

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2017/00004

In the matter between:

ANICET BAUM N.O.

APPLICANT

and

**AIR NAMIBIA (PROPRIETARY) LIMITED
TRANSNAMIB HOLDINGS LIMITED
THE MASTER OF THE HIGH COURT**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral Citation: *Baum v Air Namibia (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2017/00004)
[2019] NAHCMD 244 (18 July 2019).

CORAM: MASUKU J

Heard on: 18 April 2019

Delivered on: 18 July 2019

Flynote: Insolvency Law – Recognition of foreign liquidator by local court - Such recognition not detracting from the court's power to deal with errant litigant – Recognition granted.

Civil Procedure: Affidavits – Of Juristic persons - Authority to oppose proceedings – Resolution salutary – Mere averment of authority will suffice whether in reply or otherwise – Failure to do so detrimental – Opposition of second respondent falling by the wayside in absence of allegation of deponent being authorized to oppose proceedings on second respondent's behalf.

Summary: This is an opposed application for the recognition of the applicant, Mr. Anicet Baum *N. O.*, as the sole Liquidator of an entity known as Challengeair SA (In Bankruptcy) within this court's jurisdiction.

The first respondent, in its answering affidavit stated that it opposed the application for recognition on behalf of both respondents and raised various defences. The applicant challenged the authority of first respondent to depose to an affidavit opposing the application on behalf of second respondent in that there is no notice to oppose the application filed on behalf of the second respondent and there is no allegation in the answering affidavit stating that the first respondent was authorised to oppose the application on behalf of the second respondent. The first respondent further did not deal with the issue pertaining to the authority of the deponent raised by the applicant.

Held further that: The deponent to the affidavit is an employee of the 1st respondent. He ordinarily has no right to represent a legal entity to which he has no legal connection.

Held further that: This could have been cured if there was an appropriate allegation, accompanied by a resolution passed by the Board of the 2nd respondent, authorising the opposition of the proceedings on behalf of the 2nd respondent and authorizing the said deponent to depose to the affidavit in opposition.

Held that: Because the challenge was raised in the replying affidavit, which the applicant was perfectly entitled to do, there is nothing that would have precluded the 2nd respondent from applying for leave to file an affidavit dealing specifically with this attack.

Held further that: There is no counter-argument raised by the 2nd respondent, leaving the court in the position where it must uphold the argument that the proceedings in question are not properly authorised by the 2nd respondent in the circumstances.

Held that: The opposition of the 2nd respondent has fallen by the wayside.

Held: The applicant seeks to announce himself and to seek conditional admission into the Namibian homestead.

Held that: He should be admitted into the homestead, which does not necessarily amount to the success of his mission.

Held further that: It would be unseemly that the court be seen or perceived to provide a veil of protection to *incolae* of its jurisdiction in such proceedings.

Held that: The duty of the court is but one - to do justice between persons before it, in line with the judicial oath, constitutional prescriptions and ethos.

Held further that: Recognition is not only based on comity of nations but also on notions of equity and convenience

Court granting the application for recognition as liquidator to the applicant with costs but on the express understanding that whatever defences the 1st respondent wishes to raise, may be raised during the hearing on the merits.

ORDER

1. The Applicant, Mr. Anicet Baum's appointment in terms of the Laws of Belgium, as the sole liquidator of Challengeair S. A. (In Bankruptcy) is hereby granted

recognition in the Republic of Namibia, for the purposes of pursuing the litigation referred to below, namely:

(a) Declaring that the Applicant shall be entitled to, in his capacity as the 'Sole Receiver' (Curator/Curateur') of Challengeair S. A, (In Bankruptcy'), initiate and where appropriate, prosecute any court proceedings in the Republic of Namibia against the First and Second Respondents, namely, Air Namibia (Proprietary) Limited and TransNamib Holdings Limited for the recognition and enforcement of:

- (i) The 'Partial Final Award on Liability' of 6 August 2008 and the 'Final Award' on Quantum, both rendered by Mr. Julian D. M. Lew QC in the arbitration proceedings between Challengeair S. A. (In Bankruptcy) and Air Namibia (Proprietary) Limited and TransNamib Holdings Limited, the 'Partial Final Award on Liability' being fully incorporated into the 'Final Award on Quantum' and jointly referred to as 'the Award'; or
 - (ii) The Order of the Higher Regional Court of Munich, Germany against the Respondents, namely, Air Namibia (Proprietary) Limited and TransNamib Holdings Limited against the Respondents in favour of Challengeair A. S. (In Bankruptcy), handed down on 12 January 2015.
2. It is specifically recorded that the recognition of the Applicant, recorded in paragraph 1 above, does not serve to extinguish or render *res judicata* the defences that the Respondents have raised in these proceedings and may wish to pursue, in their election, at the hearing of the main case.
 3. The First and Second Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and two instructed Counsel.
 4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J;

Introduction

[1] Serving before this court for determination is essentially an opposed application for the recognition of the applicant, Mr. Anicet Baum *N. O.*, as the sole Liquidator of an entity known as Challengeair SA (In Bankruptcy) within this court's jurisdiction.

[2] The application further seeks the recognition of the applicant for the purposes of the enforcement of a partial arbitral final award dated 6 August 2008 and a final arbitral award on quantum, dated 4 August 2011. These arbitral awards were rendered by Mr. Julian D. M. Lew QC, in the arbitration proceedings between Challengeair SA (In Bankruptcy) and the above-named respondents, namely, Air Namibia (Pty) Ltd and TransNamib Holdings Ltd and/or the recognition and enforcement of an order of the Higher Regional Court of Munich, Germany, against the respondents in favour of Challengeair SA, handed down on 12 January, 2015.

The parties

[3] The applicant Mr. Anicet Baum, describes himself in the founding affidavit as a major male person and an attorney, with offices located in Belgium. He states further that a judgment of the Commercial Court of Brussels, dated 28 July 1998, appointed him as the sole receiver (curator/curateur) of an entity known as Challengeair S. A. (In Bankruptcy).

[4] The 1st respondent is Air Namibia (Pty) Ltd, described in the founding papers, as an entity that is incorporated in terms of the company laws of Namibia, involved in the air transportation of passengers and cargo, within and without Namibia. It is further described as having a substantial base and that it enjoys the financial support of the Namibian Government.

[5] The 2nd respondent, TransNamib Holdings Ltd, is described in similar terms as a holding company which was incorporated in terms of the applicable provisions of the National Trust Services Holding Company Act¹ conducts. It is further described as conducting business domestically and internationally from Namibia. It is also said to enjoy the financial support of the Government of the Republic of Namibia. The 3rd respondent is the Master of the High Court, against whom no order is sought, but is cited for whatever interest her office may have in the proceedings.

The applicant's case

[6] The applicant sets out the dispute that has resulted in the launching of this application as follows: Challengeair SA (In Bankruptcy), ('Challengeair') and the respondents got involved in a dispute regarding the lease and maintenance of a Boeing 767 – 33 aircraft. The said parties subsequently, and in a bid to resolve the dispute, entered into a written arbitration agreement, on 16 December 2005. It is not necessary to rehash the terms of the agreement and thereby burden this judgment unnecessarily.

[7] The parties thereafter appointed Mr. Julian D. M. Lew QC, as the sole arbitrator. The arbitration was to be conducted under the auspices of the UNCITRAL Arbitration Rules. In the said arbitration, the applicant was the claimant and the respondents served as such.

[8] The arbitrator, after dealing with the dispute, on 4 August 2011, issued an award in favour of the applicant in terms of which the respondents were to pay Challengeair an amount of US\$ 6,525,146.71 in respect of unpaid maintenance, rent and insurance; an

¹ Act No. 28 of 1998.

amount of US\$ 13, 032, 641.88 in respect of interest on late and non-payment of maintenance, rent and insurance *premia* up to 31 July 2011; payment in respect of costs and expenses, namely, Euro 296,822.61; GBPound 255,515.13; Swiss Francs 1,679,848.70; ZAR 617,636.68 and US\$ 326,257.00.

[9] It would appear that the respondents challenged the award in favour of Challengeair but without success. The applicant claims that the award remains unsatisfied to date and efforts to obtain satisfaction of the terms of the award have thus far been unsuccessful.

[10] The applicant deposes further that the award issued by the arbitrator falls neatly within the confines of the Arbitration Act² and that he is entitled to rely on the provisions of s 31 of the said Act for purposes of seeking the relief stated above. The applicant further states that in terms of the common law, when parties have agreed to submit a dispute to arbitration, the obligation to abide by the terms of the award, is one enforceable in a court of law and can be rendered executable by an order of court.

[11] Finally, the applicant submits that the court has the necessary jurisdiction to hear and determine his application and accordingly grant the relief sought in the notice of motion. The applicant urges the court to exercise its powers in his favour, failing which Challengeair will not be able to enforce the award in its favour in Namibia.

The respondents' case

[12] The respondents, as indicated, did not take the application lying down. They returned the fire via the answering affidavit deposed to by Mr. Jerhome Tjizo, described as the Senior Legal Manager of the 1st respondent. His affidavit, it must be stated, was filed purportedly in answer on behalf of both respondents. The first issue of note, is that the deponent states that the respondents, in opposition, would raise various points of law *in limine*, with the qualification that the decision not to answer to each specific

² Act No. 42 of 1965.

allegation in the founding affidavit should in no way be construed as an admission of any portion of the applicant's allegations.

[13] The respondents raised the following points of law:

- (a) That the applicant has displayed a disregard of the orders of this court;
- (b) Material non-disclosure on the part of the Challengeair in respect of a settlement agreement;
- (c) The relief sought is incompetent and non-joinder; in addition
- (d) The applicant raised certain legal defences, namely:
 - (i) Lack of jurisdiction of the arbitrator;
 - (ii) The German court order relied upon by the applicant in the alternative is not a substantive order, but merely a procedural one and cannot therefore be enforced outside Germany;
 - (iii) The applicant lacks *locus standi*.

[14] It must be mentioned that from a reading of the respondents' affidavit, it is apparent that the respondents, although raising some defences, as stated in (d) above, state unequivocally, that the court is not called upon, in these proceedings, to decide the sustainability of those defences. It was stated that the purpose of raising these was to avoid a situation arising where because the court has, in its discretion, decided to grant the application for recognition as prayed for, the applicant then seeks to plead, at a later stage, on the merits, that the defences, when raised in respect of the merits, are *res judicata*.

[15] The respondents also threw a cautionary word to the applicant, namely that if he succeeds in obtaining an order for recognition, he must steer clear of prosecuting the matter on application because there are a myriad of disputes of fact, which would render the matter unsuitable to be brought via motion proceedings. It just remains that – a caution and I will refrain from expressing any opinion, considering that the admonition is directed to the applicant and may be a live issue at some future date if the applicant's application succeeds at this juncture.

[16] Having set out the legal issues which fall for determination, above, it is necessary, at this juncture, to then embark on a discussion and decision on all the points of law raised, barring a consideration of the defences referred to in the immediately preceding paragraph.

Determination

Authority of the Second Respondent

[17] The first salvo launched in the line of assault by the applicant, in his replying affidavit relates to the authority of the 2nd respondent, TransNamib Holdings, to oppose this application. This attack emanates from the fact that the answering affidavit filed is deposed to by Mr. Tjizo, who is apparently an employee of the 1st respondent. In this regard, the applicant continues, there is no notice to oppose the application filed on behalf of the 2nd respondent. Furthermore, there is no allegation in the answering affidavit stating that the said deponent was duly authorised to oppose the application on behalf of the 2nd respondent.

[18] This challenge raised by the applicant in its replying affidavit remains unchallenged and no explanation is provided by the respondents, particularly by the 2nd respondent. This is very important because it is plain that the deponent to the affidavit is an employee of the 1st respondent. He ordinarily has no right to represent a legal entity to which he has no legal connection. This could have been cured if there was an appropriate allegation, accompanied by a resolution passed by the Board of the 2nd respondent, authorising the opposition of the proceedings on behalf of the 2nd respondent.

[19] Because the challenge was raised in the replying affidavit, which the applicant was perfectly entitled to do, there is nothing that would have precluded the 2nd respondent from applying for leave to file to an affidavit dealing specifically with this attack. As we stand, there is no counter-argument raised by the 2nd respondent, leaving

the court in the position where it must uphold the argument that the proceedings in question are not properly authorized by the 2nd respondent in the circumstances. That conclusion appears inevitable in the circumstances.

[20] In *Rally for Democracy and Progress and Others v The Electoral Commission for Namibia and Others*³ the Supreme Court expressed itself as follows on this very issue:

'It is of course, trite law that "unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution". It follows that if legal proceedings are instituted (or opposed) in the name of a juristic person, the proceedings must, as a general rule, be properly authorized. In motion proceedings, it will normally suffice if the individual who institutes the proceedings on behalf of the artificial person states under oath that he or she has been duly authorized to do so. Salutary as the practice may be to support an allegation to that effect by attaching a certified copy of the resolution of the juristic person authorizing the institution of the proceedings by the individual at its instance, it is not usually required. In civil practice and procedure legal challenges to the asserted authority of individuals purporting to act on behalf of juristic persons are infrequent and range in force and scope from bare denials to incontrovertible evidential proof that the action taken has not been authorized. The nature of the response expected by the Courts of the individual purporting to act on authority of the artificial person depends on the evidential substance of the challenge. It is trite that not any challenge will suffice. The High Court has recently dealt with challenges of that nature in the following manner:

"It is now settled that in order to invoke the principle that a party whose authority is challenged must for the most spurious challenges to authority that will not only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) AT 1190F – G:

"In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant. This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within and the knowledge of the applicant and not his opponent. A

³ 2013 (3) NR 663 (SC) para 42

fortiori is this the approach appropriate in a case where the respondent has equal access to the true facts.”

It is now trite that the applicant need not do more in the founding papers than allege that authorization has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding the authorization. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority.’

[21] What is sauce for the goose, must be sauce for the gander. In this regard, it will be noticed that the Supreme Court dealt with a challenge to authority that was mounted by the respondent. The principle applied by the Supreme Court in cases of respondents, in my view, holds true in cases such as the present, where it is the applicant that mounts the challenge of the authority of an artificial person to oppose court proceedings.

[22] A reading of the answering affidavit in the instant case, makes no averment whatsoever regarding the authority of the 2nd respondent to oppose the proceedings. Even after the challenge was raised, the 2nd respondent decided, to its own peril, to ignore this issue. In my view, the challenge to the authority of the 2nd respondent to oppose the proceedings, is not idle or a stratagem directed at raising spurious points of law to protract and procure delay in the quick and efficient disposal of the case.

[23] The challenge was aptly raised and necessarily so, in view of what the affidavit of the deponent to the answering affidavit did not say, when the allegation that the said affidavit was filed in respect of the opposition of both respondents is starkly clear. The 2nd respondent appears to have found this issue not worth responding to, to its detriment. I accordingly find that there is no proper authorization of the application by the 2nd respondent in the circumstances. This point of law must be resolved in favour of the applicant in the circumstances.

[24] I now turn to deal with the issues raised in relation to the merits, acknowledging as I should that the opposition, if any, of the 2nd respondent, has fallen by the wayside.

In this regard, I will deal seriatim with the legal contentions of the 1st respondent, which are aimed at showing that the applicant is not entitled to be granted the order it seeks.

[25] I should preface my remarks by stating the obvious, namely that when one has regard to the applicant's case, it is built primarily, if not exclusively on a judgment of this Division in *Miller N. O. and Others v Prosperity Africa Holdings (Pty) Ltd*⁴. In the process, the applicant's legal practitioners relied heavily on various passages of the judgment. Stripped to the bare bones, the *ratio decidendi* of the judgment is that a foreign liquidator, or comparable officer, who seeks to deal with the assets of a foreign entity in liquidation, located in this jurisdiction, may not litigate or take any steps in this jurisdiction without having first applied for and being granted recognition by the courts of this country. If he or she does so, whatever process issued out of this court in that regard, is a nullity.

[26] In essence, the applicant alleged that it did not want to be found to be off-side and guilty of desecrating the sanctity of this jurisdiction as it were by dealing willy-nilly with local assets without having been granted leave by this court and duly admitted. The applicant stated in the heads of argument, that the applicant, by launching this application, seeks to 'announce himself and to seek admission into the homestead', being this jurisdiction, as it were. The applicant further states, in an accusatorial tone, that the respondents, impelled by impure motives, seek to avoid the applicant being so recognized and admitted to seek the recognition and enforcement of the awards mentioned earlier in this judgment.⁵

[27] The applicant also sought umbrage in *Ward v Smit in re Gurr v Zambia Airways Corporation*⁶ (cited with approval in *Miller N. O.*) where the Supreme Court of Appeal of South Africa expressed itself as follows on this question:

'The appointment of a liquidator to an external company in the country of its incorporation and the authority conferred by foreign legislation to deal with the assets of that company have no extra-territorial application. Such a liquidator, until he or she is recognized by

⁴ 2017 (2) NR 370 (HC).

⁵ Para 8 of the applicant's heads of argument.

