NOT REPORTABLE

CASE NO. A 275/11

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ETALE HOLDINGS (PTY) LTD	**1st APPLICANT**
ETALE FISHING COMPANY (PTY) LTD	**2nd APPLICANT**

and

THE MINISTER OF FISHERIES AND MARINE RESOURCES, NAMIBIA	**1st RESPONDENT**
THE PERMANENT SECRETARY, alternatively THE ACTING PERMANENT SECRETARY, OF THE MINISTRY OF FISHERIES AND MARINE RESOURCES, NAMIBIA	**2nd RESPONDENT**
OZOHI FISHING COMPANY (PTY) LTD	**3rd RESPONDENT**
OMPAGONA FISHING COMPANY (PTY) LTD	**4th RESPONDENT**
EHANGA HOLDINGS (PTY) LTD	**5th RESPONDENT**

CORAM: **CORBETT, A.J**

Heard on: 8 November 2011
Delivered on: 10 November 2011

JUDGMENT

CORBETT, A.J: .

[1] In 1999 Northern Fisheries Industries (Pty) Ltd and Ozohi Fishing Company (Pty) Ltd ("Ozohi"), Ompagona Fishing Company (Pty) Ltd ("Ompagona") and Ehanga Holdings (Pty) Ltd ("Ehanga") concluded a written agreement". The purpose of the agreement was that such companies (referred to in the agreement as "concessionaries") would pool their hake wet fish quotas so as to share in the economies of scale and other benefits to be derived from the rationalisation of their catching, processing and marketing efforts. In order to give effect to this purpose, Etale Holdings (Pty) Ltd ("Etale Holdings"), the first applicant in these proceedings, was incorporated in 2004. This company in turn holds all the shares in Etale Fishing Company (Pty) Ltd ("Etale Fishing"). Etale Holdings authorized Etale Fishing to conduct the fishing, processing and marketing on behalf of Etale Holdings, Ozohi, Ompangona and Ehanga.

[2] The current fishing season commenced on 1 May 2011 and will continue until 30 April 2012. The harvesting of marine resources in terms of section 39 of the Marine Resources Act, No. 27 of 2000 ("the Act") is subject to a quota being granted by the Minister of Fisheries and Marine Resources ("the Minister") limiting the quantity of fish that may be harvested during the fishing season by any rights holder . Section 32 (3) of the Act provides that no person may use any vessel to harvest any marine resources for commercial purposes except in terms of a licence issued in terms of section 40 (3) of the Act.

[3] On 7 October 2011, applications were made in terms of section 40 (1) of the Act for the licencing of fishing vessels MFV Etale Bounty and MFV Twafika, to be used by the quota holders Ompagona and Ehanga. When the Minister had as of 1 November 2011 not issued licences for these vessels pursuant to the applications, this application was launched as a matter of urgency. Etale Holdings and Etale Fishing seek a *mandamus* in terms whereof the Minister be directed and ordered to adjudicate, in terms of the Act, upon the applications so lodged by no later than close of business on 11 November 2011. The Minister and the Permanent Secretary oppose the application, whilst Ozohi, Ompagona and Ehanga do not do so.

[4] Mr Barnard, who appeared on behalf of the applicants, submitted that the Minister is entrusted with the statutory duty to consider and adjudicate upon

applications for licences, and in so doing, must adjudicate applications within a reasonable time. [1]

[5] Mr Ndlovu who appeared on behalf of the Minister and the Permanent Secretary raised two points *in limine*, more particularly that the applicants lack the necessary *locus standi* to bring the application, and that the applicants have not made out a case for urgency as contemplated by Rule 6 (12) of the Rules of Court. The parties did not request that the *in limine* issues be argued separately and accordingly argument was heard on these issues, together with the merits.

