



**REPORTABLE**

CASE NO: SA 33/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**SAREL JACOBUS BURGER OBERHOLZER**

**Appellant**

and

**ANNA MARIA LOOTS**

**First Respondent**

**MYL VYFTIG PUB & GRILL CC**

**Second Respondent**

**Coram:** MAINGA JA, HOFF JA and FRANK AJA

**Heard:** 16 October 2023

**Delivered:** 22 November 2023

**Summary:** The appellant, Oberholzer, instituted an action against the first respondent, Loots, to compel her to transfer Erf 172, Henties Bay (Extension No. 1), (Erf 172), as well as the total membership in the second respondent, Myl Vyftig Pub & Grill CC (the Pub & Grill) to him. His claim was premised on Loots holding both Erf 172 and the membership in the Pub & Grill as his nominee/trustee, in terms of an informal trust and not in her own right. Oberholzer and Loots, although not married, lived together as husband and wife from 2011 until the end of 2016 (and on two occasions, during the period of their relationship, the parties publicly got engaged to be married). Oberholzer, through a close corporation, Brak-Wasser Engineering CC,

of which entity he was the sole member attracted lucrative projects (ie with Weatherly Mining Namibia Limited at the Otjihase mine outside Windhoek and contract work for a South African company named Rula). Loots gradually became involved in the day-to-day administration and finances of the business accounts and Oberholzer's personal account and moved monies between the various accounts as she deemed fit. The proceeds from these projects were used to acquire Erf 172 and the membership in the Pub & Grill for their mutual benefit. Their relationship came to an end when Oberholzer, left the common home during January 2017. When Oberholzer left the common home, Loots was the registered owner of Erf 172 and the sole member of the Pub & Grill. Loots maintained that she held both the mentioned interests in her own right and that the Deeds Registry and amended founding statement of the Pub & Grill reflect the correct position. Loots filed a counterclaim for damages amounting to N\$50 000 in respect of the breaches of promise by Oberholzer to marry her.

According to the particulars of claim, the alleged holding of the property and membership interest by Loots came about in the following circumstances: Oberholzer was previously married. He laboured under the wrong impression that his ex-wife, to whom he was married in community of property, would be entitled to lay claim to one half of his property (even the property acquired after their divorce). An arrangement between Oberholzer and Loots was triggered when a dispute arose in respect of arrear maintenance payable by Oberholzer to his children. Because of this, Oberholzer entered into an oral agreement, described as an informal trust, with Loots in that whenever he wished to acquire property this would be done in her name and she would then hold such property(ies) as his undisclosed nominee/trustee and should their relationship flounder she would transfer the property back to him. In evidence, Oberholzer readily conceded that the idea was to keep the property away from his ex-wife.

The court *a quo* dismissed Oberholzer's claim with costs and granted the counterclaim in the amount of N\$5000 with interest and costs. The dismissal of the claim in convention was based on a credibility finding against Oberholzer whose evidence was stated to be 'vague and inconsistent', contained contradictions

between the particulars of claim and his evidence was thus 'unreliable and untruthful'.

Oberholzer filed a Notice of Appeal against the whole judgment of the court *a quo*. There was however no attack on the judgment in respect of the counterclaim in the grounds of appeal or in the heads of argument filed on behalf of Oberholzer in this Court. Counsel for Oberholzer in his oral submissions also made no reference to it and it is thus not necessary to deal with the counterclaim in this judgment save to confirm it.

On appeal, the purpose or motive for the agreement relied upon and sought to be enforced by Oberholzer, on the face thereof, appears to be one in fraud or attempted fraud of a creditor (his ex-wife). This Court directed a letter to the parties' legal practitioners to address this Court on whether the agreement the appellant is relying on is not an agreement in fraud of a creditor and by necessary implication also fraud upon other potential creditors? And if so, can it sustain the cause of action as pleaded? As the particulars of claim sought to compel specific performance of this unenforceable agreement, which is not competent in law, and not some relief on an equitable basis, the question that this Court must determine is whether there is any other basis in the particulars of claim as framed, for Oberholzer to be granted relief.

*Held that*, the analyses of the evidence by the court *a quo* as supported by counsel for Loots is obviously a useful one when considering evidence in any trial but this should not be done in isolation and without reference to other evidence presented. The other evidence may put a different gloss on the evidence being analysed or may assist to put the evidence in a different context. Whereas it is correct to weigh contrasting stances up against one another with reference to the evidence this normally cannot simply be done by analysing each stance on its own without reference to the evidence that intersects the opposing stances. Such intersecting evidence may be of importance to establish the full picture and may affect the probabilities.

*Held that*, with regards to the informal trust agreement alleged in the particulars of claim, Oberholzer has on a balance of probabilities established that he was motivated by the desire to conceal the fact that he was the part owner of Erf 172 and

the Pub & Grill from his ex-wife so as to undermine any maintenance claim she may have against him on behalf of their children. He thus entered into an agreement with Loots that she would as an undisclosed nominee/trustee hold for him his share of the acquisition of Erf 172 and the Pub & Grill and that as the purpose for Loots acting as his nominee/trustee has fallen by the wayside he is entitled to seek the re-transfer of his share of the property and membership interest to him.

*Held that*, the above general finding is based on the assumption that it is a valid agreement.

*Held that*, the background to the alleged agreement and its terms were abundantly clear from Oberholzer's evidence and whether it proved effective or not, did or did not prejudice the maintenance claim against him, affected other creditors of his or not, and whether he was insolvent or not is of no moment as pointed out by Lazarus AJ in *Maseko v Maseko* 1992 (3) SA 190 (W). This is so as it was clear that the purpose of the informal trust agreement between him and Loots was to hide the assets from his ex-wife and was thus morally reprehensible.

*Held that*, the agreement relied on by Oberholzer is against public policy and hence unenforceable. Loots did not raise this as a defence but it is clear from the pleadings and it also emerges from the evidence that it is against public policy. It is thus the duty of this Court to not enforce the agreement and there is nothing to prevent this point from being raised *mero motu* by this Court. No order can thus be given which would amount to the enforcement of the agreement

*Held that*, the approach set out in *Jajbhay v Cassim* 1939 AD 537 as endorsed by this Court in *Ferrari v Ruch* 1994 NR 287 (SC) and *Moolman & another v Jeandre Development* 2016 (2) NR 322 (SC) applies. This approach allows the court to do simple justice between 'the persons involved' in the unenforceable agreement. The court must consider the following factors: whether one of the parties would be unjustly enriched at the expense of the other if relief is not granted; the relative degrees of turpitude attaching to the conduct of the parties in entering into and implementing the particular agreement, and after taking into account all the relevant circumstances come to a decision, what justice requires in a particular case.

*Held that*, to do justice between the parties in the present matter, and taking into account each party's contribution to the acquisition of the erf and the Pub & Grill, appellant and the first respondent should be awarded 60 per cent and 40 per cent respectively of both the erf and the Pub & Grill.

The appeal succeeds and the judgment of the court *a quo* is set aside as reflected in the order. The order of the court *a quo* in the counterclaim is confirmed.

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### APPEAL JUDGMENT

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FRANK AJA (MAINGA JA and HOFF JA concurring):

#### Introduction

[1] Appellant (Oberholzer) and first respondent (Loots) lived together as husband and wife from 2011 until the end of 2016 despite the fact that they were not married to one another and on two occasions during this period publicly got engaged to be married. The relationship came to an end when Oberholzer left the common home of the parties during January 2017.

[2] When Oberholzer left the common home in January 2017, Loots was the registered owner of Erf 172, Henties Bay (Extension No. 1) from which property she conducted business as Myl Vyftig Pub & Grill CC (the Pub & Grill) in the name of second respondent and as the sole member of second respondent.

