

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV- MOT-GEN-2022/00336

In the matter between:

**HEIWAL INVESTMENTS (PROPRIETARY) LIMITED
ROLAND ENKE**

**FIRST APPLICANT
SECOND APPLICANT**

and

**REGISTRAR: THE BUSINESS AND INTELLECTUAL
PROPERTY AUTHORITY OF NAMIBIA
ENKEHAUS MEDICAL CENTRE
ENKEHAUS PHARMACY CC
ENKEHAUS PRIVATE HOSPITAL CC**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Neutral Citation: *Heiwal Investments (Proprietary) Limited v Registrar: The Business and Intellectual Property Authority of Namibia* (HC-MD-CIV-MOT-GEN-2022/00336) [2023] NAHCMD 605 (29 September 2023)

Coram: UEITELE J
Heard: 15 March 2023
Delivered: 29 SEPTEMBER 2023

Flynote: *Close corporation* – Name of – Application for order directing close corporation to change its name in terms of s 20(2)(b) of Close Corporations Act 26 of 1988.

Close Corporations Act 26 of 1988 to change name of close corporations – Court holding s 20(2)(b) much wider than the causing of confusion – Applicant successful if could show undesirability or likelihood of causing damage.

Summary: The first applicant trades in the property and property letting business and is alleged to be the current owner of a building known as 'Enkenhaus' situated at erf 7070, Bahnhof Street, Windhoek. In 1969, the second applicant's father constructed a building called the Bastion building, which later became known as the first "Enkenhaus building".

The second, third and fourth respondents trade in the medical field, and have acquired a reputation in the field. The second respondent operates from Enkehaus building situated in Bahnhof Street, Windhoek, while the third and fourth respondents operate from Katima Mulilo.

On 22 June 2021, the second applicant instructed his legal practitioners to address (which they did) a letter to the first respondent in her capacity as Registrar of Close Corporations requesting her to order a close corporation registered as Enkehaus Private Hospital CC (the fourth respondent) to change its name in terms of s 20 of the Close Corporations Act of 1988.

The first respondent refused to order Enkehaus Private Hospital CC to change their entity name in terms of section 20 of the Close Corporations Act, hence this application. The second to the fourth respondents opposes the applicants' application and raised four preliminary objections to the applicants' claim.

Held that section 20 of the Close Corporations Act confers on an interested person the option to either approach the Registrar or a Court to seek an order directing a close corporation to change its name. But once the interested party has made an election that party must live with the consequences of its choice or election.

Held further that a consequence of an election to approach the Registrar as contemplated in s 20(2)(a) is that once the party approaches the Registrar and the Registrar makes a decision that decision will remain valid and binding until set aside by a superior court. The court on this basis refused to grant the relief sought by the applicant.

Held furthermore that the applicants have, not placed before court any facts which point to the 'undesirability' of the names used by the respondents or the damages that the respondents are likely to cause to the applicants by using the names in question.

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ORDER

1. The first respondent's decision dated 23 August 2021, declining the applicants' demand/request to order the second, third and fourth respondent to change their names, is hereby confirmed.
2. The names of the second, third and fourth respondents not undesirable nor are they calculated to cause damage to the applicants in terms of the provisions of s 20(2) of the Close Corporation Act 26 of 1988.
3. The applicants must pay the second, third and fourth respondents cost of suit. Such costs to include the costs of one instructing and one instructed counsel.
4. The matter is considered finalized and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] A name is necessary to the very existence of a company this includes a close corporation; it is one of the company's attributes and is a means of identification. It is by means of a company's name that the company preserves its legal identity through changes of membership, business constitution and different spheres of activity. A successful business enterprise soon acquires a commercial goodwill in respect of its products or services that members of the public and consumers associate with the company name, so that a company name has become a more and more valuable asset in itself¹.

[2] This case concerns the question as to how far the law protects an established business enterprise from other enterprises using a name or names that are similar to its name. The first applicant in this matter is a private company by the name of Heiwal Investments (Proprietary) Limited, a private company duly incorporated in terms of the company laws of Namibia. The second applicant is Roland Enke, who is a director of Heiwal Investments (Proprietary) Limited. I will in this judgment, for convenience sake, refer to the first and second applicant as the applicants. Where I need to refer to them individually, I will refer to the first applicant as Heiwal Investments and to the second applicant as Roland.

