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**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**



**CASE NUMBER: 52044/2013**

(1) <u>REPORTABLE: YES / NO</u> (2) <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> (3) <u>REVISED.</u>	
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DATE

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SIGNATURE

In the matter between:

**A. H.**  
**(ID:.....)**

**APPLICANT**

and

**A. H.**  
**(ID:.....)**

**1<sup>ST</sup> RESPONDENT**

**LOSKOP PLASTIEK PYPE CC**  
**(REG NO: CK96/58831/23)**

**2<sup>ND</sup> RESPONDENT**

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**CORAM: DE VRIES AJ**

<b><u>JUDGMENT</u></b>
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1. In this matter the Applicant applies for a final interdict against the 1<sup>st</sup> Respondent, prohibiting her from effecting any payments not authorised by the Applicant from the account of the 2<sup>nd</sup> Respondent.

2. The 1<sup>st</sup> Respondent opposes this Application and brings a counter application in the following terms:

2.1 That *pendente lite* the adjudication of the divorce action between the Applicant and the 1<sup>st</sup> Respondent under case number 6511/2012, both the Applicant and the 1<sup>st</sup> Respondent are interdicted and restrained from disposing or dealing, in any way, with any assets and/or funds of the 2<sup>nd</sup> Respondent, except in the normal day-to-day running of the business, in the absence of the expressed consent of the other;

2.2 That Danie Sauer Auditors, with business address at corner of West-and Cowen Ntuli Streets, Middelburg, Mpumalanga, is requested and authorised to conduct a forensic financial audit on the 2<sup>nd</sup> Respondent and to obtain all information and documents required for the purpose thereof;

- 2.3 The Applicant and the 2<sup>nd</sup> Respondent are ordered to provide all information and documents requested by Danie Sauer Auditors for purposes of the aforementioned audit;
- 2.4 That the costs of the forensic audit be paid by the 2<sup>nd</sup> Respondent;
- 2.5 That the Applicant, should the counter application be opposed, be ordered to pay the 1<sup>st</sup> Respondent's costs.

### **FACTUAL BACKGROUND**

3. The Applicant and the 1<sup>st</sup> Respondent each hold a 50% interest in the 2<sup>nd</sup> Respondent, a close corporation.
4. Divorce proceedings are pending between the Applicant and the 1<sup>st</sup> Respondent.
5. The 2<sup>nd</sup> Respondent conducts a successful business with an annual turnover of R 10 000 000.00 per annum (1<sup>st</sup> Respondent avers that the turnover is R 15 000 000.00 per annum).
6. The day-to-day running of the 2<sup>nd</sup> Respondent is attended to by the Applicant, the 1<sup>st</sup> Respondent not having been involved with the day-to-day running of the 2<sup>nd</sup> Respondent since 2007 due to other business commitments.

7. Both the Applicant and the 1<sup>st</sup> Respondent have signing authority on the bank account of the 2<sup>nd</sup> Respondent.

**THE DISPUTE:**

8. Applicant avers that the 1<sup>st</sup> Respondent drew the following amounts from the account of the 2<sup>nd</sup> Respondent:

8.1	On 11 January 2012	R 15 000.00;
8.2	On 13 January 2012	R 6 000.00;
8.3	On 13 January 2012	R 5 000.00;
8.4	On 19 January 2012	R 10 000.00;
8.5	On 12 March 2012	R 5 000.00;
8.6	On 22 March 2012	R 5 000.00;
8.7	On 25 April 2012	R 5 000.00;
8.8	On 11 May 2012	R 5 000.00;
8.9	On 16 May 2012	R 20 621.00;
8.10	On 6 August 2012	R 5 000.00;
8.11	On 6 August 2012	R 3 000.00;
8.12	On 12 September 2012	R 5 000.00;
8.13	On 22 September 2012	R 5 000.00;
8.14	On 29 September 2012	R 5 000.00;
8.15	On 10 October 2012	R 5 000.00;
8.16	On 2 November 2012	R 5 000.00;
8.17	On 12 November 2012	R 5 000.00;

8.18	On 23 November 2012	R 5 000.00;
8.19	On 4 December 2012	R 30 000.00;
8.20	On 13 December 2012	R 5 000.00;
8.21	On 12 February 2013	R 5 000.00;
8.22	On 9 March 2013	R 5 000.00;
8.23	On 30 May 2013	R 5 000.00;
8.24	On 29 June 2013	R 2 000.00.