[3] Mr Oberholzer instituted an action against Loots to compel her to transfer Erf 172 to him as well as the total membership in the Pub & Grill. His claim was premised on Loots holding both Erf 172 and the membership in the Pub & Grill as his

nominee/trustee and not in her own right. Loots denied the averments in this respect by Oberholzer and maintained that she held both the mentioned interests in her own right and that the Deeds Registry and amended founding statement of the Pub & Grill reflect the correct position.

[4] Loots, apart from denying the claim by Oberholzer as aforesaid also instituted a counterclaim against Oberholzer for damages of N\$50 000 in respect of the breaches of promise by Oberholzer to marry her.

[5] The court *a quo* dismissed Oberholzer's claim with costs and granted the counterclaim in the amount of N\$5000 with interest and costs. The dismissal of the claim in convention was essentially based on a credibility finding against Oberholzer whose evidence was stated to be 'vague and inconsistent', contained contradictions between the particulars of claim and his evidence and as a result was thus 'unreliable and untruthful'. Oberholzer filed a Notice of Appeal against the whole judgment of the court *a quo*. However, if regard is had to the grounds of appeal and the heads of argument filed on his behalf in this Court, it is apparent that there is no attack on the judgment in respect of the counterclaim. Counsel for Oberholzer in his oral submissions also made no reference to it and it is thus not necessary to deal with the counterclaim in this judgment save to confirm it.

#### Claim in convention

[6] According to the particulars of claim the alleged holding of the property and membership interest by Loots came about in the following circumstances. Oberholzer was under the impression (wrongly) that his ex-wife, to whom he was

married in community of property, would be entitled to lay claim to one half of his property (even the property acquired after their divorce) and hence entered into an oral agreement with Loots that whenever he wished to acquire property this would be done in her name and she would then hold such property(ies) as his undisclosed nominee/trustee and should the relationship flounder she would transfer the property back to him. In evidence, Oberholzer readily conceded that the idea was to keep the property away from his ex-wife.

[7] In the particulars of claim, the agreement aforementioned was described as an informal trust agreement in terms whereof the trustee (Loots) would hold the property acquired as nominee/trustee for and on behalf of Oberholzer who would retain ownership of such property despite the fact that Loots would appear as owner on any document relevant to such transactions. The break-down of the relationship between Oberholzer and Loots would be the trigger for the properties to be 're-transferred' to him.

[8] As it is evident that the said agreement would only apply in respect of properties that Oberholzer acquired, he alleged that he 'purchased and paid' N\$1 500 000 and N\$1 million for Erf 172 and for the membership interest in the Pub & Grill respectively.

[9] In her plea Loots denied the alleged trust agreement and stated that she purchased Erf 172 and the Pub & Grill 'partly from funds contributed and donated by (Oberholzer) . . . and partly from her own funds'.

[10] As the purpose or motive for the agreement relied upon and sought to be enforced by Oberholzer, on the face thereof, appears to be one in fraud or attempted fraud of a creditor (his ex-wife) this Court directed that a letter be addressed to the parties legal practitioners in the following terms:

‘Is the agreement the appellant relies on as being pivotal to his case not an agreement in fraud of a creditor (his ex-wife) and by necessary implication also fraud upon his potential creditors? If so, can it sustain the cause of action as pleaded.’

The parties were directed to address the above issue in their written heads of argument.

[11] As is evident from the letter, the issue raised refers to the fact that agreements in fraud of creditors or designed to mislead creditors have always been regarded as being against public policy and hence unenforceable.<sup>1</sup> As the particulars of claim seeks to compel specific performance of this unenforceable agreement, which is not competent in law, and not some relief on an equitable basis, the question that arises is whether there is any other basis in the particulars of claim as framed, for Mr Oberholzer to be granted relief.<sup>2</sup>

### The evidence

[12] Oberholzer and Loots met when the former was in the process of divorcing from his then wife. A romantic relationship quickly developed and Oberholzer moved in with Loots. They started to cohabit during the course of 2011. Loots testified that at the time Oberholzer was unemployed while she was employed and working for a

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<sup>1</sup> *Moolman & another v Jeandre Development CC* 2016 (2) NR 322 (SC) para 62 with reference to *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

<sup>2</sup> *Ferrari v Ruch* 1994 NR 287 (SC) and *Schweiger v Müller* 2013 (1) NR 87 (SC).



business in Windhoek. She was employed in a business which provided her benefits such as a pension fund and a medical aid fund. Because Oberholzer was unemployed she covered all the couple's expenses from her salary. While it is correct that Oberholzer was unemployed this did not mean that he earned no income. He worked on and off on projects of a mechanical nature and from the bank statements dealt with in evidence he clearly contributed to the couple's maintenance and expenses. The amount involved is such that it cannot be said that he was the main provider and one can accept that Loots' impression that she carried the burden of the living expenses was correct although her testimony clearly exaggerated her contribution at that stage.

[13] The aforesaid financial disparity between these contributions made by the cohabitating parties was not of a long duration because Oberholzer's position changed for the better when he started to work for Weatherly Mining Namibia Limited (Weatherly) at the Otjihase mine outside Windhoek. For this purpose he used a close corporation, Brak-Wasser Engineering CC (Brak-Wasser) of which he, was the sole member.

[14] What Oberholzer's qualifications were or what his trade was at the time does not appear from the record. It is however evident that he had certain technical qualifications in a mechanical engineering type of field because of the work he was engaged in at the mine and which is also evident from the word 'Engineering' in the name of the close corporation.

[15] It is clear that Brak-Wasser entered into an agreement with Weatherly to render services to the latter at Otjihase mine. The exact nature of the services was not canvassed at the trial but it seems that Brak-Wasser was involved with some services to the mine for which it had to employ persons including artisans such as boiler makers and welders and that Brak-Wasser worked on the basis that it would invoice Weatherly on a monthly basis for services rendered to it. It was more in the nature of an independent contractor than of an employee. It was further required by this agreement that Oberholzer reside on the mine in a house provided by Weatherly. This request, again implicitly, fortifies the inference that Oberholzer was a key man in this relationship who had the necessary qualifications or expertise to supervise a team of artisans and their related support staff.

[16] Because the agreement with Weatherly required Oberholzer to reside on site, the couple moved to the mine and into a residential dwelling made available for this purpose by Weatherly. During this period the divorce of Oberholzer was finalised and he and Loots became engaged at a party at a friend's house on the mine towards the end of 2011. In addition, Loots became involved in the Brak-Wasser project by assisting with the finances and administration of its operations.

[17] The involvement of Loots in the finances, human resources and administration of the Weatherly contract at the time was a gradual one where Loots initially did this part-time, then on a half-day basis when she arranged with her employer in Windhoek to only work half day at that business and eventually on a fulltime time basis after resigning from her employment in Windhoek. The Weatherly contract clearly became gradually more demanding and also more profitable.

Eventually, Loots described herself as being in charge of the day-to-day administration, the payroll, the payments, head of human resources and as the person who did all the negotiations on behalf of Oberholzer with Weatherly as her English was of a high enough level whereas the competency of Oberholzer in this regard was not on such level as to conduct these negotiations himself.

