CASE NO.: A 297/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THEOPHILLIS MOFUKA	APPLICANT
and	
DAVID ABRAHAM SHIKWAMBI	1ST RESPONDENT
REMEGIUS TANGENI NAKALE	2ND RESPONDENT
PEGMATITE DIAMOND & FISHING (PTY) LTD	3RD RESPONDENT
KELLER & NEUHAUS TRUST COMPANY (PTY) LTD	4TH RESPONDENT

CORAM: MILLER, AJ

Heard on: 22-23 November 2011; 02 December 2011; 13 March 2012

Delivered on: 23 May 2012

JUDGMENT:

MILLER, AJ: [1] The applicant and the first respondent were at the relevant times the shareholders and directors of the third respondent, which in turn is a private limited liability company.

[2] The relationship between the applicant and the first respondent is anything but harmonious. Added to that is the fact that it would appear from the papers that their understanding of corporate governance, and the duties of directors and shareholders are at times lacking.

[3] The upshot of all this is that they became embroiled in litigation of which this is for the present or least, the latest in time.

[4] A convenient starting point in the history of the litigation between the applicant and the first respondent is the application filed by the applicant on 18 April 2008. In that application the applicant obtained the following order against the first respondent:

"

1. That the Court condones the non-compliance with the forms and service provided for by the Rules of this Court and the Application is heard as one of urgency as contemplated by Rule 6(12) of the Rules of the above High Court;
2. By agreement between the parties the Rule Nisi is discharged;
3. By agreement between the parties the First Respondent retracts his purported decision of 27 March 2008 to terminate the Applicant's appointment as director of the Third Respondent;
4. By agreement between the parties the First Respondent retracts his purported decision of 27 March 2008 to terminate the Applicant's shareholding in and to the Third Respondent;
5. That the First Respondent undertakes not to in any way whatsoever interfering with the Applicant's rights as director of the Third Respondent, to participate in the day to day management of the Applicant;

6. That the First Respondent undertakes not to in any way whatsoever interfering with the Applicant's rights as shareholder of the Third Respondent and in particular to desist from selling, disposing of, encumbering or in any manner whatsoever deal with any shares held by the Applicant in the Third Respondent.
7. That the First Respondent undertakes not to in any way whatsoever alter and/or take any decision or cause the Third Respondent from taking any decision to alter the Third Respondent's register of directors or share register;
8. That the First Respondent undertakes not to in any way whatsoever take any decision or cause the Third Respondent from taking any decision to alter its authorised or issued share capital or from issuing and/or allotting and/or selling any shares in the Third Respondent to any third party;
9. That the First Respondent undertakes not to in any way whatsoever sell, dispose of, encumber, cede, assign, transfer or make over any right in and to Exclusive Prospecting Licence numbers 3768, 3771, 3832, 3833, 3834, 3835, without approval of all directors of the Third Respondent at a directors meeting;
10. That the First Respondent undertakes not to in any way whatsoever take delivery of any monies due to the Third Respondent in terms of any existing agreement with any third party or agreement which may be entered into with any Third Party, whether by cheque, bill of exchange, promissory note or other legal payment;
11. That the First Respondent undertakes not to in any way whatsoever deposit any monies of the Third Respondent into his own personal account or any other account other than that of the 3rd Respondent;
12. The undertakings by the First Respondent in Par. 2.3 to 2.9 shall remain valid pending the:

12.1 the finalization of an action to be instituted by the Applicant for and on behalf of the Third Respondent against the First Respondent for the recovery of the amount of N$300,000.00 being monies belonging to the Third Respondent and which the First Respondent unlawfully appropriate for himself;

12.2 The finalization of an action by the Applicant for the rectification of the share register of the Third respondent so as to reflect the applicant a 50% shareholder of the Third Respondent.

13. Costs to stand over until the matter is finalized."

[5] The action contemplated in paragraphs 12.1 and 12.2 of the abovementioned order was duly instituted under Case Number I 2157/2008 on 08 July 2008. That action is still pending before this Court. That action concerns a claim *inter* alia against the first respondent for the repayment of certain monies allegedly received on behalf of the third respondent, which never found its way into the books of the third respondent.