[3] On 21 July 2022 the applicants commenced proceedings in this court by notice of motion, in terms of which they sought an order:

'1 The second (Enkehaus Medical Centre), third (Enkehaus Pharmacy Centre) and the fourth (Enkehaus Private Hospital CC) respondents are directed to change their names in terms of section 20(2)(b) of the Close Corporation Act, No. 26 of 1988, within 15 days of the order, by adopting a name which does not contain the name "Enkehaus" or "Enke" (or any name which contains, or is similar to the foregoing).

2 Should the second, third and fourth defendants not comply with the order set out in prayer 1, the first respondent is directed to give effect to the aforesaid order within a period of 15 days commencing upon the expiry of the 15 day period referred to in prayer.

¹ JB Cilliers, *'Similar Company Names: A Comparative Analysis and Suggested Approach - Part 1'* (1998) 61(4) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* (Journal for Contemporary Roman-Dutch Law) 582.

3 Any respondent electing to oppose the application (jointly and severally, the one paying the others to be absolved) is ordered to pay the costs of this action, being the costs of one instructing and two instructed legal practitioners.'

[4] Of the four respondents, three indicated that they will and in fact opposed the relief sought by the applicants. The first respondent, Registrar: Business and Intellectual Property Authority of Namibia, is a nominal respondent. The second respondent is Enkehaus Medical Centre CC, a close corporation duly incorporated in terms of the laws of this Republic. The third respondent is Enkehaus Pharmacy CC, a close corporation duly incorporated in terms of the laws of this Republic and the fourth respondent is Enkehaus Private Hospital CC, a close corporation duly incorporated in terms of the laws of this Republic. Dr Ernest Kombo, who deposed to the answering affidavit on behalf of the respondents, is the sole registered member of the second, third and fourth respondent.

[5] I find it appropriate to, for best understanding of the issues that are involved in this matter, give a brief background of the facts that, gave rise to the applicants instituting the claim that is now before this court.

Factual Background.

[6] The background facts that I gathered from the pleadings are not complicated and are to a large extent not in dispute and they are as follows. During 1957, the late Hans- Herman Enke, who is the father of Roland, established a business known at the time as H.H. Enke Office Machines (Proprietary) Limited, which business was located at number 4 Trift Street Ausspannplatz, Windhoek (which location today is known as the Carl List building). This business traded in the sale and servicing of office machines.

[7] During the year 1969, the late Hans- Herman Enke started to construct a building called the Bastion Station Building, which allegedly later became known as the Enkehaus building in Windhoek. During the year 1974, the late Hans- Herman Enke incorporated Heiwal Investments (Pty) Ltd and subsequently

acquired a building in Búlow Street, Windhoek which allegedly also became known as 'Enkehaus'. Mr Roland alleges, without submitting any proof to that effect, that Heiwal Investments as the owner of the building that was situated in Búlow Street, effected renovations to that building and H.H. Enke Office Machines (Proprietary) Limited traded from that building.

[8] It is not clear from the evidence before court as to when Heiwal Investments allegedly acquired a building situated at erf 7070 Bahnhof Street, but from the evidence before court, it appears that during the year 1988 H.H. Enke Office Machines (Proprietary) Limited moved (from the building in Búlow Street) to a building situated on Erf 7070, Bahnhof Street. The building situated at Erf 7070 in Bahnhof Street is also known as Enkehaus and the building is according to Roland, owned by Heiwal Investments.

[9] I pause here and express my doubts about the accuracy of the allegation that the building situated on Erf 7070 Bahnhof Street is owned by Heiwal Investments. My doubt is based on three facts, the first being that Roland did not tender into evidence proof in the form of a title deed as regards the ownership of the building. Secondly, Roland tendered into evidence a valuation report, which was commissioned during the year 2020 relating to the building situated on erf 7070 Bahnhof Street. The valuation report was for estate purposes in respect of the estate of the late Hans-Herman Enke. If the building belongs to Heiwal Investments why would its value be of any relevance to the late Enke's estate? The third basis of my doubt is that during May 2020 the late Hans-Herman Enke in his personal capacity concluded a lease agreement in respect of the property (Erf 7070 Bahnhof Street). Why would the late Enke conclude a lease agreement in his personal capacity if the building belonged to Heiwal Investments?