[18] During 2014, a friend of Oberholzer contacted him to enquire whether he would be interested to do some contract work for a South African Company named Rula which had been appointed by Nampower to do work for it at the Van Eck power station on the outskirts of Windhoek. This friend, Mr van Blerk, was the appointed consultant for Rula. Oberholzer was keen to do this work but was faced with a problem, namely, that he was bound by the contract with Weatherly to be available on a mine site at all times. After discussions between him, van Blerk and Loots, it was decided that Brak-Wasser would enter into this contract and that van Blerk would also have some kind of supervisory role to play in this regard. What is of importance to note is that Rula clearly wanted the expertise of Oberholzer involved and would not have contracted with Brak-Wasser if Oberholzer was not involved. According to Loots it was decided between her and Oberholzer that she could manage the sub-contract for Rula for her own profit, ie that she would be entitled to the profits earned on this project. Oberholzer denied this. When Loots was asked why the contract was not formally assigned to her or was one between her and Rula she answered as follows:

'My Lord they could not do it like that because then (Brak-Wasser) would not get the contract. Brak-Wasser got the contract but Oberholzer between me and him gave the

profits of the contract to me . . . So obviously nowhere on the paper work it was done like that.'

[19] What was done internally in the records of Brak-Wasser to effect the agreement relating to the Rula project between Oberholzer and Loots according to the latter was to cause Brak-Wasser to open a second account at the bank to which the parties at the trial referred to as the 'Nampower account'. It goes without saying that this was to allow any interested party to separately establish the profitability of the Rula project and would, of course, also enable the accountant or bookkeeper of Brak-Wasser to determine the profit due to Loots. However, the way Loots operated the various accounts of Brak-Wasser made what would have been a fairly simple exercise near impossible.

[20] It is clear that Oberholzer entrusted Loots with all his finances as well as that of Brak-Wasser. In this regard, she had Powers of Attorney to operate his personal bank account and whatever other account Brak-Wasser operated. As will become apparent below, this included a call account where surplus funds could be parked to earn interest as well as a dedicated account under the Brak-Wasser name (the Nampower account), where the payments in respect of the Rula project (which I deal with below) were to be reflected so as to distinguish it from the Brak-Wasser account which would continue to be used for the transactions relating to the Weatherly contract.

[21] Loots was entitled to move monies between these various accounts as she deemed fit and according to her, she would make payments from the accounts she thought the most expedient at any specific time and that she also moved funds as

she deemed fit between the accounts on many occasions is clear from the evidence. In her evidence, she mentioned that this was done as she and Oberholzer were going to get married so it did not matter into which account monies was paid into or withdrawn from and she further stated the position as follows:

'To keep two things separate because the Brak-Wasser account was his and the Nampower account was mine to keep track of how much money came in but I also paid out from that account. I paid some of his debts from the Brak-Wasser account. He paid some of the Nampower debts, so the two was, we were going to get married, so I did not care from which account I did what at the end.

[22] From the evidence, the roles Oberholzer and Loots played with respect to the business of Brak-Wasser seems to me very clear. Oberholzer would see to the technical aspects and Loots would see to the administration and financial side and the money of Brak-Wasser was treated as their money. This position appears clearly from the following evidence of Loots:

' . . . it is very difficult for me to remember every, all the monies where I put them and why I put them there because I had, he gave the accounts to me and I was running the business and I can do with the money as I wish as long as he have what he wants he was satisfied, so the Nampower money when he needed money in the Brak-Wasser account I put money from the Nampower account to the Brak-Wasser account so that it can pay things and *viz-a-viz*. I put my Nampower account money into the call account because we got interest on that. And then I took it and not put it into the Nampower account I put it into the Brak-Wasser account because at that stage he need money on the Brak-Wasser account, so it is very difficult for me to say exactly from which account did what happened.'

[23] The Rula project, after being extended on a number of occasions came to an end around June 2015 and Weatherly ceased its mining operations at the Otjihase

mine at the end of October 2015. This meant that Brak-Wasser's two lucrative contracts also came to an end. Oberholzer and Loots moved to Henties Bay and resided there in a house owned by Loots. Here in Henties Bay in the course of 2016 Oberholzer and Loots had a second engagement function and set a date for their marriage for 9 June 2017 which would coincide with the birthday of Loots.

[24] Whilst at Henties Bay, a dispute arose in respect of arrear maintenance payable by Oberholzer to his children. His ex-wife clearly not satisfied with the reasons Oberholzer advanced for his failure to comply with his maintenance obligations towards their children, addressed the reasons for such dissatisfaction in an e-mail dated 4 February 2016 which reached Oberholzer via his lawyers at the time. The relevant portion of the e-mail from his ex-wife reads as follows:

'Mr Oberholzer is currently living in Henties Bay and is mostly fishing and entertaining family and friends to the costs of our children.

I'm aware he has an empty plot at Henties Bay and also many vehicles. If he does not have a current business, why can't the vehicles and/or plot be sold and money be kept in trust for the children.

He also participates in Vasbyt 4 x 4 competitions which are very costly, but there is money for these expenses but not for the children.'

[25] This e-mail according to Oberholzer is what triggered the agreement with Loots on which he relied for the relief he sought in his action and which is the subject matter of this appeal. According to him, he laboured under the impression that his ex-wife, to whom he was married in community of property, would be entitled to lay claim to half of his assets irrespective of whether these assets were acquired before

or after their divorce. Based on this erroneous (with hindsight) assumption he entered into the agreement relied upon in this matter. In short, the parties agreed that in future, all assets he wished to acquire would be acquired in the name of Loots as his undisclosed nominee/trustee who would hold this property for him and that this property would be transferred to him should their relationship terminate. As already pointed out, Loots denies there was such an agreement.

[26] Nevertheless subsequent to this missive from his ex-wife, Oberholzer sold the erf (empty plot) referred to in the missive and transferred the purchase price into either the personal account of Loots or the Brak-Wasser account. Oberholzer vacillated on this aspect and in his testimony on one occasion testified it was paid into the account of Loots and on another occasion testified it was paid into the Brak-Wasser account. Irrespective of the account paid into, Loots would obviously have been aware of this as she was in charge of both accounts.

[27] Apart from the erf that Oberholzer sold in response to the missive from his ex-wife, he acquired a house at Erf 245 Kreef Street, Henties Bay, together with Loots where the couple moved to after Loots sold her house in Henties Bay in which the couple initially lived when they moved to Henties Bay. Loots also owned a vacant erf adjacent to the one that Oberholzer sold which she also eventually sold.

[28] Subsequent to the sale by Oberholzer of his erf in response to the missive from his ex-wife, Loots, who at some stage in her life prior to meeting Oberholzer, managed a restaurant type business in Keetmanshoop, noticed that the Pub & Grill business (second respondent) operating in Henties Bay was for sale. She and Oberholzer approached an estate agent, Mrs du Preez, in connection with this

business. It is not clear what discussions proceeded the couple's visit to the estate agent but it is clear from the surrounding evidence that the couple intended to live in Henties Bay permanently and ideally do something there that would finance or assist in financing their retirement in that town.

[29] The couple visited the Pub & Grill business and negotiated with the owner (Mr de Jager) of the Pub & Grill and eventually concluded two agreements in this regard. One agreement to purchase the membership interest of the close corporation that was conducting the business of the Pub & Grill and which business was conducted from the property on Erf 172 (Extension No. 1). This property was the subject matter of the second agreement with Mr de Jager who was also the owner of this property. These two agreements were linked to one another with the result that both the premises from which the Pub & Grill was operated as well as the membership in the close corporation running the Pub & Grill business was sold by Mr de Jager per the two agreements signed on 1 January 2016. The purchase price for the Pub & Grill was N\$1 million and for Erf 172 was N\$1 500 000. The total purchase amount in respect of both purchases thus amounted to N\$2 500 000. The counter party in respect of both the agreements signed with Mr de Jager on 1 June 2016 was Loots. Mrs du Preez testified that she advised the couple to make the purchases jointly but Oberholzer told her that Loots had to be identified as the purchaser in both the agreements and she thus facilitated the agreements on this basis and Loots was the purchaser in respect of both the agreements.