[6] On 10 October 2008 the applicant obtained an order for the appointment of Adv. Schimming-Chase as a provisional *curator ad litem*. The order reads as follows:

"

IT IS ORDERED:

1. That Advocate Essie, Malaika Schimming-Chase is hereby appointed as provisional *curator ad litem* in terms of section 266 of the Companies Act, Act 61 of 1973 (amended) for the Third Respondent against David Abraham Shikwambi for the recovery of monies due, owing and payable to the Third Respondent and unlawfully misappropriated by the said David Abraham

Shikwambi during the period 4 August 2006 to 6 October 2007 and for such other relief as she may deem necessary.

2. That the provisional *curator ad litem* is directed to conduct such investigations as she might deem necessary and to report to the above Honourable Court on a date to be determined by the Registrar of this Honourable Court, on the question of the desirability of the institution of the proceedings referred to. In particular, the provisional *curator ad litem* is expressly granted the powers of an inspector in terms of section 267 as read with section 260 of the Companies Act, Act 61 of 1973 (as amended) and in particular but not limited to:

   2.1 summons any director, officer, employee, member or agent of the Third Respondent to appear before her at a time and place specified in such summons to be interrogated or to produce any book or document so specified.

   2.2 administer an oath or accept an affirmation from any person appearing before her in pursuance of a summons, and to interrogate such person and require him/her to produce any book or document.

   2.3 retain for examination any book or document produced to her in pursuance of a summons for a period not exceeding two months or for such period of periods as the Registrar of this Honourable Court may on good cause show and permit."

[7] The order was discharged on 6th July 2011 following the report prepared and delivered by the *curator ad litem* on 15 June 2010.

[8] Come to 22nd of November 2011 the applicant once more approached this Court for an order in the following terms:

"

PART A:

1. Condoning the Applicant's non-compliance with the forms and service provided for by the Rules of the above Honourable Court and hearing this application as one of urgency as contemplated by Rule 6(12) of the Rules of the above Honourable Court;
2. That a *rule nisi* issues calling upon the respondents and all/any interested parties to show cause (if any) pending an application for a declaratory order, alternatively an application for rescission in Part B of this application, why an order in the following terms should not be made final:
   2.1 Ordering and directing the respondents to forthwith restore to the applicant the use and possession of his share certificate evidencing his shareholding in third respondent;
   2.2 Ordering and directing the respondents to forthwith reverse the cancellation of the applicant's share certificate and his removal fromt he share register of the third respondent;
   2.3 Declaring the 1st respondent to be in contempt of the order issued by the above Court on 18 April 2008 int erms whereof the First Respondent was, by agreement, interdicted and restrained from:

   "...not to in any way whatsoever interfering with the Applicant's rights as shareholder of the Third Respondent and in particular to desist from selling, disposing of, encumbering or in any manner whatsoever deal with any shares held by the Applicant in the Third Respondent;

   ...The undertakings by the First Respondent...shall remain valid pending the:

   ...finalization of an action to be instituted by the Applicant for and on behalf of the Third Respondent against the First Respondent for the recovery of the amount of N$300,000.00 being monies belonging to

the Third Respondent and which the First Respondent unlawfully appropriated for himself;

The finalization of an action by the Applicant for the rectification of the share register of the Third respondent so as to reflect the Applicant a 50% shareholder of the Third Respondent."

2.4 That prayers 2.1 and 2.2 shall operate as an interim interdict with immediate effect, pending the return date of this application.

PART B:

1. Declaring the order issued by the above Honourable Court on 6 June 2011 (Annexure M7 to this application) to be null and void *ab initio*;
2. Alternatively; rescinding and setting aside the order issued by the above Honourable Court on 6 June 2011 (Annexure M7 to this application);
3. Ordering the first, second and fourth respondents to pay the costs of this application on a scale as between attorney and client.
4. Such further and/or alternative relief as this Honourable Court may deem fit."

[9] Prayers 1, 2.1, 2.2 and 2.4 were disposed of by me on 02 December 2011 when a rule nisi I had issued on 23 November 2011 was by consent between the parties confirmed in the following terms:

"

1. That the Rule Nisi in terms of Prayers 2.1, 2.2 and 2.4 of Part A of the Notice of Motion is confirmed.
2. That the First Respondent to pay the costs of the application as far as Part A is concerned.
3. That the relief claimed in Paragraph 2.3 of Part A and Part B of the Notice of Motion will be heard on the 13th March 2012 at 10h00."