[10] I now return to the background facts. The late Enke, during the year 1992 sold his shares in H.H. Enke Office Machines (Proprietary) Limited. What is not clear from the evidence is whether what was sold was just the shares or the business as a going concern and its name. As I indicated earlier, on 01 May 2015 the late Hans-Herman Enke concluded a lease agreement in respect of the building (that is the building known as Enkehaus situated on Erf 7070, Bahnhof

Street) for a period of one year, with an entity known as Mwelasse Investment CC. From the evidence before court it is apparent that as from the year 2016 the second respondent, Enkehaus Medical Centre CC, has been subleasing a portion of that building from Mwelasse Investment CC.

[11] On 04 June 2021, Roland instructed his legal practitioners, as his agent, to apply for the registration of a trademark "Enkehaus" in terms of s140 of the Industrial Property Act 1 of 2012 ("the Industrial Property Act"). Alleging that he for the first time became aware of the existence of a close corporation with the name Enkehaus, Private Hospital, CC, on 22 June 2021, instructed his legal practitioners to address (which they did) a letter to the first respondent (Registrar: Business and Intellectual Property Authority Namibia) in her capacity as Registrar of Close Corporations requesting her to order a close corporation registered as Enkehaus Private Hospital CC (the fourth respondent) to change its name in terms of s 20 of the Close Corporations Act.

[12] On 23 August 2021, the Registrar: Business and Intellectual Property Authority Namibia (I will, in this judgment for ease of reference refer to her as the Registrar of Business) responded to Roland's legal practitioners' letter of 22 June 2021. In her response, the Registrar of Business amongst other matters stated the following:

'...This letter serves as an acknowledgement of receipt your letter dated 22 June 2021 and BIPA takes note of the content therein. BIPA apologizes for the delay in responding to your letter.

It has come to the Registrar of Business' attention that your client, Roland Enke, filed for an application to trademark "Enkehaus" under trademark number NA/T/2021/473 on 16 June 2021.

We regret to inform you that your trademark application for the name "Enkehaus" was erroneously filed by the Registrar as there is already an entity as you are aware, by the name Enkehaus Private Hospital CC that has been registered as far back as 2020. It is against this background that the Registrar will not order Enkehaus Private Hospital CC to

change their entity name in terms of section 20 of the Close Corporations Act, 1988 (Act No. 26 of 1988)...'

[13] Roland is aggrieved by the decision of the Registrar of Business' refusal to order the close corporation registered as Enkehaus Private Hospital CC (the fourth respondent) to change its name in terms of s 20 of the Close Corporations Act. Based on that grievance the applicants instituted these proceedings claiming the relief that I set out in paragraph [3] of this judgment.

[14] On 28 July 2022 the second, third and fourth respondents (the respondents) signified their intention to oppose the applicants' claim. On 17 August 2022, the respondents delivered their answering affidavit to the applicants' founding affidavit. In the answering affidavit, the respondents raised four preliminary objections to the applicants' claim.

[15] The first preliminary objection is to the effect that s 20(2) of the Close Corporations Act creates two distinct alternative statutory remedies. In terms of s 20(2)(a) of the Close Corporation Act, an interested person may make application to the Registrar of Business within a period of one year whereas in terms of s 20(2)(b), an interested person may make application to court within a period of two years. The respondents contend that the applicants made an election to invoke s 20(2)(a). Accordingly, so the respondents contend, the applicants are in law precluded from simultaneously seeking relief under the alternative remedy created in s 22(2)(b) of the Close Corporation Act.

[16] The second preliminary objection relates to the period within which the application may be lodged. The respondents contend that the applicants lodged their application in excess of the two years' contemplated in s 20(2)(b) and that this court has no jurisdiction or power to condone the late filing of the application. The third preliminary objection is the respondents' contention that the applicants' application lacks averments that are necessary to sustain a cause of action under section 20(2)(b) of the Close Corporations Act, in that the second applicant does not allege that the second to fourth respondents' names are undesirable or are calculated to cause damage in relation to himself as an applicant.

[17] The fourth and final preliminary objection is that the relief which the applicants seek against the Registrar of Business is incompetent. The incompetence arises from the fact that the decision of the Registrar of Business' rejecting the second applicant's section 20(2)(a) application stands, and is not sought to be set aside in this application.

[18] I will before, I deal with the merits of the application, consider the preliminary objections raised by the respondents. I will start off and considered the first and fourth objections together.

Are the applicants precluded from seeking the relief under s 20(2)(a)& (b) ?