[30] Towards the end of 2016 the relationship between Oberholzer and Loots became strained and on 17 January 2017, Oberholzer left the common home never



to return. Oberholzer demanded that the membership interest in the Pub & Grill as well as Erf 172 be transferred to him and as Loots refused to do so he instituted an action in the High Court to compel her to do so.

### Evaluation of evidence

[31] Oberholzer testified and called six witnesses in respect of his claim. The judge *a quo* made short shrift of the evidence of these witnesses in a single paragraph that reads as follows:

[26] The testimony by van Blerk and the other witnesses (Fransina Gamibes, Liesel Gaeses, Simon Seister and Tjiweza) on behalf of Oberholzer was so poor, vacillating or of so romancing a character and failed to deal with the *essentiale* of Oberholzer's claim that I reject it and I need not repeat or summarise it here.<sup>3</sup>

[32] The only witnesses dealt with in any detail in the judgment relate to the evidence given by Mrs du Preez, Oberholzer and Loots. The evidence of Mrs du Preez is summarised and the only comment with regard to this witness is a statement that in cross-examination 'she confirmed that she cannot say whose funds were used' to pay the deposit for the two transactions with Mr de Jager.

[33] In dealing with the evidence of Oberholzer, the judge *a quo* found that the ex-wife of Oberholzer never mentioned or threatened to claim half of his estate as the e-mail from his ex-wife clearly indicated that what she was complaining of was the fact that he was not honouring his maintenance obligations. It seems to have been accepted that as a result of the e-mail, Oberholzer sold the erf mentioned in the e-

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<sup>3</sup> *Oberholzer v Loots* (HC-MD-CIV-ACT-OTH-2017/04333) [2020] NAHCMD 164 (16 April 2021).

mail and paid the proceeds of the sale into a personal account of Loots. According to the judge *a quo*, the aforementioned evidence of Oberholzer was unsatisfactory and contradicted the 'informal trust agreement' pleaded and merely indicative of an intention to hide assets from his ex-wife. This conclusion is stated as follows in the judgment *a quo*:

[51] In my view Oberholzer's evidence was vague and inconsistent when one looks at the evidence with respect to the undisputed or indisputable facts that I have narrated above. I therefore find his evidence unreliable and untruthful. He in addition contradicted himself on the pleaded case . . . (. . . he admitted that the reason for selling the immovable property and putting money into Loots' account was to hide the money from his former wife as she was demanding money for the maintenance of their children).

[52] . . . I therefore reject Oberholzer's evidence that he and Loots entered into an oral agreement to establish an informal trust for his benefit. Oberholzer has therefore failed to discharge the onus resting on him and his claim accordingly fails.'

[34] In dealing with the evidence of Loots in the judgment, this amounted solely to a summary of the evidence of Loots and one of her witnesses Tshinana Tshiqwetha. In respect of the other two witnesses called on behalf of Loots it is simply stated:

[30] The testimony by Winnie Nembungu, and Shean Swanepoel on behalf of Loots was more about their perception as to who the owner of [the Pub & Grill] was and does in my view not carry any probative value and I therefore disregard it.'

[35] As is evident from the judgment *a quo* the evidence of Oberholzer was rejected on its own without any reference to the evidence presented by Loots or her witnesses. Counsel for Loots in the heads of argument filed on her behalf supports

this approach and analysed the evidence of Oberholzer by focussing on minutiae and semantic contradictions to submit that his evidence, on its own, stood to be rejected without any reference to evidence presented on behalf of Loots.

[36] The analyses of the court *a quo* as supported by counsel for Loots is obviously a useful one when considering evidence in any trial but this should not be done in isolation and without reference to other evidence presented. The other evidence may put a different gloss on the evidence being analysed or may assist to put the evidence in a different context. Whereas it is correct to weigh contrasting stances up against one another with reference to the evidence this normally cannot simply be done by analysing each stance on its own without reference to the evidence that intersects the opposing stances. Such intersecting evidence may be of importance to establish the full picture and may affect the probabilities. I deliberately used the word 'normally' as there may be cases where there is no intersecting of the evidence as mentioned and where the version of the party bearing the onus is so incredible that it would serve no purpose to analyse the evidence in support of the opposing stance. The latter position will, of course, normally lead to an application for absolution from the instance.

[37] In support of his case Oberholzer called witnesses to establish that he was the owner of the Pub & Grill. These witnesses were Fransina Gamibes, Liesel Gaeses, Simon Seister and Tjiweza. Similarly, Loots called Winnie Nembungu and Shean Swanepoel to testify that she was the owner of the Pub & Grill. As indicated above, the court *a quo* rejected the evidence of the witnesses called in this regard by Oberholzer and held that those called by Loots carried no probative value. Whereas

there may be some criticism of the reasons for the rejection out of hand, because of the lack of the credibility of the witnesses called on behalf of Oberholzer, the fact of the matter is that all these witnesses could only speak of their perceptions as to who the owner of the Pub & Grill was. Even the evidence tendered that Loots said to someone that she would make a final decision only after speaking to Oberholzer when it came to improvements at the Pub & Grill is of no moment as it is clear that at the time she regarded him as her husband and I can see nothing awry in her statement as this is something she probably would have discussed or consulted with him about. The alleged statement she made about the fact that the business and/or the property was registered in her name hence Oberholzer's claim in this regard was futile is likewise of no assistance to Oberholzer's case as this comment was made after the relationship soured and he insisted on the Pub & Grill and property being transferred to him. In fact, this evidence (which Loots denied) is in her favour as it corroborated her stance that it was indeed her property. Be that as it may, the court *a quo* cannot be faulted for its conclusion in respect of the witnesses mentioned.

[38] I have mentioned the manner in which Oberholzer and Loots handled their financial affairs during the period that Brak-Wasser was engaged with Weatherly Mining and in respect of the Rula project. The court *a quo* 'in its background summary' states in this regard 'they furthermore took the relationship to another level, they shared their profits and losses and also dealt with their financial accounts and affairs as if they were a married couple'. Under the heading 'Did Oberholzer prove the existence of an agreement between him and Loots to form the informal trust?' The court *a quo* stated as follows:

[48] What can furthermore not be disputed from the testimony (of both Oberholzer and Loots) is that the parties inter-changeably used their different bank accounts to pay for each other's expenses and business expenses. It appears from the evidence that there was no specific arrangement at the time with regards to loans or repayment, but that the understanding between the parties was (albeit tacit or implied) that their respective estates were dealt with as if it is a joint estate. This is indicative of the parties' mind-set at the time of the alleged informal trust agreement.'

[39] Subject to one qualification, the above comments by the court *a quo* cannot be faulted. The qualification is more in the nature of an explanation than a qualification and it is this: Payments during this time were done by Loots as she had signing powers on all the accounts. Thus it was clear that Oberholzer would not necessarily have known of any individual payments made by Loots. His lackadaisical attitude to his finances and those of Brak-Wasser however meant that payments were made between the accounts as found by the court *a quo*. This explanation must also be seen in the context where Loots claimed to have paid for many of Oberholzer's personal expenses creating the impression that she supported him financially from her own pocket and it then turned out that she 'paid' for his expenses from his own accounts or the Brak-Wasser account. As testified by her, when the money was there, Oberholzer took no interest in the finances and left this aspect to her and the company bookkeeper.