[6] In this judgment, I deal at the outset with the first point *in limine*. *Locus standi* involves the question of whether a person who approaches the Court for relief has a right to do so. Consideration has to be given to whether a party enforcing a legal right has a sufficient interest in the relief claimed. [2] It is often so that a person who has an interest in the relief claimed may, this interest notwithstanding, not be able to claim the relief if the claim is not based upon a legally enforceable right. [3]

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[1] Otjozondu Mining (Pty) Ltd v Minister of Mines and Energy and Another, 2007 (2) NR 469 (HC), at 473G, where Heathcote A.J stated: "*The applicant is entitled to have its application considered within a reasonable time. In terms of the common law, where a duty lies on an administrative authority to perform some or other action, the authority cannot refuse or fail to do so. Any such refusal or failure to act within a reasonable time would allow a person affected to bring an application for a mandamus to force the authority to act.* See: J R de Ville, JudicialReview of Administrative Action in South Africa." Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another, 2009 (1) NR 277 (HC), at 288 H: "*In my view the prejudice for the respondents and other persons or institutions interested in obtaining exploration rights are obvious. The Act and the object thereof, as referred to earlier herein, require that there should be finality within a reasonable period …*"

[2] Gross and Others v Pentz, 1996 (4) SA 617 (AD), at 632 C - F

[3] Cabinet of the Transitional Government for the Territory of South West Africa v Eins, 1988 (3) SA 369 (AD), at 388 E - I

[7] In advancing the applicants' case that they indeed have *locus standi* to bring this application, reliance was placed upon the provisions of the "pooling" agreement referred to earlier. Clause 3.4 of the agreement provides that the concessionaries each hold a right of exploitation to catch wet fish hake and desire to pool their quotas. Further reliance is placed on clause 3.5.4 of the agreement where it stated that "*the concessionaries will each grant Etale the right to utilize their respective concessions*". Clause 4.2 further provides that: "*The sole purpose of Etale will be to conduct fish catching, processing and marketing operations pursuant to this agreement*". Clause 8.1 authorizes Etale for as long as the concessionary holds a concession to catch the fish that the concessionary is from time to time entitled to catch in terms of the quotas awarded to it. Finally, reliance is placed on clause 18 of the agreement which deals with the obligation imposed upon the parties to co-operate with one another with the utmost good faith to give full effect to the intents and purposes of the pooling agreement and not to do anything which might prejudice or detract from the rights, property and interests of any one of the concessionaries. In short, so it is contended, because the applicants and the concessionaries are contractually bound by the pooling agreement to pool their resources and co-operate in the manner referred to, these contractual arrangements clothe the applicants with *locus standi* to bring this application.

[8] The Minister counters the submissions by stating that he has no relationship whatsoever with the applicants and owes them no obligations in terms of the Act. It is contended that the applicants have no legal right to seek to enforce the rights of Ompagona and Ehanga, and accordingly lack the necessary *locus standi* to do so.

[9] In regard to the licencing of fishing vessels under the Act, section 40 provides that:

> "**40(1) The holder of a right or an exploratory right or a person nominated under section 35(2) who wishes to use a fishing vessel for commercial purposes in Namibian waters or a person who wished to use a Namibian flag vessel for harvesting any marine resource outside Namibian waters shall apply for a licence to the Permanent Secretary in the manner prescribed.**
>
> **(2) A licence to use a fishing vessel to harvest a marine resource shall only be valid if the licencee holds a right or an exploratory right for that resource, and if a quota has been allocated, holds a quota for that resource.**

> **(3) The Minister may, upon application by a person referred to in subsection (1), issue a licence to that person in respect of a fishing vessel, authorizing such activities, subject to such conditions and valid for such period, as the Minister may determine and state in the licence.**"

[10] In the founding affidavit, Mr Kathindi, the Managing Director of Etale Fishing, states:

> "**I am also a director of fourth and fifth respondents (*i.e Ompagona and Ehanga)*. In this capacity I have been mandated, in terms of a written authority, to attend to the licencing of fishing vessels on behalf of such respondents, since the year 2002. I have since then accordingly, and until now, attended to and signed the various applications for licences on behalf of the third, fourth and fifth respondents.**"

This statement underlines that, on the applicants' version, the authority to apply for the fishing vessel licences, is derived from Mr Kathindi's written mandate, as a director of both Ompangona and Ehanga, as opposed to any mandate he may have obtained from the applicants. Significantly he makes no reference to his authority being derived from the pooling contract. This statement evidences a recognition on the part of Mr Kathindi that it is the rights holder – in this case

Ompagona and Ehanga – as holders of the hake wet fish quotas that are entitled in terms of section 40 (1) of the Act to apply to the Permanent Secretary to licence specific fishing vessels to be used for commercial fishing purposes.

