Nampharm (Pty) Ltd for the sum of N$898, 791.77. The second respondent alleges that he was called upon to and in fact paid the full amount to Nampharm (Pty) Ltd. He thus claims from the applicant 50 percent of the amount he, the second respondent, had paid.

[8] The applicant filed a plea alleging that he signed the acknowledgement of debt due to misrepresentations made by the second respondent. In any event he pleads that his debt is a liability of the partnership and his obligation to pay any portion thereof must await the final dissolution of the partnership and a settlement of the partnership books of account.

[9] In a counterclaim filed together with his plea, the applicant seeks an order directing the second respondent to render a full and proper account of the income generated by the partnership and of the payment of the debts. He further seeks a debotement of the accounts and payment of any amounts due to him.

[10] The second respondents' response to this is that both the applicant and himself had an equal duty to account to each other for the respective practices conducted by them for and on behalf of the partnership. Following an allegation

that the applicant is not willing to satisfy his reciprocal obligations the second respondent alleges that the counterclaim is premature.

[11] This action is yet to be enrolled for hearing. It certainly is ripe for hearing.

[12] I have dealt with the action simply to illustrate that there is much unfinished business between the former partners which await determination by this Court in the future.

[13] It is against this backdrop that the applicant, launched the present proceedings seeking the following relief:

"

1. That the first respondent be placed under provisional winding-up in the hands of the Master of the above Honourable Court;
2. That a *rule nisi* be issued calling upon all interested parties to show cause, if any, on a date and time to be determined by this Honourable Court, why:
    a) This Court should not order the final winding-up of the first respondent;
    b) The costs of this application should not be costs in the winding-up.
3. That service of the *rule nisi* be effected as follows:
    a) By serving a copy thereof on the first respondent's registered office; and
    b) Publishing a copy thereof in one edition of the Government Gazette and the *"Namibian"* newspaper.

4. Granting to the applicant such further and/or alternative relief as this Honourable Court may deem fit."

[14] The applicant contends that due to the breakdown of the partnership it has become just and equitable to wind up the first respondent.

[15] The response of the respondents was to launch a counter application claiming the following relief:

"

1. Granting leave to second respondent to refer to the parties as in Case Number A261/10 ("the main application").
2. That Applicant cease to be a member of the First Respondent.
3. That Erf 225, Erospark situated in the Municipal Area of Windhoek, Registration Division "K", Khomas Region measuring 1145 square meters be sold on the open market either by way of public auction or through property agents for the approximate value thereof determined by the average between one valuation by a valuator appointed by Applicant, one by second respondent and another agreed to by both valuators;
4. That the balance outstanding under the Mortgage Bond No B6309/2006 in favour of Standard Bank of Namibia Limited in respect of erf 225, Erospark be paid in full from the proceeds of such sale;
5. That the net proceeds after payment of the Mortgage Bond be divided in half and the Applicant be paid out his share;
6. That 50% of the net proceeds after payment of the mortgage bond be paid out to second respondent;

7. Facilitating the cancellation of the aforesaid Mortgage Bond and underlying sureties;
8. Directing that the costs of the main application as well as the costs of the Counter Application be paid from the Applicant's share;
9. Further and/or alternative relief."

[16] At the heart of the counter application lies an allegation by the second respondent that Erf 558, was acquired by the first respondent at a time prior to the applicant becoming a member of the first respondent. He alleges in effect that the applicant and the second respondent expressly agreed at the time when the applicant became a member that the applicants' rights would not include any interest in Erf 558, but would be limited to only Erf 225.

[17] Mr. Mouton who appears for the respondents contend that this is an unresolved issue, relating to the affairs of the partnership which together with the other issues raised await adjudication before another court. This he contends renders it premature to seek the winding up of the first respondent and the application should be dismissed or stayed pending the final determination of the pending trial.

[18] There is clearly a close link between the affairs of the first respondent and those of the partnership. The two properties were utilized to run two medical practices on behalf of the partnership. The second respondent conducted and presumably still conducts his practice from Erf 558 and has done so since 2003.

The applicant conducted a practice at Erf 225. In that sense the affairs of both become to some extent intertwined.

[19] In considering whether it is just and equitable to order the winding up of the first respondent the onus is on the applicant to establish this on a balance of probabilities.

[20] If he fails that signals the end of the matter. If he does establish that requirement, the court has to exercise a judicial discretion on broad principles of law, equity and justice. ***Pienaar v Thusano Foundation & Another 1992 (SA) 552 (BGD).*** "To put it another way, in its process of reasoning, the Court is guided by "broad conclusions of law, justice and equity; and is doing so it must take into account compelling interests and determine them on the basis of a judicial discretion of which "justice and equity" are on integral port. The Court has to balance the respective interests and tensions and counterbalance to compelling forces and resolve them in a fair, proper and reasonable manner. ***(Per Friedman ADP in Pienaar (supra) at p. 510 F).***

[21] A breakdown of trust and a loss of confidence between members of a close corporation, or shareholders in a private company, has been held to make it just and equitable to wind up the close corporation or company as the case may be.

[22] Non constat however that such a result must inevitably follow: The Court's discretion is not diminished or ousted by that fact.

[23] I will still be vested with the discretion to either refuse an order the winding up the first respondent, or to stay these proceedings if there are facts which warrant such a course of action.

[24] I have referred to the pending litigation between the parties. It is no answer to say, as the applicant does that the litigation does not involve the first respondent.

[25] Admittedly it does not arise directly, but given the close link between the first respondent and the partnership and the dispute concerning each partners' entitlement or otherwise relating to state of their members interest in the first respondent, the issue does and will arise albeit indirectly. These are matters which needs be resolved by the court hearing the pending trial.

[26] A finding on that issue may well make a difference as to whether the first respondent should be wound up or whether the relief claimed in the counter application should be granted instead.

[27] For the reasons I make the following orders:

1) The application for the winding up of the first respondent is stayed pending the final determination of the proceedings instituted in Case (P) I 3884/08 in the matter of Jordaan v van Wyk.
2) The costs will stand over pending the finalisation of these proceedings.

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MILLER AJ

ON BEHALF OF THE APPLICANT:	Mr. Obbes
Instructed by:	Etzold-Duvenhage
ON BEHALF OF DEFENDANTS:	Mr. Mouton
Instructed by:	Francois Erasmus & Partners