[40] It is necessary to refer to the Rula project in some more detail. As already pointed out above, this contract was initiated by van Blerk. It is clear he, together with Oberholzer and Loots, agreed to misrepresent the true position to Rula so as to see to it that Brak-Wasser gets the contract. As it turned out, the employment of competent artisans like Mr Tshiqwetha ensured this project was extended and successfully completed. It seems to me that it is clear that both Oberholzer and

Loots had no issue with the fact that they misled Rula as to the role Oberholzer would play in executing this project as they were probably of the view that this was a clever business strategy. Van Blerk was clearly conflicted and he was untruthful when he maintained that Rula knew he would not only be their consultant on the project but also the supervisor of Brak-Wasser. Mr Tshiqwetha testified he was the supervisor on the job which is contrary to the evidence of van Blerk who also testified he was in virtual daily contact with Oberholzer in respect of the project. It is clear that what was envisaged from Rula was that Oberholzer would be the full time supervisor. What in fact happened is that the bulk of the work was done by a team of artisans and their unskilled assistants supervised by Mr Tshiqwetha but also monitored by the consultant of Rula, van Blerk. The latter probably saw what he did as a dual role of a consultant/supervisor and he would have intermittently reported what was happening to Oberholzer to either discuss some or other technical issue or to report to him that everything was on course. Loots clearly dealt with the finances and human resources side of things and was the person who dealt with the artisans and their unskilled assistants the most. To simply have rejected van Blerk's evidence without analysing it in context was not warranted. Whereas it is correct that he could not deal with a claim that there was an 'informal trust agreement', he could and did give relevant evidence with regard to the Rula project which Loots indicated as the source of her funds for the purchase of the Pub & Grill and Erf 172. Thus he confirmed how the agreement came to be in place, that it was between Brak-Wasser and Rula and that he and Oberholzer did have roles to play although he exaggerated these roles and minimised the role of Mr Tshiqwetha. Mr Tshiqwetha in turn not being privy to the manner in which the Rula agreement came into being and the

terms and conditions of the contract between Rula and Brak-Wasser, clearly testified as to what he saw happening on the ground at his workplace.

[41] The manner in which Loots dealt with the income and expenses of the Rula project (of which she was entitled to the profits on her version) did not divert from the usual practice to move money between accounts as she deemed fit and she also took advantage of Oberholzer's lackadaisical attitude in this regard. Despite her initial version that she would reduce her salary from Brak-Wasser as she would now be spending more time in respect of the Rula project this assertion turned out to be incorrect as not only did she not reduce her salary from Brak-Wasser but she also drew a salary from Rula which she increased about 60 per cent when the project was humming. She paid herself double salaries. She paid some of the workers on the Rula contract from the Brak-Wasser account which she realised was a mistake but she had forgotten to correct this position. The value-added tax (VAT) payable was dealt with from Brak-Wasser and the employees for the Rula project were also allocated numbers on the Brak-Wasser payroll. In fact, she conceded that the bookkeeper would not be able to segregate the Rula project from the Weatherly contract but said if the bookkeeper had problems she could have asked her to explain matters which did not happen. She did not pay income tax on her profit from the Rula project and also did not declare it. The only inference that can be drawn from this is that the bookkeeper had no questions because both the Weatherly contract and the Rula project were projects of Brak-Wasser and hence, from an accounting perspective it was irrelevant whether an income or expense was effected in the Brak-Wasser account or in the Nampower account as it had to be consolidated in the Brak-Wasser accounting records for tax purposes. It also goes without saying

that Brak-Wasser had to pay the tax on its total net income, ie the profits of both the Weatherly and the Rula projects.

[42] The financial side of the Rula project was handled as per usual in terms of cash monthly flows, where it was needed or where Loots decided to place it and hence as far as outsiders were concerned, including the Receiver of Revenue, the Rula project was simply another project of Brak-Wasser. This complicates the issue raised in this regard, namely, did Loots administer the Rula project on the basis that she would be entitled to the profits or did she do this as an employee of Brak-Wasser as Oberholzer alleges? The court *a quo* found that Oberholzer who had the onus to establish his claim could not discharge this onus and hence implicitly could not establish that there was an agreement with Loots in this regard that she could run the Rula project for her own benefit. I agree with this finding. The fact that the bank accounts were dealt with as always does not detract from this version of Loots as it was clear that at that stage Loots and Oberholzer were still of the mind that irrespective of whom the property belonged to it would be used for their mutual benefit. This meant that there was no need, from their perspective, to strictly account for the Rula project separately as they would work it out among themselves and come to some solution which would not be a strict accounting process to the last cent but a rule of thumb exercise between persons who trust each other. It must be kept in mind that Loots was for all practical purposes in charge of the Rula project. This was also the intention right from the beginning as it was clear that Oberholzer would not be able to become involved to the degree expected from Rula because of the contract with Weatherly. If Oberholzer by necessity had to get more involved it is clear to me that Loots would have paid (given) him more than the N\$100 000 that



she did from the Rula income. In short, the probabilities in respect of who would be entitled to the Rula project profits, ie Loots or Brak-Wasser, is evenly balanced and as Oberholzer had the onus to establish this, his version in this regard, cannot be accepted over the version of Loots and it must thus be accepted that she managed the Rula project for her own profit.

[43] The next question that arises is how much profit did Loots make on the Rula project? As mentioned, to establish this will be virtually impossible due to the way the accounting side of the Brak-Wasser business was handled. Although Loots attempted to establish that she made a profit of around N\$1 162 000, this clearly did not take into account her tax liability, the amounts paid to Oberholzer, van Blerk and those wrongly paid from Brak-Wasser. It was put to Loots by counsel for Oberholzer that at the time of the acquisition of the Pub & Grill and Erf 172, she had no more than N\$700 000 to contribute and Oberholzer conceded under cross-examination that that might have been the position and also that the correct figure for the profit could have been N\$970 000. In my view, these two figures are more realistic as her profits from the Rula project and they can be accepted based on the concession of Loots to have been N\$970 000. This of course does not mean that she used the whole N\$970 000 in respect of the purchases as she could not dispute the fact that at the time of the acquisition of the business and the erf she had no more than N\$ 700 000 available for such purchases. Furthermore, it is also very clear from the evidence that the last big chunk of the purchase price was paid from money received from Weatherly to reimburse Brak-Wasser for the retrenchment costs it had with the employees when the mine stopped operations. This amount was just over N\$1 800 000. It thus follows that it would be safe to accept that Loots' contribution to the

purchase of the Pub & Grill and the erf amounted to N\$700 000 as she could not indicate any other amount available in any account. This as a percentage of the acquisition costs of N\$2 500 000 amounts to 28 per cent.

[44] As mentioned above in her plea, Loots averred that the Pub & Grill and Erf 172 were purchased by her partly from funds contributed and donated (by Oberholzer) and partly from her own funds. In her evidence-in-chief she broke this down further. She mentioned that the total costs of acquisition amounted to N\$2 553 000 (ie N\$1 500 000 for the Pub & Grill, N\$1 million for Erf 172 and N\$53 000 relating to transfer and legal fees). According to her, she paid a N\$500 000 deposit from her personal savings and at least N\$1 500 000 from the Nampower account. In addition thereto, Oberholzer donated an amount to her, which she stated did not exceed N\$500 000.

[45] In cross examination, she had to concede that she was wrong as to the funds for the total purchase price mentioned above. From the bank statements it was clear that the deposit of N\$500 000 was paid from the Brak-Wasser account as averred by Oberholzer and corroborated by Mrs du Preez. There was no evidence in the bank statements of any donation to her from Oberholzer. She conceded when it was put to her that she deposited around N\$700 000 from the Rula project into her personal account and did not have the money to pay the N\$1 500 000 she said she paid in respect of the acquisitions. Her stance shifted as to the funding and she said 'Mr Oberholzer gave me permission to buy (the Pub & Grill) . . . take whatever I need to

buy so I bought it. I bought it for my pension and me and him was supposed to get married so he would also get to benefit of it' (*sic*).