[11] It was on this basis that the licences were applied for in respect of the fishing vessels "Etale Bounty" and "Twafika". The documents in both applications are annexed to the founding papers. The covering letters to the applications are signed by Mr Kathindi on behalf of Ompagona and Ehale respectively. The applicants are identified in both letters and in the application forms as being Ompagona and Ehale. Significantly the application form requires that where reference is made to the applicant this must be to "*the name of the right holder … if the fishing vessel is to be used in terms of a right …*". The applicants' names do not feature anywhere in either of the applications lodged in terms of section 40 of the Act for the licencing of the vessels.

[12] Later on the Mr Kathindi's affidavit he states in contradictory fashion:

> "**I, in my capacity as <u>managing director of each of the applicants</u>, and as director duly authorized to do so on behalf of Ompagona and Ehanga, applied to the Permanent Secretary of the Ministry for the vessels Twafika and Etale Bounty to be licenced to respectively Ehanga and Ompagona, the latter two concessionaries who both**

hold quotas for the harvesting of hake for the period ending 30 April 2012."

[13] I am constrained to conclude that the statement that Mr Kathindi acts not only on behalf of Ompagona and Ehanga in applying for the licences, but also in his capacity as managing director of the applicants, comes as something of an afterthought and is self-serving. He needs to make this allegation because of the discord that has arisen between the applicants and the third to fifth respondents relating to the non-payment of quota levies to the Minister and usage fees to the concessionaries. These disputes call in question the authority that Mr Kathindi might have been clothed with to act on behalf of Ompagona and Ehanga. In view of the approach I take in this matter, it is unnecessary to deal with these factual allegations.

[14] It follows that, should the applicants for a licence in terms of section 40 of the Act – *in casu* Ompagona and Ehanga – be concerned about the delay in the adjudication of the applications for licences by the Minister, it is these corporate entities which possess the necessary *locus standi* to bring this application for a *mandamus* against the Minister.

[15] That is not the end of the matter. The central thrust of the applicants' argument on *locus standi* was that the applicants' claim to standing derives from the contractual purpose and the mutual obligations arising out of the pooling

agreement. In effect, although it was not characterized by Mr Barnard precisely in these terms, the applicants contend that their *locus standi* is based upon derivative rights they enjoy in terms of the pooling agreement which secure for them usage fees and other benefits.

[16] The matter of *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communications and Others, 2000 NR 1 (HC),* to which I was not referred in argument, is instructive in this regard. The applicants in that matter brought an application to review and set aside a tender award. The facts were that in terms of an agreement between International Construction and the applicants, in the event of International Construction being awarded the tender, the applicants would then be called upon to render services to International Construction in building and erecting the Government Office Park. The applicants would then have been entitled to professional fees relating to work done and for future work to be done, until the completion of the tender. There was accordingly a pooling of their resources in order to benefit from the tender, should the tender be awarded to them. These facts find resonance with the facts of this matter, where resources are to be pooled for the exploitation of fishing rights should quotas be allocated to the concessionaries by the Minister.

[17] In the *McNamara* matter it was argued by the respondents that the applicants did not have a direct and substantial interest in the subject-matter of the proceedings and thus the Court should not entertain their claims. In

considering the issue, Strydom, JP (as he then was) referred to the case of *United Watch and Diamond Company (Pty) Ltd and Others v Disa Hotels Ltd and Another, 1972 (4) SA 409 (C), at 415 F – H* where the following was stated by Corbett, J (as he then was):

> "**In *Henri Viljoen (Pty.) Ltd. v. Awerbuch Brothers,* 1953 (2) S.A. 151 (O), Horwitz, A.J.P. (with whom Van Blerk, J., concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) … an interest in the right which is the subject-matter of the litigation and …not merely a financial interest which is only an indirect interest in such litigation'. This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions … and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court.**"[4]