[10] What remained for determination therefore was the relief claimed in Prayer 2.3 and Part B of the Notice of Motion.

[11] The first respondents answering affidavit concerning these issues was filed out of time which necessitated an application for the condonation of the late filing which predictably perhaps, was opposed by the applicant.

[12] There is indeed some substance in the submissions advanced by Mr. Schickerling for the applicants that the first respondent's explanation for the late filing of the answering papers is not always satisfactory.

[13] I clearly have a discretion to grant condonation and in considering the facts and circumstances in their totality I am prepared to grant condonation mainly because as far as Part B of the order is concerned, the issue to be resolved is simply whether the order dated 10 October 2008 was a final order or not.

[14] Insofar as the relief claimed in prayer 2.3 is concerned the sole issue is the date upon which the first respondent purported to remove the first applicant as a shareholder by the simple expedient of unilaterally cancelling the share certificate held by the applicant. The first respondent admitted having done so but claims that he did so on a date prior to the order dated 18 April 2008 to which I have referred. The applicant did not seek the dispute that allegation, with the result that it became common cause. To refuse condonation in those circumstances strikes me as manifestly unjust.

[15] I turn to deal with the relief claimed in prayer 2.3. As indicated the first respondent's allegation that the act of cancelling the applicants share certificate preceded the order dated 18 October 2008 was not disputed.

[16] In argument before me Mr. Schickerling referred me instead to an alleged alteration of the share register by the first respondent on 13 March 2009. That, relates to the transfer of 1500 shares from the second respondent to the first respondent. I agree with Mr. Marcus for the first respondent that this action on the part of the first respondent never formed part of the applicant's case. The case of the applicant concerned the alteration of the share register insofar as it purported to remove the applicant as a shareholder.

[17] In the result this part of the relief claimed must fail.

[18] The final issue to be determined is whether it was competent for the court to discharge the order issued on 10 October 2008.

[19] Mr. Schickerling submits that the order, in the form in which it was given was a final order not capable of being discharged.

[20] He points to the fact that the order was that a *rule nisi* with a return date, which is the normal form in which orders of that kind is framed.

[21] Upon a plain reading of the wording used that submission is on the facts not without merit. The matter does not end there however. The appointment of the *curator* is a provisional appointment.

[22] Moreover section 266 of the Companies Act, then applicable provides for a provisional order.

[23] In order to understand what the learned judge who issued the order intended the approach formulated in ***Firestone South Africa (Pty) Ltd v Genticuro A.G. 1988 (4) SA 298 AD*** must be adopted.

[24] In that regard the passage from the judgment on p. 304 is in point. It reads as follows:

> "First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See ***Garlick v Smartt and Another, 1928 A.D. 82 at p. 87; West Rand Estates Ltd v New Zealand Insurance Co. Ltd., 1926 A.D. 173 at p. 188.*** Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to stat what its subjective intention was in giving it (***cf. Postmasburg Motors (Edms.) Bpk v Peens en Andere, 1970 (2) S.A. 35 (N.C.) at p. 39F-H).***

[25] In adopting that approach I have no doubt that the order despite the form in which it was worded was intended by the learned judge to be a provisional order capable of being discharged at some stage in the future. The very fact that the appointment was provisional carries with it the implication that the matter will be revisited in the future.

[26] As far as costs are concerned I take into account that the first respondent acted in a high-handed almost dictatorial fashion in his capacity as a director and shareholder of the third respondent. As a mark of my displeasure with such conduct he should not in my opinion be entitled to any costs.

[27] I therefore make the following order:

1. The relief claimed in prayer 2.3 and Part B of the Notice of Motion is refused.
2. There shall be no order as to costs relating to the proceedings before me to determine those issues.

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MILLER AJ

ON BEHALF OF THE APPLICANT:	Mr. Schikerling SC, assisted by Mr. Denk
Instructed by:	Chris Brandt Attorneys
ON BEHALF OF THE 1ST RESPONDENT:	Mr. Small
Instructed by:	Nixon Marcus Public Law Office