[46] In April 2016, Ongopolo Mining deposited N\$1 825 000 into the Nampower account. Loots conceded that this was the total retrenchment package Brak-Wasser had to pay to its employees when the mine closed. When it was put to her by counsel for Oberholzer that she directed Ongopolo to pay this amount in the Nampower account she curtly responded 'Yes my Lord we did not want to use the Brak-Wasser'. The upshot of all of Loots' evidence in respect of her averred contributions to the funding of the purchase price for the Pub & Grill and Erf 172 is that she could not provide documentary evidence of any contribution from her side and the probabilities are that, save for the N\$700 000 mentioned above, the total purchase consideration came from Brak-Wasser's accounts. The question that arises is did Oberholzer agree to donate an amount not exceeding N\$500 000 to enable Loots to acquire the Pub & Grill and Erf 172 and the balance of the cost of acquisition came from her own funds or did he, from his own resources and that of Brak-Wasser provide the balance of the funds to give effect to the informal agreement?

[47] In my view, the probabilities clearly favour the version that the funds were provided by Mr Oberholzer pursuant to some agreement between him and Loots. The nature of the agreement and whether it can be said to have been pleaded sufficiently are dealt with herein below. It is clear that Loots did not have sufficient funds of her own to make the purchases and the only donation she pleaded is one

not exceeding N\$500 000. As pointed out it would have taken a far larger donation than that to enable her to acquire the Pub & Grill and Erf 172. She could not identify the payment of the donation to her from the relevant bank statements nor of any payment from her own account or that of the Nampower account directly related to the income from the Rula project to contribute to the acquisition of the Pub & Grill and Erf 172. Accepting that she contributed an amount of N\$700 000 from the Rula project, the outstanding amount was still to be covered by the alleged donation from Oberholzer and there must have been some agreement between her and Oberholzer in this regard.

[48] It must be born in mind that when the Pub & Grill and Erf 172 were acquired it was in the context of the parties still cohabitating as if they were married persons. The undisputed evidence is that the parties got engaged for the second time in 2016 to be married in June 2017. The exact date of the engagement was not mentioned but this is not important in this context. This is because if it was prior to the acquisition, it meant that it was intended that the acquisitions would be used for the benefit of both Oberholzer and Loots. If it was subsequent to the engagement, the acquisitions still meant the same and are also clearly indicative of the belief that the relationship would lead to a marriage and lead to the benefit of both parties. This meant, as Loots stated in this context quoted above, that ‘. . . they were supposed to get married so that he (Oberholzer) would also get to benefit from it’. There was thus no need for any donation from Oberholzer. Whoever owned the acquisitions would utilise it for the benefit of both parties. They each contributed what they had available. N\$700 000 from Loots representing what was left of her profit from the

Rula project and the balance by Oberholzer from the late payment by Weatherly to Brak-Wasser.

What agreement did Oberholzer establish?

[49] The agreement pleaded by Oberholzer in his particulars of claim can be broken up as follows:

- (a) Based on the erroneous assumption that his ex-wife would be able to lay claim to half his assets as they were married in community of property he orally agreed with Loots to establish an informal trust in terms whereof Loots would hold assets acquired by Oberholzer as his nominee/trustee/agent for and on behalf of Oberholzer;
- (b) Oberholzer would acquire assets from time to time from third parties;
- (c) Loots would purchase such assets for and on behalf of Oberholzer as his undisclosed nominee/trustee and such assets would be registered in the name of Loots;
- (d) Loots would have no claim to the beneficial ownership of the assets but would hold it as trustee for and on behalf of Oberholzer;
- (e) Oberholzer would retain right of ownership of such assets and upon the breakdown of the relationship between Oberholzer and Loots, the former would be entitled to the re-transfer of such assets to him.

[50] The underlying assumption which was stated to be the motive for Oberholzer to enter into the averred informal trust agreement was subject to criticism by the judge *a quo* who stated that the evidence established that the motive was to hide assets from his ex-wife so as to avoid his maintenance obligations to his children. Counsel for Loots levelled and still levels the same criticism. Strangely enough Oberholzer was never confronted or challenged on the patent absurdity of the alleged assumption that once married in community of property one would forever, from a proprietary prospective, be joint owner of any property acquired (even after the divorce), to one's spouse or ex-spouse. One wonders what would then happen if such spouse marries again in community of property? Would the new spouse only have a claim to one quarter of the assets, ie one half to ex-spouse and one half of the remaining half (a quarter) to the other spouse? Did this mean Oberholzer could also lay claim to one half of his ex-wife's property as such? This assumption is so patently absurd that one would have thought that this should have been an obvious line of cross-examination or questioning. This however was not done but, what was raised is the fact that the e-mail from Oberholzer's ex-wife never claimed half of his estate but was simply an attempt by her to ensure Oberholzer's maintenance obligations to his children would be complied with. I must say from the evidence it is clear that Oberholzer clearly without any reasonable grounds simply refused to comply with his maintenance obligations which could have been nothing more than a nuisance to him.

[51] As pointed out by counsel for Loots, in an affidavit to the police laying charges against Loots relating to alleged misappropriation of monies from Brak-Wasser, he stated that the informal trust agreement was in place long before he received the

e-mail from his wife. According to him, a vehicle was purchased in the name of Loots pursuant to an agreement which he rented out to Weatherly for use at the mine. Whereas Loots admits that the vehicle was registered in her name and used at the mine, she denied it was registered in her name for the purpose to hide it from any claim by his ex-wife. This evidence of Oberholzer can safely be rejected. There was no claim for alleged maintenance at the time and Loots' explanation that the vehicle was registered in her name out of gratitude for her support during the divorce process of Oberholzer when he worked on and off cannot be disregarded. Further, Oberholzer maintained that the e-mail in April 2016 triggered the discussion between him and Loots which concluded with the 'informal trust' agreement.

[52] What further undermines his alleged erroneous assumption is the fact that he was a joint owner with Loots in respect of their common home and he was the sole member of Brak-Wasser and it did not seem to occur to him that his ex-wife would also be able to claim half of the membership of Brak-Wasser if he really believed that she was entitled to half of his assets.

[53] What however was common cause is that subsequent to the receipt of the e-mail from his ex-wife, he sold the property mentioned by her and paid the proceeds of the sale either to Loots or to Brak-Wasser. One can infer that he discussed this with her and she knew what he was doing and why he was doing it. As he himself testified, this was to keep the property 'away from my ex-wife'.

[54] It must be borne in mind that not long after receipt of the said e-mail, the purchase of the Pub & Grill and Erf 172 arose and it is obvious that the purchase was discussed between Oberholzer and Loots. They viewed it together, negotiated with the seller and as indicated by Mrs du Preez despite her suggestion that they be joint purchasers, Oberholzer instructed her that Loots would be the sole purchaser. It must also be borne in mind that it is clear from what is stated above that Oberholzer through Brak-Wasser would have to pay the bulk of the purchase price in respect of this intended acquisition. It must further be noted that the ex-wife also mentioned in the e-mail that the property could be placed in trust to cover the maintenance claims of the children. The term 'trust' was thus at the back of his mind at the time.