9. Apart from these withdrawals, the Applicant complains that the 1<sup>st</sup> Respondent is frustrating the business activities of the 2<sup>nd</sup> Respondent by refusing to sign the 2<sup>nd</sup> Respondent's financial statements or the minutes of meetings. The Applicant further contends that attempts have been made to settle their differences without success.

10.No mention is made by the Applicant of the Respondent's loan account or capital account in respect of the close corporation, indicating that the withdrawals as enumerated were in fact unlawful.

11.The 1<sup>st</sup> Respondent in her opposing affidavit indicates that both the Applicant and the 1<sup>st</sup> Respondent, from time to time, withdrew money as they saw fit for personal expenses and to maintain the children born of the marriage.

12. The 1<sup>st</sup> Respondent further alleges that the Applicant disposes and deals with the assets and funds of the 2<sup>nd</sup> Respondent without her knowledge or consent.

13. With regard to the failure to sign financial statements, the Respondent alleges that she has been denied access to the accounts and records of the 2<sup>nd</sup> Respondent, which she has not had the opportunity of inspecting or verifying.

14. The 1<sup>st</sup> Respondent further alleges that the Applicant transferred funds from the account from the 2<sup>nd</sup> Respondent as follows:

14.1 26 June 2013 R 380 000.00;

14.2 13 September 2013 R 100 000.00;

14.3 30 September 2013 R 500 000.00; and annexes bank statements evidencing these debits against the bank account of the 2<sup>nd</sup> Respondent.

15. In response to the allegation that the Applicant has withdrawn large sums of money from the account of the 2<sup>nd</sup> Respondent, the Applicant in reply alleges that these were simple transfers to another account of the 2<sup>nd</sup> Respondent without annexing any documentary proof of the veracity of his statement.

16.The 1<sup>st</sup> Respondent, in her affidavit, although opposing the Application, states:

"I have no objection to the relief prayed for by the Applicant, being granted, as long as the same relief is granted to me, as holder of the other 50% membership interest in the 2<sup>nd</sup> Respondent."

### **JUDGEMENT**

17.In view of the factual disputes on the papers, the Court would, in the normal course of events, have dismissed the Application and counter-application by virtue of the lack of essential averments to sustain the prayers sought.

18.Section 49 of the Close Corporation Act however enjoins a Court, in the event of allegation of conduct which is unfairly prejudicial, unjust or inequitable to make such an order as is just and equitable with a view to settling the dispute, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.

19.As illustration of the deficiencies in the papers, the counter-claim enjoins the Court to make an order in terms of which a firm of chartered accountants is to carry out a forensic audit, without any

indication on the papers that the said firm is prepared to carry out such an instruction.

20. In order to give effect to what has been set out herein before the Court makes the following order:

20.1 The Applicant and the 1<sup>st</sup> Respondent are prohibited from making any withdrawals from the account of the 2<sup>nd</sup> Respondent, other than in the normal course of business, until adjudication of the divorce under case number 6511/2012;

20.2 The accounting officers of the 2<sup>nd</sup> Respondent must authorise all payments, made pursuant to this order, as being in the normal course of the business of the 2<sup>nd</sup> Respondent;

20.3 The Applicant grants free access to the 1<sup>st</sup> Respondent to the accounting records of the 2<sup>nd</sup> Respondent for perusal by her personally or any accountant nominated by her to do such an inspection on her behalf;

20.4 Each party is ordered to pay their own costs.

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DE VRIES, AJ



JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION,

PRETORIA

Representation for the Applicant:

Counsel                      Adv: C Rip

Instructed by

Representation for respondent

Counsel                      Adv: J J Greef

Instructed by: