

“ANNEXURE 11”  
Practice Directive 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> Abdulkarem Abdella Abduselam & 2 Others // Luxury Investment M.A (PTY) Ltd & 6 Others	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2018/00385
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard before:</b> Honourable Mr Justice Angula, Deputy Judge-President	<b>Date of hearing:</b> 30 November 2018
	<b>Delivered on:</b> 3 December 2018
<b>Neutral citation:</b> <i>Abduselam v Luxury Investment M.A (Pty) Ltd</i> (HC-MD-CIV-MOT-GEN-2018/00385) [2018] NAHCMD 397 (3 December 2018)	
<b>The order:</b>  Having heard <b>Mr Namandje</b> , counsel for the applicants, and <b>Mr Conradie</b> , counsel for the first, second and seventh respondents, and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  <ol style="list-style-type: none"><li>1. The application is dismissed.</li><li>2. The applicants are ordered to pay first, second and seventh respondents costs.</li><li>3. The matter is removed from the roll and considered finalized.</li></ol>	
<b>Reasons for orders:</b>  [1] This is an urgent application for interim relief. Apart from an order dispensing with time period for non-compliance with the time periods stipulated by the rules of this court and to hear the matter as one of urgency, the applicants, in addition, seek further orders: firstly, that first, second, third and fourth respondents be ordered to take steps within 5 days of the issuance of this court order, to lodge with the Registrar of Companies (the Registrar), the applicants' consents as directors of the first respondent in compliance with the terms of the Association Agreement entered into between the parties. Secondly, restraining and	

interdicting the second respondent from frustrating the implementation project to be executed by the seventh respondent in terms of the Association Agreement. Thirdly, restraining and interdicting the second respondent from seeking to interfere with the applicants' applications for work and visas permits with the Ministry of Home Affairs and Immigration and that the second respondent withdraws 'any letter he sent to the Ministry of Home Affairs and Immigration purporting to inform it that the Association Agreement has been cancelled'. Fourthly, that the aforesaid orders operate as interim interdict pending the finalisation of the dispute to be instituted by the applicants within 10 days from the date of the court order.

[2] The facts appear from the pleadings and need not be traversed in detail. Briefly, the second respondent procured a contract from the Ministry of Works, Transport and Communication to scrap and remove a shipwreck situated in waters, some distance from the Lüderitz harbour. This has to be done before end of January 2019. It turned out that the second respondent did not have money to execute the project. He then entered into an Association Agreement with the applicants in terms of which he, so to speak, 'sold or ceded' the project to the applicants, as financiers of the project. As a result the applicant became shareholder and directors in the first respondents. As a consideration, the second respondent has to receive N\$11 million. The parties thereafter contracted the seventh respondent to cut up the shipwreck and remove the debris. It is estimated that the scrap would yield for the applicants between N\$77 and N\$80 million when sold on the international market. The site of the project is situated within diamond protected areas of which Namdeb is the concession holder. In order to enter the area where the site of the project is situated, one has to apply for and be issued with entry permits by Namdeb. The applicants are South African citizens and thus need to be issued with work permits and visas in order to visit the project site.

Points in limine:

[3] The respondents raised two points *in limine*. Firstly, that the application is not urgent, alternatively the urgency is self-created and secondly, that the applicants are abusing the interim relief procedure.

[4] As regards to the urgency, the court is satisfied that the matter is commercial urgent for one of the reasons advanced by the applicants namely that there had been delay to commence with the execution of the project. Most of the factors constituting the delay were outside the control of the applicants. Furthermore in the court's view, the matter is urgent given the fact that the deadline for finalising the project is getting closer, being end of January 2019.

[5] In respect of the second point of alleged abuse of process, the court is not persuaded that the bringing of the application in itself amounts to an abuse of process. The court is, however, of the view that the applicants

could have given notice to the respondents of the dispute pursuant to the provisions of the Association Agreement, without first applying for an interim interdict so that by the time the applicants apply for the interim interdict pending the institution of the arbitration proceedings, both the court and the respondent would know the nature of the dispute.

[6] For the foregoing reasons, the points *in limine* cannot be sustained and are rejected. I next move to give reasons pertaining to the merit.