[55] Once it is accepted, as I do above, that Oberholzer paid at least the substantial portion of the purchase price in respect of the Pub & Grill and Erf 172 and taking into account that the e-mail from his wife must have still been fresh in his mind, the only reason for the property acquired not being registered in his name or jointly with Loots was his desire to, out of spite or malice, hide the property from his ex-wife so as to make any potential claims with regard to the maintenance of their children more difficult. No other reason appears from the evidence or was suggested by him. Loots probably knew this and this is why, after their relationship turned sour, she was not truthful as to the funding of these acquisitions. She clearly has a motive not to walk away from the relationship where she helped to build the business of Brak-Wasser and to find herself in a position to receive nothing in return. Furthermore, Oberholzer just walked out on her to move in with his now current wife and this must also have hurt. It must similarly be kept in mind that Oberholzer also had a motive to minimise the role Loots played in the building up of the business of



Brak-Wasser and to deny her any claim to the properties concerned and the regret he must have for allowing her to deal with the finances as she did. He was so upset by what has happened that he even pursued criminal charges against her. The more likely scenario is that the couple intended to acquire the Pub & Grill jointly, but by agreement the share of Oberholzer had been disguised from his ex-wife.

[56] I cannot say that an agreement to put all future acquisitions in the name of Loots was established but I do find that the probabilities establish that there was at least such an agreement in respect of the purchase of the Pub & Grill and Erf 172. Furthermore, I doubt whether there was any discussion about claiming re-transfer if the relationship should fail. At the time there was no reason for Oberholzer and Loots to discuss this and this was clearly not contemplated as they had just recently become engaged or were about to get engaged shortly thereafter for the second time. So I do not accept that this was an express term of their agreement. What is obvious is that this would not be a situation that could prevail despite the dissolution of the relationship. Further, the whole purpose of the agreement had fallen by the wayside as the ex-wife cannot claim half of the estate of Oberholzer and the maintenance obligations flowing from the divorce order is no longer in place as the children involved have all since become adults. The purpose for the 'informal trust' has fallen away and the real position should now prevail.<sup>4</sup>

[57] To conclude in respect of the agreement alleged in the particulars of claim, I find that Oberholzer on a balance of probabilities established that, motivated by the

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<sup>4</sup> In a passive trust where the nominee follows the ownership for the person beneficially entitled to the property, the Trustee is bound to obey instructions of the beneficiary who may bring the agreement to an end whenever he/she chooses to do so (See *Strydom v De Lange* 1970 (2) SA 6 (T)).

desire to conceal the fact that he was the part owner of the Pub & Grill and Erf 172 from his ex-wife so as to undermine any maintenance claim she may have against him on behalf of their children, he entered into an agreement with Loots that she would as an undisclosed nominee/trustee hold for him his share of the acquisition of the Pub & Grill and Erf 172. As the purpose for Loots acting as his nominee has fallen by the wayside he is entitled to seek the re-transfer of his share of the property to him. In stating the above general finding it must be mentioned that it is based on the assumption that it is a valid agreement. It is to this aspect that I now turn.

Informal trust agreement contrary to public policy

[58] The sole purpose of the agreement was to conceal the fact that Oberholzer was the part owner of the Pub & Grill and Erf 172 from his ex-wife so that she would not be able to execute against his share of the property in respect of any maintenance claim she had on behalf of their children. The concealment of the share of Oberholzer to and in the Pub & Grill and Erf 172 would, by necessary implication, also affect any potential creditor of Oberholzer seeking a judgment against him. I have referred to this matter above and can only state that I have little doubt what Oberholzer and Loots agreed to was at the minimum an attempt to perpetuate a fraud against his ex-wife and children and by necessary implication also against potential creditors of Oberholzer. The fact that, on the evidence this concealment did not adversely affect the claim of his ex-wife on behalf of the children or any other of his creditors does not in my view save the contract from invalidity. In *Maseko v Maseko*,<sup>5</sup> (the plaintiff who had two certificates of possession in respect of certain properties in a place known as Soweto bound herself as surety for two purchasers of

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<sup>5</sup> *Maseko v Maseko* 1992 (3) SA 190 (W).

motor vehicles which were financed by Wesbank). These purchasers defaulted in their payments for these vehicles and the possibility arose that plaintiff would be held liable as surety. Plaintiff and the defendant in that matter agreed as follows: They would marry and then transfer the certificates of possession to defendant whereafter they would get divorced and when there was no longer a threat that the certificates of possession might be attached, the defendant would re-transfer the certificates to plaintiff. Despite the fact that Wesbank never claimed from plaintiff based on her sureties, the extent of the plaintiff's potential liability to Wesbank was not established and that there was no evidence that plaintiff was insolvent when the agreement was concluded with defendant. The court per Lazarus AJ dealt with the matter as follows:

'There is no doubt that the purpose of the agreement was to conceal the assets from Wesbank and possibly other creditors, though the mention in the particulars of claim of creditors in the plural was not taken further in the evidence. As far as Wesbank is concerned it seems clear that plaintiff had a potential liability as guarantor but the extent of that liability was not canvassed in the evidence. In fact Wesbank never issued summons against the plaintiff and it may be that arrangements satisfactory to that concern were eventually made by the purchasers. All that can be said on what is before me is that because of a potential liability to Wesbank plaintiff planned or acquiesced that she was insolvent at the time or that the cession to defendant would render her insolvent. This notwithstanding, it seems to me that the scheme was morally reprehensible because it was designed to mislead existing or potential creditors as to the plaintiff's worth. While there is no *fraudem creditorum* without proof of actual prejudice (see *Hockey v Rixom & Smith* 1939 SR 107), it is my view that an agreement designed to mislead creditors is immoral and against public policy even if it has not yet served its purpose (cf *Schuster v Guether* 1933 SR 19).<sup>6</sup>

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<sup>6</sup> *Supra* at 196E-H.

[59] The approach by Lazarus AJ is reinforced in reference to *Moolman*<sup>7</sup> by Smuts JA to the old case of *Eastwood v Sphestone*<sup>8</sup> where Innes CJ indicated that 'What we have to look to is the tendency of the proposed transaction, not the actually proved result'.

[60] Counsel for Oberholzer submitted that as this issue was not raised in the pleadings it should not be dealt with. According to him the full facts were not placed before the court as would have been done had this point been raised in the plea. He points out that it is clear that Oberholzer had sufficient assets to cover the maintenance claim by his ex-wife in respect of their children. He was the joint owner of the property in which he and Loots resided and he was the sole member of Brak-Wasser. There is no evidence of other creditors that would possibly be prejudiced by the 'informal trust' agreement. The problem I have with the submission is the purpose of the agreement is clear, namely to frustrate the maintenance claim on behalf of his children. Oberholzer retained full ownership of the property and could dispose of it whenever he wished and hence Loots was more of a shield against claims from the ex-wife than a nominee/trustee. I thus cannot accept the submission by counsel for Oberholzer that the agreement with Loots amounted to an informal trust that was not intended to have an adverse effect on the maintenance claims of his ex-wife on behalf of their children. This is contrary to the explicit evidence of Oberholzer. The fact that, with hindsight it did not affect his ex-wife and children adversely is neither here nor there. The intention was to keep the property safe against any attachment arising from maintenance claims and as pointed out above such attempt is against public policy. Whereas it is correct that a reliance on illegality

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<sup>7</sup> *Moolman & another v Jeandre Development* 2016 (2) NR 322 (SC) para 66.

<sup>8</sup> *Eastwood v Sphestone* 1902 TS 294 at 302.

must in the normal course be pleaded where such illegality is clear from an agreement or the evidence, a court will not enforce it.<sup>9</sup> In the present case the background to the alleged agreement and its terms were abundantly clear from the evidence of Oberholzer and whether it proved effective or not, did or did not prejudice the maintenance claim against Oberholzer, whether it affected other creditors of Oberholzer or not, and whether he was insolvent or not is of no moment as pointed out by Lazarus AJ in *Maseko*. This is so as it was clear that the purpose was to hide the assets from his ex-wife and hence was morally reprehensible.

[61] It follows that the agreement relied on by Oberholzer is against public policy and hence unenforceable<sup>10</sup>. It is correct that Loots did not raise this as a defence but it is clear from the pleadings and it also emerges from the evidence that it is against public policy and it is thus the duty of this Court to not enforce the agreement and there is nothing to prevent this point from being raised *mero motu*<sup>11</sup> by this Court. This means no order can be given which would amount to the enforcement of the agreement.<sup>12</sup>

[62] This means the only way to deal with this matter is to follow the approach set out in *Jajbhay v Cassim*<sup>13</sup> as endorsed by this Court in *Ferrari v Ruch*<sup>14</sup> and *Moolman*. This allows the court to do simple justice between 'the persons involved' in the unenforceable agreement. As pointed out in *Ferrari* one of the considerations would be whether one of the parties would be unjustly enriched at the expense of the other if relief is not granted. Another factor would be the relative degrees of turpitude

<sup>9</sup> *Moolman* paras 69 and 70.

<sup>10</sup> *Lion Match C. Ltd v Wessels* 1996 OPD 376 at 381 and *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) and *Moolman* at 342.

<sup>11</sup> *Moolman* at 339.

<sup>12</sup> *Moolman* at 341F and 342F.

<sup>13</sup> *Jajbhay v Cassim* 1939 AD 537.

<sup>14</sup> *Ferrari v Ruch* 1994 NR 287 (SC).

attaching to the conduct of the parties in entering into and implementing the particular agreement. What however cannot be done is to grant an order that would amount to indirectly enforcing the agreement. Thus in both *Ferrari* and *Moolman* the claimants were deprived of the interest they would have been entitled to in terms of the invalid agreements. It must be kept in mind that Loots is entitled to 28 per cent of the interest in the Pub & Grill and the same percentage in Erf 172 as she paid for this with her profits from the Rula project.<sup>15</sup>

[63] Oberholzer and Loots lived together for about five years as if they were husband and wife and both contributed their time to the success of Brak-Wasser. In fact Loots' contribution to the success of Brak-Wasser was substantial and vital as she was effectively in charge of the accounting and day-to-day administration of Brak-Wasser. It must be borne in mind that Loots resigned her previous work which affected her pension and medical aid fund benefits to assist Oberholzer in the business of Brak-Wasser. While they were together, the finances of the couple were run for the benefit of them both. Loots acted on the basis that she and Oberholzer would marry and thus was content to make the contributions being under the impression that whatever assets either of them acquire would be for the benefit of both of them. Oberholzer out of malice decided that he would make it as difficult as possible for his ex-wife to get him to pay the maintenance of their children despite the fact that he had more than sufficient funds and sources of funds to pay such maintenance. It was his plan to conceal his assets to basically hassle and irritate his ex-wife and Loots went along with his plan because she laboured under the impression that the plan would not change the reality that she and her future

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<sup>15</sup> If the costs of transfer are added to the purchase price the total costs of acquisition is N\$2 553 000 and Loots interest is marginally reduced to at 27,42 per cent.

husband would use the funds for their mutual benefits irrespective of who the lawful owner of any such assets was. The turpitude of Oberholzer overshadows that of Loots.

[64] The Pub & Grill business has in the meantime closed down as it was not successful and on the evidence its assets consists of some equipment such as freezers. The liquor stock was sold to settle an indebtedness to Spar at Henties Bay. Oberholzer knew that he purchased a business which would be subject to the vagaries of the market which he simply abandoned when he left the common home in January 2017. As he bought the business when it was still operational, a purchase of N\$1 million was representative of a running concern with goodwill and a fully stocked bar. This is obviously not the case at present. No evidence was presented as to the current value of the business but it was put to Oberholzer by counsel for Loots that he may be seeking the return of a business with outstanding debts but this did not deter him from his claim. As the business is dormant and as it was always the intention that the business would be run for the benefit of both Oberholzer and Loots, I am of the view that, to do simple justice between the parties concerned is to direct Loots to transfer 60 per cent of the membership in the business to Oberholzer. If they are of the view that it will be impossible for them to run the close corporation on this basis, one can buy out the other or a third party can be sought to buy out one or the other or they can liquidate the close corporation.

[65] The Pub & Grill was conducted from Erf 172 and the agreement in respect of the Pub & Grill and Erf 172 was indivisible. It is obvious that the Pub & Grill was

purchased with Erf 172 so that the former could conduct its business from the latter. Erf 172 was purchased for N\$ 1 500 000. The value of Erf 172 was not established in the court *a quo* and one simply does not know the current value. However, taking into account that Loots made a contribution of N\$700 000 in respect of the total acquisition costs of just over N\$2 500 000 and the diminishing value of the Pub & Grill as well as the respective degrees of turpitude in respect of the unenforceable agreement, I am of the view that a similar order should be made in terms of Erf 172 namely that Oberholzer should be registered as a 60 per cent joint owner of Erf 172 together with Loots. Once again, if they cannot live with this situation, one can buy out the other, a third party can buy out one of them or they can sell the property and divide the net proceeds *pro rata* their respective interests in the property.

#### Costs

[66] As is evident from what is stated above Oberholzer should have been partially successful in the court *a quo* and on the basis that the costs follow the result he should have been awarded costs in the court *a quo* which made a plain costs order in favour of Loots. No issue was raised with regard to the scale of the costs order and I shall issue a similar costs order in favour of Oberholzer as in the court *a quo*. As far as the appeal is concerned, there was no suggestion that the normal practise that the costs should follow the result should not issue. Oberholzer engaged an instructing legal practitioner and an instructed legal practitioner on appeal whereas Loots was represented by one legal practitioner, as she was in the court *a quo*. I am of the view that the nature and scope of the appeal was such that it cannot be said that it was unreasonable for Oberholzer to engage an instructing and an instructed legal practitioner and I shall thus grant such an order on appeal.



## Conclusion

[67] The appeal succeeds and the judgment of the court *a quo* is set aside and the following order is substituted for the order of the High Court:

- (a) 'Plaintiff's claim succeeds to the following extent:
  - (i) The first defendant is ordered and directed to sign all papers necessary to effect the transfer of 60 per cent of her member's interest in second defendant to the plaintiff within one month of this order.
  - (ii) The cost incurred to effect the transfer of the 60 per cent member's interest shall be borne equally by the parties.
  - (iii) The first defendant is ordered and directed to sign all the papers necessary to reflect the parties as co-owners of Erf 172, Henties Bay (Extention No. 1), in the Municipality of Henties Bay, Registration Division "G", Erongo Region, measuring 998 (nine hundred and ninety eight) square metres, held by Deed of Transfer No. T3048/2013 as follows: plaintiff 60 per cent undivided share and first defendant 40 per cent undivided share. This order and directive must be complied with within one month of this order.

- (iv) The costs incurred to have the plaintiff reflected as the co-owner of a 60 per cent undivided share in the above mentioned property shall be borne by the plaintiff.
  - (v) Should the first defendant fail to comply with paragraphs (a)(i) and/or (iii) of this order, the Deputy Sheriff is herewith authorised to sign on her behalf all the papers necessary to give effect to the said orders set out in the abovementioned two sub-paragraphs.
  - (vi) First defendant must pay the plaintiff's costs of suit.
  - (vii) In respect of the first defendant's counterclaim, the plaintiff must pay to the first defendant the amount of N\$5000 plus interest at the rate of 20 per cent per annum reckoned from 1 April 2022 to the date of payment both days included.'
- (b) First respondent is to pay the costs of the appeal inclusive of the costs of one instructing and one instructed legal practitioner.

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**FRANK AJA**

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MAINGA JA

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HOFF JA

APPEARANCES

APPELLANT:

J A N Strydom

Instructed by Fisher, Quarmby & Pfeifer

FIRST AND SECOND RESPONDENTS: J H Olivier

Of Jan Olivier and Company