[19] Counsel for the applicants argued that the respondents' first preliminary objection is misplaced because; first the applicants are not seeking a "parallel/simultaneous relief" under the alternative remedy created in s 20(2)(b) of the Close Corporation Act because there is no appeal pending before the Registrar of Business regarding the applicants' application in terms of s 20(2)(a) of the Close Corporation Act. Counsel for the applicants further argued that the appeal referred to in the applicants founding affidavit relate to a refusal by the Registrar of Business to register a trademark under the Industrial Property Act, whilst the present application concerns s 20(2)(b) of the Close Corporations Act.

[20] Counsel for applicants proceeded and argued that the Close Corporations Act does not create a right of appeal against the decisions of the Registrar of Business and thirdly, the applicants are not precluded from applying to this Court for an order in terms of s 20(2)(b) by virtue of the fact that it has exercised a right under section 20(2)(a). Section 20(2) of the Act is clear and unambiguous, it is permissive and affords an interested party a choice, argued counsel for the applicant.

[21] I agree with counsel for the applicants that the applicants are not pursuing a '*parallel/simultaneous relief*' under the alternative remedy created in s 20(2)(b) of the Close Corporation Act, because there is no application or appeal pending before the Registrar of Business or other tribunal against the Registrar of

Business' refusal to direct the respondents to change their names. The appeal that was pending was an appeal against the Registrar's decision in terms of the Industrial Property Act 1 of 2012.²

[22] I, however do not agree with counsel that it can exercise both options granted to it by s 20(2) of the Close Corporations Act. I do not agree for the following reasons. Section 20(2) of the Close Corporations Act, reads as follows:

'(2) Any interested person may –

(a) within a period of one year referred to in subsection (1), on payment of the prescribed fee apply in writing to the Registrar for an order directing the corporation to change its name on the ground of undesirability or that such name is calculated to cause damage to the applicant; or

(b) within a period of two years after the registration of a founding statement apply to a Court for an order directing the corporation to change its name on the ground of undesirability or that such name is calculated to cause damage to the applicant, and the Court may on such application make such order as it deems fit.'

[23] What is clear from the above quoted section is the fact the section confers on an interested person the option to either approach the Registrar or a Court to seek an order directing a close corporation to change its name. But once the interested party has made an election, that party must live with the consequences of its choice or election. A consequence of an election to approach the Registrar as contemplated in s 20(2)(a) is that once the party approaches the Registrar and the Registrar makes a decision that decision will remain valid and binding until set aside by a superior court.

[24] The above principle was enunciated in the matter of *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*³ which has been referred to with approval in a number of cases in this jurisdiction. The '*Oudekraal principle*' entails that once a public body has made an administrative decision (whether the decision is right or wrong or defective) it (the administrative body) has no power to change the

² See the matter of *Enke v The Registrar: Industrial Property* (IPT 1/2022) [2023] NAHCMD 190 (14 April 2023).

³ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).

administrative decision or set it aside. Even defective decisions of administrative bodies remain binding until they are set aside through judicial review.

[25] In *Minister of Finance v Merlus Seafood Processors (Pty) Ltd*⁴ Mainga JA discuss the *Oudekraal* principle as follows:

'The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter Administrative Law at 355:

There exists an evidential presumption of validity expressed by the *maxim omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.'

'At other times it has been explained on little more than pragmatic grounds. In *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) (i)n a sense delay would . . . 'validate' a nullity. Or as Lord Radcliffe said in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 769 – 70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 88):

An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

[26] The decision by the Registrar of Business to refuse to order the respondents to change their names undoubtedly constitutes an administrative decision which remains valid until set aside by a competent court⁵. The decision made by the Registrar of Business has legal consequences. Counsel for the applicants argued that the Close Corporations Act, does not create a right of

⁴ *Minister of Finance v Merlus Seafood Processors (Pty) Ltd* 2016 (4) NR 1042 (SC)

⁵ *Oudekraal Principle supra as referred to and applied in Fernandes v Baleia Do Mar Industrial Safety Supplies CC* (HC-MD-CIV-MOT-GEN-2017/00204) [2018] NAHCMD 337 (17 October 2018) at [44].

appeal against the decisions of the Registrar of Business. This argument is fallacious, s 20(6) of the Close Corporation Act reads that:

'(6) Any person feeling aggrieved by any decision or order of the Registrar under this section [that is under s 20] may, within one month after the date of such decision or order, apply to the High Court of Namibia for relief, and the Court may consider the merits of any such matter, receive further evidence and make any order it deems fit.'

