

**IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)**

Case No: J 4393/01

Before the Honourable Judge Landman
Judgment delivered on 10 October 2001

In the matter between:

Applicant

and

1st Respondent

2nd Respondent

JUDGMENT

Landman J:

1. The applicant seeks a rule nisi and an interim interdict. The substantive relief sought is as follows:

- (a) That the respondents are interdicted from interfering with the audit to be done at applicant's offices in Nelspruit by an independent auditor;
- (b) The first respondent is interdicted from assaulting or from threatening any member or employee of the applicant or the auditor with assault; and
- (c) Costs

2. Mr Van der Merwe, who appears for the respondents, submits that the applicant seeks a final interdict and therefore the test for such an interdict must be used. A court must look at the substance and not the form when deciding the nature of the relief sought. See **BHT Water Treatment (Pty) Ltd v Leslie and another** 1993 (1) SA 47 (W) at 55B-E. The nature of the relief indicates that a final interdict is sought. I therefore intend to apply the test for such an interdict.

3.The applicant must show that this court has jurisdiction to entertain the matter. The jurisdiction of this court rests on the relationship of the parties. The applicant must show that the two respondents are its employees as defined in s 213 of the Labour Relations Act 66 of 1995 (the LRA).

4.The respondents were and are members of the applicant close corporation. The members of the close corporation concluded an agreement of association between themselves and the close corporation on 5 February 2000. They agreed:

“Die lede van die bk. is almal werkende lede wat geregtig is vir alle voordele soos hieronder genoem.

Indien ‘n werkende lid is nie sy ooreerkoms nakom as werkende lid nie, sal die ander lede van die bk. hom voor die bk. lede daag vir ‘n verduideling van sy of haar optrede en indien so ‘n lid skuldig bevind word, hy ‘n skriftelike waarskuwing gaan ontvang. Indien so ‘n persoon hom weer skuldig maak aan dieselfde wan optrede hy weer gedaag gaan word voor die lede en dan sy laaste waarskuwing gaan ontvang. So ‘n lid sal dan as ‘n niwerkende lid verklaar word en sal dan van sy voordele onthef word.

...

Bk. lede of nie lede se salarisse sal in ‘n vergadering bespreek word vir ‘n aanpasbare inkomste.”

5.Various benefits were paid to “werkende lede” by the close corporation. These overlap with benefits which are paid to an employee. But the intention of the parties was not to bring about a relationship of employer and employee. The intention of the parties was to regulate a relationship between them inter se and that of the close corporation approximately to a partnership agreement. See H S Cilliers et al **Close Corporations: A comprehensive guide**:

“4.01 An association agreement may be described as a written agreement between members of a close corporation regulating the internal relations between them inter se and between them and the close corporation. Although it is advisable to enter into an association agreement it is not a prerequisite for the formation or running of a close corporation. By utilising an association agreement the necessary flexibility, tailored to the needs of the particular undertaking, can be obtained. In the absence of such an agreement the provisions of the act regarding internal relationships and management would apply.

4.03 The association agreement should be seen as a document performing the following functions:

It serves the purpose which the articles of association normally serves in the private company, namely to state the procedures to be adopted in the administration of the corporate body.

It deals with matters normally dealt with in a partnership agreement, particularly matters relating to financing the business, grounds for terminating membership, taking over of the interests of a retiring member, restraints on retiring members, valuation of a retiring member's interest, etcetera.

It deals with matters which are dealt with in shareholders' agreements, such as the division of powers in the corporation, the designation of representatives of the corporation, the percentage profit sharing and matters of policy."

6.The respondents were suspended as members but later reinstated. Although the applicant had put in place contracts of employment between the close corporation and the members, this occurred before the respondents were reinstated. The respondents did not attend the meeting where this was accepted. They have not accepted any such contract and must be treated as members of the close corporation. This is not a matter concerning employees but the protection of members of the close corporation.

7.In the result the application is dismissed with costs.

Signed and dated at BRAAMFONTEIN this 26th day of October 2001.

A A Landman

Judge of the Labour Court of South Africa