⁶ 1998 (3) SA 175 (SCA), at 179D

a South African Court, will accordingly have no power to deal with assets of the company situated in this country, regardless of whether those assets are movable or immovable; nor will, creditors be precluded from attaching the assets and proceeding to execution. When an external company is being wound up in the country of its incorporation, a competent South African Court, will, however, on application and in the exercise of its discretion, grant an order recognizing the foreign liquidator and ordinarily by doing so, declare the liquidator to be entitled to deal with local assets (subject of course to local law) as if those assets were situated in the country in question. Such an order will be founded not only upon considerations comity, but also convenience and equity.'

[28] The 1st respondent does not, it seems, generally speaking, quibble with the statement of the law above. Its main contention is that there are countervailing considerations, in the instant case, which should result in the court refusing the applicant's recognition. In the alternative, the 1st respondent implores the court to refer the matter to oral evidence as, so it contends, there is a myriad of disputes of fact, which cannot be properly or conveniently resolved in motion proceedings such as these. Are the contentions of the 1st respondent at all supportable? The applicant states that they are entirely without merit. I answer this question below.

[29] The first prong of attack of the 1st respondent, is that the notice of motion is cast in too wide terms for the reason that in prayer 3.1, the order reads in part, in relation to the applicant, 'he shall be entitled to initiate proceedings in the Namibian Courts concerning the private arbitration award.' The criticism levelled is that the applicant, if the order is granted as is, may not only initiate but proceed to prosecute the proceedings despite defences like lack of *locus standi*, lack of the court's jurisdiction and 'a host of other defences' which must be decided *initio litis*.

[30] I am of the view that this criticism is not meritorious. I say so for the reason that the court order, if granted, will obviously entitle the applicant to initiate the proceedings and if there is any opposition thereto, the court will deal *initio litis* with any defences that are raised in opposition to the applicant obtaining the relief he ultimately seeks. Whatever defences are in the 1st respondent's vault, it can keep under wraps and

detonate them once the proceedings proper, have been instituted. The word 'prosecute', used in the order sought would not have the effect of foreclosing any defences that the 1st respondent may have at the appropriate time.

[31] Another issue taken by the applicant is with regard to the nature of the so-called 'Munich Order', namely, whether it is procedural or not. I am of the considered view that although there are disparate contentions filed by experts in German law about its nature, there is no need to resolve this issue at this juncture. The court seized with the main matter, if recognition is granted, will have the wherewithal to consider all the issues at play and decide in particular, whether or not the order is enforceable. In doing so, there is no indication that the respondents will be muzzled and that their defences on the merits, if and when raised, will be considered *pro non scripto*.

[32] It appears that my understanding of the order sought by the applicant is at variance with that attached by the 1st respondent and its legal practitioners. I say so for the reason that when one reads the order sought in prayer 1, it deals with recognition. The recognition sought is qualified by prayer 2, which reads, 'Declaring that the applicant shall be entitled to, in his capacity as sole 'receiver' (curator/caurateur)' of Challengeair, initiate and prosecute court proceedings in Namibia against the respondents for the recognition and enforcement of - ...'

[33] It is plain that there are two prayers, which possibly due to a typographical error, in the numbering, or inelegant drafting, are in the same paragraph. The declarator, it seems to me, is distinct from the recognition and is the substance of the relief that will be sought if the recognition is granted by the court. That this is the case can be seen from the No. 2, which appears in para 1. There is, in my view, no need to be unduly technical about this and to split hairs as it were. The court is at large, in exercise of its reserve of powers, in any event, to grant an order in such revised form as may meet the exigencies of the case, if satisfied that a proper case has been made in the papers. This will be done so as to eliminate any uncertainty or perceived prejudice, injustice or unfairness to a respondent.

[34] It seems to me also that the further contention by the 1st respondent in its heads of argument that the common law does not permit execution against a Namibian in multiple jurisdictions, is also a point that can be raised in the main proceedings and need not detain the court at this juncture of recognition. It appears to be an issue for consideration as to whether or not to grant the eventual order and not the recognition of the applicant, at least not at this nascent stage, which proceedings are, in a sense, preparatory to the main proceedings, as a manner of speaking.

[35] Another arrow in the 1st respondent's quiver, is that the court is being requested by the applicant to enforce a private arbitration award. It is in this regard argued that the processes of the court cannot be properly lent to giving effect to a private award. In this regard, further goes the argument, the principle of 'comity of nations' applies only to orders given by courts of law and not awards issued in private arbitrations. It is also argued that the finding of another court, constitutes hearsay evidence in this jurisdiction.⁷

[36] Whilst it may be correct that the eventual enforcement of the arbitration will be of a private nature, if granted, one fact that cannot be avoided is that the appointment of the applicant and the status that he seeks in the current proceedings, emanates from a court of another country, and in respect of which the principle of comity of nations applies. In any event, I am of the considered view that whether the award can eventually be enforced by an order of this court, is one that need not detain this court at this juncture. It can be fully and properly ventilated at the hearing of the main matter.