[7] The reason why the first order cannot be granted are as follows: The court is of the view that the applicants have not made out a *prima facie* case to justify an order that the first, second, third and fourth respondents be ordered to lodge with the Registrar consent forms for the applicants to be registered in the record of the Registrar as directors. The relief sought appears to be premised on a misconception of the law. The applicants allege that by not filing the consent forms, the second respondent 'had been deliberately and fraudulently misleading the applicants into believing that they are directors of the first respondent'. Section 219(3) of the Companies Act, 2004 provides that a person who has been appointed as a director must indicate his consent to act as such by completing the consent form, signing and lodging such form with the company within 28 days after the date of his appointment. Failure to lodge the said form does not invalidate the appointment. It follows therefore from the foregoing that the validity of the applicants' appointment as directors, is not dependent upon the consent form being lodged with the Registrar. Furthermore any act they have performed from the date of their appointment as directors is valid. They became directors from the date of their appointment as such.

[8] In terms of section 224 of the Companies Act, every company is obliged to keep an updated register of its directors and to lodge a return with the Registrar reflecting particulars of each of its directors. It follows therefore that, as a matter of law, the applicants have been directors since March 2018 which is the month of their appointment as directors in terms of the Association Agreement. The applicants do not require a court order to become directors, let alone, an order on urgent basis. (See: Cilliers and Benade & Others: Corporate Law, second edition, page 118; van Dorsten: Rights, Powers and Duties of Directors, page 42).

[9] In any event, if the applicants chose to insist on their contractual rights, in this connection, the court understanding of the agreement is that, the applicants' action with their registration as directors only lies against the second and fifth respondents and not against the first, third and fourth. This is because clause 5.2.3 of the Association Agreement stipulates that the second and the fifth respondent 'shall pass the requisite statutory terms and sign all affidavits' to implement the terms of the Association Agreement in order to ensure that the applicants become directors of the first respondent.

[10] However, in terms of clause 5.2.4 of the Association Agreement, it is the auditors of the first respondent, Luxury Investments, through its company secretary, who was obliged, upon receipt of the necessary documents from the second and fifth respondents, to lodge the requisite forms with the Registrar. In the light of these facts, the court is of the view that the order sought against the first, third and fourth respondent is incompetent in so far as the applicants sought to enforce the terms of the Association Agreement. Accordingly, the order cannot, for the foregoing reasons, be granted.

[11] In so far as the third order sought is concerned, the court is of the view that the applicants have equally not made out a *prima facie* case. This conclusion is based on the followings facts: there is no reliable evidence that the second respondent is interfering or attempts to interfere with the execution of the project. The only admitted evidence by the second respondent of obstruction with the execution of the project was when he attempted to terminate the Association Agreement. It is common cause that the attempt at termination was rejected by the applicants and as a result, the Association Agreement still stands. The evidence tendered in support of this order is based on hearsay evidence and it is denied by the respondents' deponents to whom such statements or conduct is attributed. The court is mindful of the rule that hearsay evidence may, in limited circumstances, be admitted in urgent applications. The hearsay evidence tendered by the applicants in the present matter does not meet that exception.

[12] As regard, the fourth order sought that the applicants have equally not made out a *prima facie* case. It is not the applicants' case that they have submitted to the Ministry of Home Affairs applications for work permit and/or visas. It would have been easier for the applicants to attach copies of such applications to their papers. They did not. The applicants do not say when, if, they submitted such applications to the Ministry of Home Affairs. Furthermore, the applicants did not produce 'any letter' sent by the second respondent or his legal practitioner to the Ministry of Home Affairs informing the Ministry that the Association Agreement has been terminated. In any event, it appears to be common cause that at the time when this application was prepared, the applicants travelled to Namibia and entered the country on valid visas and work permits which only expired on or around 23 October 2018.

[13] Even it were to be accepted that such a letter was sent to the Ministry of Home Affairs, it would be fair to assume that the officials responsible for considering the applicants' applications will not merely act on the instructions of the second respondent; they will take into consideration all relevant facts presented to them, in refusing or granting the applications.

[14] It is for the foregoing reasons that above order was made.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>First, Second and Seventh Respondents</b>
S Namandje of Sisa Namandje & Co. Inc., Windhoek	D Conradie of Conradie & Damaseb, Windhoek