



SUMMARY
REPORTABLE

CASE NO.: A 209/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**REMA TIP TOP NAMIBIA (PTY) LTD AND OTHERS v SEPP
THALMAIER AND OTHERS**

PARKER J

2011 March 17

Company Law - Jurisdiction - Second respondent challenging jurisdiction
of

the Court over him on account of the second respondent being resident and domiciled in South Africa - Court finding that the first applicant is a Namibian company in terms of the Companies Act (Act 61 of 1973 (as amended), the second respondent is a director of the first applicant, the application relates to allegations of second respondent's breach of fiduciary duty towards first applicant and the relief claimed is limited to Namibia - Consequently, Court finding that the second respondent is subject to the jurisdiction of the Court in the instant proceedings -Accordingly, Court dismissing second respondent's preliminary objection.

Company Law - Notice of motion - Application launched by artificial

person

(a company (first applicant)), a natural person (second applicant), and third applicant (a close corporation) -

Respondents challenging locus standi and authority of applicants to bring the application - Court accepting respondents' contention that in the absence of an unanimous resolution of the shareholders made by voting in general meeting in terms of a clause in the shareholders agreement relating to first applicant, applicants lack locus standi and authority to launch application - Furthermore, Court rejecting applicants' reliance on the doctrine of 'derivative' action (or 'application') as clothing second applicant with authority to bring application - Court reasoning that the company on whose behalf the second applicant purports to act is the first applicant but that company has not been joined and cited as a respondent.

Held, where a legal persona applicant on whose behalf a natural person applicant purports to act is a company that company must be cited and joined as a respondent.

CASE NO.: A 209/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

REMA TIP TOP NAMIBIA (PTY) LTD

1st Applicant

SEPP MATHIAS ROM

2nd Applicant

ROMTEETZ INVESTMENTS CC

3rd Applicant

and

SEPP THALMAIER

1st Respondent

THORSTEN WACH

2nd Respondent

STAHLGRUBER OTTO GRUBER AG

3rd Respondent

NENANA MANAGEMENT SERVICE (PTY) LTD

4th

Respondent

CORAM: PARKER J

Heard on: 2010 March 29; 2010 September 16; 2011 February 9

Delivered on: 2011 March 17

JUDGMENT

PARKER J: [1] In this application the applicants, represented by

Mr Heathcote SC, assisted by Mr Dicks, have moved the Court by notice of motion for an order in terms contained in the notice of motion. Affidavits of the

second applicant, inter alios, were used in support of the application. The respondents (i.e. the first, second and fourth respondents) have moved to reject the application; and in that behalf the first respondent and the second respondent (the managing director of the fourth respondent) filed opposing affidavits. In his affidavit, the second respondent, represented by Mr Graves SC, has raised preliminary objections, including the question of jurisdiction of this Court to the effect that he is 'a resident of, and domiciled, in the Republic of South Africa from where I conduct all of my business dealings for the Rema Tip Top group of companies which includes - (significantly and unwittingly, I must say) - RTT Namibia, and Rema Tip Top South Africa (Pty) Ltd ('RTT South Africa'). That being the case, so the objection goes, 'The applicants have not taken any steps to clothe this Court with the necessary jurisdiction to grant the orders sought in prayers 2 and 3 of the notice of motion.' The second respondent concludes, 'In the absence of any prospect of the orders sought in prayers 2 and 3 being effective there is, I submit, no basis for this Court to assume jurisdiction in respect of me whilst I am resident and domiciled in the Republic of South Africa.

[2] The other preliminary objection properly so called challenges the locus standi and authority of the first applicant to launch the application. That is to say; according to the second respondent, in the second applicant's founding affidavit the second applicant 'alleges that he was authorized to launch this application against Thalmaier (the first respondent) in terms of a resolution of the board of directors of RTT Namibia (the first applicant) of 11 March 2009 ... Significantly Rom (the second applicant) does not allege that he is authorized by the first applicant to represent it in this application against me, Stahlgruber (the third respondent) and Nenana (the fourth respondent).' As respects this point,

the first respondent, represented by Mr Totemeyer SC, makes common cause with the submission made on this point by counsel for the second respondent in counsel's heads of argument.

[3] I shall treat the preliminary objection on the question of jurisdiction first and after that the preliminary objection on locus standi and authority because a determination of these objections may be dispositive of the application.

[4] The applicants content that this Court has jurisdiction to grant the relief sought against the respondents. Mr. Heathcote argues as follows. The first applicant is a Namibian company, and it is registered and incorporated in Namibia in accordance with the provisions of the Companies Act, 1973 (Act 61 of 1973, as amended). It has its principal place of business in Namibia, and its management is situated and conducted in Namibia. Furthermore, it is not in dispute that at all relevant times hereto the second respondent was a director of the first applicant in Namibia. Counsel submitted further that the second respondent breached and continues to breach his fiduciary duty to the first applicant, *inter alia*, in Namibia; and the relief claimed by the applicants is limited to Namibia. Counsel concluded that in virtue 'of the foregoing the second respondent was subject to the jurisdiction of this Court; and finally, it is common cause that this Court has jurisdiction over first respondent.'