[27] What is as clear as daylight is the fact that an interested person has the right to approach this Court for a remedy if it is aggrieved by a decision of the Registrar. I therefore, find that this court cannot just ignore the decision by the Registrar and act as if such a decision was nonexistent. I further find that if this court makes orders or decisions disregarding the existence of administrative order and decisions made by administrative bodies that will be an invitation for anarchy which is inimical to the rule of law. On this bases I will refuse to grant the orders sought by the applicants.

[28] The conclusion that I have reached in the preceding paragraph makes it unnecessary for me to consider the other preliminary objections raised by the respondents. There is, however, also another basis on which I will refuse the relief sought by the applicants.

Are the names of the respondents undesirable or calculated to cause the applicants damage?

[29] The applicants application is based on s 20(2)(b) of the Close Corporations Act. In *Gonschorek and Others v Asmus and Another*⁶ the Supreme Court observed that although at the root of s 20(2)(b) lies the likelihood of confusion between the names, a reading of the authorities shows that the enquiry in terms of s 20(2)(b) is much wider and that an applicant would be successful if it can show either undesirability or that the name was calculated to cause damage.

⁶ *Gonschorek and Others v Asmus and Another* 2008 (1) NR 262 (SC).

[30] In *Peregrine Group (Pty) Ltd and Others v Peregrine Holdings Ltd and Others*⁷ the court accepted the approach suggested by Cilliers that⁸,

'The merits to be considered by the Court are whether, on a balance of probability and on the evidence before it, the existing company has such vested rights in its name or particular words in its name that the registration of the new company or the amended name of another company is undesirable, or whether the existing company has shown not only that confusion or deception is likely, but if either ensues it will probably cause it damage. This distinction clearly delineates the two pillars of the protection against the similar company names'

[31] Concerning the 'undesirable' inquiry, the Supreme Court of Appeal accepted that:

"... it is inappropriate to attempt to circumscribe the circumstances under which the registration of a company name might be found to be "undesirable". To do so would negate the very flexibility intended by the Legislature by the introduction of the undesirability test in the section and the wide discretion conferred upon the Court to "make such order as it deems fit". For the purposes of the present matter it suffices to say that, where the names of companies are the same or substantially similar and where there is a likelihood that members of the public will be confused in their dealings with the competing parties, these are important factors which the Court will take into account when considering whether or not a name is "undesirable". It does not follow that the mere existence of the same or similar names on the register (without more) is "undesirable".

[32] As regards the second leg of the section namely 'calculated to cause damage', usually resolves itself in the same inquiry, namely the likelihood of confusion or deception. In *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd*⁹ the court reasoned that:

'The registration of a company by a name cannot, in the nature of things, by itself cause damage to the objector. Actual damage can be caused only if the company carries on activities in the course of which it uses its name. But in the ordinary course of things a

⁷ *Peregrine Group (Pty) Ltd and Others v Peregrine Holdings Ltd and Others* 2001 (3) SA 1268(SCA) at 1274.

⁸ JB Cilliers *supra* footnote No. 1.

⁹ *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd* (2) 1989 (1) SA 255 (A) at 266.

trading company is likely to carry on activities, and hence the registration of a company may be calculated to cause damage to the objector...Registration of a company by a name identical with that by which a company is already registered may serve as an example. Plainly such a registration is calculated to cause damage to the latter company. It is calculated to cause confusion between the businesses conducted by the two companies; or to affect the latter company in its business by diverting customers to the new company; or to affect the credit or goodwill of the latter company. ...What s 45(2) contemplates is not a factual but an abstract inquiry - not an inquiry whether damage has occurred or will occur, but an inquiry whether 'in the ordinary course of things', 'in the ordinary sense of business', and having regard to any relevant circumstances, the registration of the company by the name concerned is likely to cause damage to the objector. If damage has in fact occurred, that would be relevant only insofar as it may tend to show that it was a likely result.'

[33] In the present matter it appears that the applicants are seeking an order in terms of s 20(2)(b) because the name Enkehaus is derived from and associated with Roland's family name and has been used in relation to his family business carried on under his family name for decades. Roland in his founding affidavit sets out the reasons why they (that is Heiwal Investments and he) are seeking an order directing the respondents to change their names as follows:

'28. I am advised that a close corporation acquires legal personality and corporate status by virtue of its registration in terms of the Act. The starting point in registering a close corporation is to reserve a name which is not, in the words of section 19(1) of the Act, "in the opinion of the Registrar, undesirable"....

