

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No I 4327/2009

In the matter between:

**KITTIWAKE FISHING CC**

**APPLICANT**

and

**LÜDERITZ DIESEL SERVICES CC**

**FIRST RESPONDENT**

**OB DAVIDS PROPERTIES CC**

**SECOND RESPONDENT**

**DEPUTY SHERIFF FOR THE**

**DISTRICT OF LÜDERITZ**

**THIRD RESPONDENT**

**Neutral citation:** *Kittiwake Fishing CC v Lüderitz Diesel Services CC* (I 4327-2009) [2014] NAHCMD 152 (30 April 2014)

**Coram:** VAN NIEKERK J

**Heard:** 2 December 2011

**Delivered:** 30 April 2014

**Flynote:** **Application** – By close corporation – Member authorized by resolution of close corporation to institute application on its behalf for certain relief – Member launching application for different relief – Lack of authority fatal for success of application – Application dismissed.

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**ORDER**

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1. The application is dismissed with costs.

2. In respect of the first respondent the costs shall include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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VAN NIEKERK J:

[1] In this matter the applicant applies for the following relief:

1. Condoning non compliance with rules of this Honourable Court insofar as it may be necessary.
2. Declaring the service of Summons instituted by 1<sup>st</sup> Respondent against Kittiwake Fishing Company (Pty) Ltd effected by 3<sup>rd</sup> Respondent on the applicant as unlawful, alternatively not proper.
3. Declaring the Notice of Intention to Defend dated 12 March 2010 on behalf of Applicant as unlawful, alternatively unauthorized.
4. Declaring the purported notice of amendment on behalf of Applicant dated 12 March 2010 as unlawful, alternatively unauthorized.
5. Declaring the amendment orally requested by First Respondent on 16 April 2010 as unlawful, alternatively improper.
6. Declaring the Summary Judgment against the Applicant as *void*.
7. Declaring the attachment of Applicant's movable property by 3<sup>rd</sup> Respondent as unlawful.

8. Declaring the Sale in Execution of Applicant's movable property by 3<sup>rd</sup> Respondent unlawful.
9. Cost of suit.
10. Alternative and/or alternative relief.'

[2] The first and second respondents filed notices of opposition, but only the first respondent filed answering papers. The second respondent elected to only argue the matter on the applicant's papers on the date of hearing.

[3] It is common cause that the first respondent obtained summary judgment against the applicant on 16 April 2010 for payment in the sum of N\$100 296.91, plus interest on this amount at the rate of 20% per annum as from 31 August 2009, plus costs of suit. Subsequent thereto, the third respondent attached certain of the applicant's movables. Although the applicant never expressly states as much in its founding affidavit, it may be inferred from the notice of motion, that these which were sold in execution, as the first respondent points out in its answering affidavit.

[4] When the matter was heard, the parties presented argument on several points. On the view I take of the matter it is not necessary to deal with all these points. The fact of the matter is that, as Mr Kutzner on behalf of the first respondent points out in its answering affidavit, the relief sought in the notice of motion is not authorized by the applicant. The applicant's founding affidavit is deposed to by one of its members, Mr August Maletzky. In paragraph 1.3 of the founding affidavit he makes the allegation that he is duly authorised by the applicant to depose to the affidavit and to launch 'this declaratory order (declaration of rights) on behalf of Applicant.' In this regard he refers to an attached copy of a resolution by the applicant's members. The resolution reads as follows:

'To authorize August Maletzky to represent in court and make application for Rescission of Judgment of the High Court's judgment of 30 November 2010

in Case No.: I 4327/2009, and to take such steps necessary to stay the judicial sale of the Close Corporation's Assets in general and the movables attached in foregoing High Court Case, including appeal to the Supreme Court if necessary.

The members resolve to grant unto August Maletzky the status and authority which in law makes his acts, intentions and knowledge those of Kittiwake Fishing Close Corporation so as to treat them as the Close Corporation itself. August Maletzky is equally authorized to set aside judgments (*sic*) relevant to the foregoing case.'

[5] The relief sought in the applicant's notice of motion does not relate to a judgment of this Court given on 30 November 2010 and it does not consist of an application to rescind any judgment granted by this Court, or for any sale in execution to be stayed. If the last sentence of the resolution is interpreted to mean what was probably intended, namely that Mr Maletzky is authorised to institute proceedings to have a judgment relevant to the case set aside, the problem remains that the relief sought in the notice of motion does not pray for any judgment to be set aside. Instead, the relief prayed for in the notice of motion is declaratory in nature.

[6] In my view the fact that the application is not authorised in the sense set out above is fatal for its success. In addition, the applicant has not made out any case whatsoever against the second respondent. Apart from the citation of the second respondent there is no further reference to it or to the basis on which it is cited as a party in the application.

[7] In the result there can be no other order than that the application is dismissed with costs, such costs to include in the case of the first respondent, the costs of one instructing and one instructed counsel.

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\_\_\_\_\_(signed on original)\_\_\_\_\_

K van Niekerk

Judge

APPEARANCE

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For the applicant:

Mr A Maletzky

Member of applicant

For the first respondent:

Adv B van der Merwe

Instr. by Engling, Stritter & Partners

For the second respondent:

Mr S Vlieghe

Of Koep & Partners