[5] In support of his submission counsel referred to the Court a number of South African cases on the point. I have visited those authorities, but I have decided that it is safer to apply the Namibian case of *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC) only; not least because it is a Supreme Court decision, but also one does not need to embark on an excursion of

conceptualization to comprehend the term 'domestic companies' as it applies to Namibia. When the South African cases speak of 'domestic companies'; the question is: is it 'domestic' *qua* the State of South Africa in relation to foreign States or 'domestic' *qua* a Province of South Africa in relation to other Provinces of South Africa?

[6] Be that as it may, having considered Mr Heathcote's submission and the second respondent's contentions in the light of the interpretation and application of the provisions of s. 16 of the High Court Act, 1990 (Act No. 16 of 1990) to which Mr. Heathcote drew my attention and upon the authority of *Mahe Construction (Pty) Ltd v Seasonaire* supra, I have come to the conclusion that the second respondent is subject to the jurisdiction of this Court. The preliminary objection respecting the Court's jurisdiction therefore fails.

[7] I now proceed to determine the preliminary objection that the applicants lack locus standi and authority to launch the present application. The first and second respondents aver that the first applicant lacks authority and has no locus standi to bring the present application. It is trite, so Mr Totemeyer says - and I accept the point of law contended by counsel - that an applicant which is a legal persona bears the onus of proving that an application is duly authorized when such authority is challenged (*Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799 (HC) at 805F-806C and the cases there reviewed and relied on). In this regard, I find that the first and second respondents have properly challenged the authority of the applicants to launch the present application. In that event upon the authorities, e.g. *National Union of Namibian Workers v Naholo* 2006 (2) NR 659; *Wlotzkasbaken Home*

Owners Association v Erongo Regional Council supra, the second applicant bears the burden of meeting the challenge by placing sufficient evidence before the Court that he or she has such authority.

[8] Counsel submitted that legal representatives could not have been appointed 'to prosecute such proceedings' because of the absence of an unanimous resolution of the shareholders made by voting in general meeting in terms of clause 11, read with clause 11.1.17, of the shareholders agreement (Annexure 'SR4B' to the second applicant's affidavit). In buttressing their argument counsel submitted further that from the proceedings of the meeting of the board of directors of 11 March 2009 it is indisputable that the first applicant was not authorized to institute proceedings against the second respondent. I accept counsel's submission. It is clear from 'Resolution 2' (being a part of Annexure 'SR42' to the affidavit of the second applicant) that no valid resolution was made that could possibly clothe the applicants with authority to institute proceedings against the second respondent.

[9] In an attempt to meet the challenge respecting locus standi and authority to bring the proceedings against the second respondent and having realized that the reliance on 'Resolution 2' could not succeed, the second applicant then says he relies on the doctrine of 'derivative action' ('application') in the following terms:

'I also launched the application on behalf of the first applicant against the first and second respondents derivatively, in my own name and on behalf of the third applicant who authorized me to do so.'

Mr Graves's response thereto in submission is that the second applicant who is a member of the third applicant has no right himself to proceed derivatively. Counsel goes on, 'Furthermore, the company on whose behalf the second applicant purports to act is the first applicant. The first applicant should have been cited and joined as a respondent.'

[10] I accept counsel's submission that 'the first applicant should have been cited and joined as a respondent' in order to sustain derivative proceedings; that is to say, the first applicant must be made a respondent in the present application (*Gower, Principles of Modern Company Law* : p.

590; *Beattie v Beattie Ltd* [1938] Ch. 708 at 718 (CA); *Spokes v Grosvenor Hotel* [1897] 2 QB 124, cited with approval by Mathews J in *Desai v A H Moosa (Pty) Ltd* 1932 NPD 157 at 159, also relied on by LAWSA First Reissue, Vol. 4, Part 2: para 205). The first applicant has not been made a respondent in this matter. It follows reasonably and inevitably that I should uphold the point *in limine* on locus standi and authority. Accordingly, I find that the applicants lack locus standi and authority to bring this application. I hasten to add that this holding is dispositive of the present application. Therefore it would make no sense to treat any other issues. For the foregoing, I hold that there is no application properly before the Court.

[11] In the result I make the following order:

The application is dismissed with costs, including costs consequent upon the employment of one instructing counsel and one instructed counsel; in favour of -

- (i) the first respondent;
- (ii) the second and fourth respondents.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANTS:

Adv. R Heathcote SC
Adv. G Dicks

Instructed by:

H D Bossau & Co.

COUNSEL ON BEHALF OF THE FIRST RESPONDENT:

Adv. R Totemeyer SC

Instructed by:

LorentzAngula Inc.

COUNSEL ON BEHALF OF THE SECOND AND FOURTH RESPONDENT:

Adv. N J Graves SC

Instructed by:

LorentzAngula Inc.