[18] The *United Watch and Diamond Co.* case, *supra*, concerns the rights of sub-tenants to intervene in proceedings where the tenant's rights were in issue. In this regard the Court stated further at *417 B – C:*

[4] At 7 d - F

> "**The sub-tenants' right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The sub-tenant, in effect, hires a defeasible interest. (See *Ntai and Others v. Vereeniging Town Council and Another,* 1953 (4) S.A. 579 (A.D.) at p. 591). He can consequently have no direct legal interest in proceedings in which the tenant's continued right of occupation is in issue, however much the termination of that right may affect him commercially and financially.**"

[19] Further reference was made in the *McNamara* decision to *Wistyn Enterprises (Pty) Ltd v Levi Strauss Co. and Another, 1986 (4) SA 796 (T)* where Ackermann J found that the right of a registered user of a trademark is also a derivative right because it is essentially the right to use a proprietor's trademark. At *803 H - J* the following was said:

> "**As already pointed out a third party with a derivative right may have a substantial financial interest in the right of his *auctor* which will be adversely affected if his *auctor's* right is cancelled or declared to be non-existent. This fact, as well as the fact that the third party may or may not have a right to claim damages against the *auctor* who sits by and allows his right to be extinguished, does not make of such**

third party, with a mere derived right, a person who has to be joined in the proceedings. There are disadvantages which the registered user may suffer. These are no different, in my view, from the disadvantages which any party with no more than a derived right might suffer under comparable circumstances.

At *804 D – E* the Court concluded that:

"**The conclusion I reach is that the registered users of the trade marks in question, while they may have a substantial financial or commercial interest in the present application, do not have a legal interest in the subject-matter of the application of a nature which necessitates their being joined in these proceedings.**"

[20] In the *McNamara* case the Court accordingly concluded as follows[5]:

"**Mr *Levin* also referred the Court to the agreements between IC and the various applicants but these agreements, in my opinion, further underline the fact that the applicants would acquire, *vis-a-vis* IC, the right to render services to IC and to be remunerated by IC only if the tender was awarded to IC. In my opinion their rights are derivative and dependent on IC acquiring the right to build the office complex. As such their interest in the proceedings is financial and they lack**

[5] At 9G – 10B

> **sufficient and direct interest in the subject-matter of these proceedings. I think this is also evident from the relief claimed by the applicants. The relief claimed by them is really for and on behalf of the contractor IC which relief, if granted, would then indirectly be to their advantage as well. … For purposes of *locus standi* they labour under the same disqualification namely, their rights being derivative, they lack a direct interest which would be required in order to give them standing in the present application".**

[21] I respectfully agree with the conclusions reached in this judgment and the authorities to which reference is made. I find that the applicants have no more than derivative right to the relief sought. Their interests are to be derived from the contractual arrangements between the applicants and the concessionaries *inter se.* They constitute no more than financial interests in the usage fees and other benefits to be derived from the pooling agreement, should quotas be allocated to the concessionaries and should Ompagona and Ehale be granted licences for their fishing vessels to catch hake. The rights holders are Ompagona and Ehale and it is these entities that are clothed with *locus standi* to bring this application for a *mandamus*, but chose not to do so.

[22] It is trite that if an applicant has no *locus standi* to bring the application, urgency is not shown. [6] In the light of the conclusion which I reach on the issue of

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[6] Moleko v Minister of Plural Relations and Development and Another, 1979 (1) SA 125 (T), at 129 H – 130 A, quoted with approval in Clear Channel Independent Advertising (Pty) Ltd and Another v TransNamib Holdings Ltd and Others, 2006 (1) NR 121 (HC), at p. 140, para [52]

locus standi, it is unnecessary to deal with the further issues raised by counsel in argument.

[23] As a result, I make the following order:

[23.1] The application is dismissed with costs.

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CORBETT, A.J

ON BEHALF OF THE APPLICANTS: Adv. T A Barnard
Instructed by Koep & Partners

ON BEHALF OF THE 1st and 2nd RESPONDENTS:	Mr M. Ndlovu *Instructed by The Government Attorney*