31.As evident from the founding statements of the second to fourth respondents, the members of those Close Corporations do not bear the family name Enke, nor do their family names otherwise resemble the family name Enke in any way. As pointed out above, the name Enkehaus is derived from and associated with my family name and has been used in relation to my family business carried on under my family name for decades. It has also been used by the first applicant since 1988, which is, as shown, owns the Enkehaus building in Bahnhof Street and owned the previous Enkehaus in Billow Street. As shown, the shareholders of the first applicant are my family members and I...

33. I am advised and submit that both the first applicant and I have a property or quasi property right to the use and enjoyment of my own family name Enke, as well as to the

use and enjoyment of the name "Enkehaus" which is based on and derived from my family name Enke. That extends to the carrying on of business and the selling of goods and rendering of services (including letting) under the name "Enkehaus". The principals of the second to the fourth respondents have no such rights. This right of the applicants is an absolute right, which I have been advised is subject to certain exceptions in law, (none of which apply in this instance). One of those exceptions is that others with the same family name can (again subject to certain exceptions) also use that name. As shown, this is not the case as far as the second to fourth respondents are concerned. The existence of this absolute right of the applicants alone, I am advised, renders the registration of the names of the second to fourth respondents (bearing the name Enkehaus) undesirable within the meaning of section 20(2)(b) of the Close Corporations Act...'

[34] I have no doubt that Roland was ill advised or received wrong advise. I say so because Strydom AJA in *Gonschorek and Others v Asmus and Another*¹⁰ held that the essence of what is protected by the law and the courts is the reputation of a business. The learned judge with approval quoted Van Dijkhorst J¹¹, as stating that :

'In every passing off case two propositions have to be established by a plaintiff before he can succeed. The first is that his name, mark, sign or get-up has become distinctive, that is, that in the eyes of the public it has acquired a significance or meaning as indicating a particular origin of the goods (business, services) in respect of which that feature is used. This is called reputation. The second is that the use of the feature concerned was likely to deceive and thus cause confusion and injury, actual or probable, to the goodwill of the plaintiff's business.' [Italicized and underlined for emphasis]

[35] The learned judge after referring to the above authorities and others held that because nobody can lay claim to a monopoly in a family name, or a descriptive or generic word, the courts would, in the first instance, protect the applicant if the name has acquired a secondary meaning or if it is proved that the goods have acquired a reputation and that the defendant has led the public to believe that they are buying the goods of the plaintiff. In the second instance, the courts will grant a plaintiff protection if there is proof of relevant reputation and/or that the name or get-up of the defendant's goods are likely to confuse a

¹⁰ *Supra* footnote 8.

¹¹ *Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd and Another* 1991 (2) SA 455 (W).

substantial number of the public in believing that the goods of the defendant are those of the plaintiff.

[36] In the present matter, it is furthermore so that Enkehaus is not the name of an existing company or business of the applicants, the applicants are therefore not seeking to protect vested rights in the name of an existing company. The name in question is simply the name of a building or buildings that at one time belonged to the plaintiff's father. On the evidence that was placed before me there was no thread of evidence that the buildings 'Enkehouse' at one time or the other belonged to the Heiwal Investments or to Roland. The evidence before me point to the fact that Enkehouse building was the property of the late Hans Herman Enke and the building is currently the property of the Estate Late Enke. The applicants have furthermore, not placed before court any facts which point to the 'undesirability' of the names used by the respondents or the damages that the respondents are likely to cause to the applicants for using the names in question.

[37] In the result I have come to the conclusion that the applicants have not made out a case for relief they seek and I must consequently dismiss their application. As regards costs no reasons have been advanced why cost must not follow the course.

Order

[38] For the reasons set out in this judgment, I make the following order.

1. The first respondent's decision dated 23 August 2021, declining the applicants' demand/request to order the second, third and fourth respondent to change their names, is hereby confirmed.
2. The names of the second, third and fourth respondents not undesirable and calculated to cause damage to the applicants in terms of the provisions of s 20(2) of the Close Corporation Act 26 of 1988.

3. The applicants must pay the second, third and fourth respondents cost of suit. Such costs to include the costs of one instructing and one instructed counsel.
4. The matter is considered finalized and is removed from the roll.

UEITELE SFI
Judge

APPEARANCES:

APPLICANTS:

N Bassingwaighte assisted by
E Nekwaya
Instructed by LorentzAngula,
Windhoek

RESPONDENTS:

J Diedericks
Instructed by Afrika Jantjies & Associates,
Windhoek