[37] I do not think Namibia would appreciate or accept with fondness a Belgian, or any other court for that matter, acting in kind, in a case, where a Namibian citizen seeks his or her recognition as a liquidator appointed by this court to enforce a private arbitration award in a foreign country. It must, in this connection, be recalled as well that in the *Ward* case, comity of states is not the only criterion to be considered by the court. Equity and convenience should be weighed in and I accordingly do so in this case. It

⁷ *Prollius v Minister of Home Affairs and Immigration and Others* and one similar case 2018 (1) NR 118 (HC) paras 83-85.

does not lie in the province of the court and would in any event be unseemly that the court be seen or perceived to provide a veil of protection to *incolae* of its jurisdiction in such proceedings. The duty of the court is but one - to do justice between persons before it, in line with the judicial oath, constitutional prescriptions and ethos.

[38] As the Biblical saying goes, 'Do unto others as you may wish to have them do unto you'. We should not be in-ward looking in dealing with this case and consider the pros only. We should also consider the cons as well. My comments in this regard, must be understood, as they are intended, to be limited only to the application for recognition. What happens beyond that stage is to be dealt with at that stage, with appropriate defences and other contentions fit to be raised and determined then.

[39] This leads me to another argument advanced by the 1st respondent against the granting of the order and it is this – the applicant is not appointed as a curator by the Belgian court. In support of this contention, the 1st respondent refers the court to the instrument of appointment, and he claims that the said instrument, among other things, stated that the applicant was to act under the supervision of a Judge Commissioner in carrying out his tasks.⁸

[40] The applicant states in response that the court should consider the 1st respondent's answer to the allegations of the applicant regarding his appointment as stated in the answering affidavit. At para 1.2 of the founding affidavit, the applicant states that he was appointed as such and attaches a court judgment to that effect⁹. Remarkably, the 1st respondent did not raise issue with this assertion. In point of fact, the 1st respondent did not respond to this allegation at all. It stands to be accepted as it was never placed in issue by it. The court is entitled, for purposes of dealing with recognition take the court order at face value.

[41] The intricacies and permutations that may arise from the issues of *locus standi* and related matters regarding the enforcement proceedings, may be raised and to good

⁸ Annexure AB2A to the Founding Affidavit.

⁹ Page 6 of the Founding Affidavit.

effect at that stage. The question of *locus standi* to bring an application for recognition and the *locus standi* for purposes of obtaining the order that will eventually be sought should not be confused at this nascent stage in my view. One can mention, for present purposes that from the attachments to the papers, it is clear that the applicant is not a stranger and it would appear that orders were obtained against him in this court by the respondents. In those cases, he was cited in the very capacity he claims in the instant case, it seems to me. The issue of the propriety of the appointment of the applicant to obtain the relief, is best dealt with in the main proceedings.

[42] Furthermore, it is clear from a reading of the papers that the parties herein have sat across the lectern from each other for a long time in the arbitration proceedings as well. It does not appear that questions about his status, now raised were raised then. That may appear to be queer. I am however, of the considered view that for the limited extent of seeking recognition, the applicant should be allowed to bring this application with the 1st respondent reserving its right to deal with *locus standi* of the applicant in relation to the main proceedings.

[43] Another contention by the 1st respondent is that the applicant has disregarded orders of this court and should, on that score, not be granted the order for recognition. The applicant pleads that he is not aware of these orders but states under oath that he is willing to meet them once fully apprised and is required to comply. The question in my considered view is if the 1st respondent's contention is true, is the proper course to deny the applicant recognition? I think not and I say so for two reasons.

[44] First, the recognition of the applicant is the best way open to bring the applicant before this court to face his misdemeanours, if misdemeanours they at all be. The recognition would take nothing from the court's powers to deal with an errant litigant. Once he is properly before court, and properly clothed with the suit of recognition may the court be perfectly placed, where a case is made, to unleash the whip of contempt and deny the applicant the relief or put him to such terms as the court may deem appropriate or meet to purge his contempt.

[45] Second, it appears that the raising of contempt in a collateral manner at recognition stage, is not the best manner by which to deal with the applicant's alleged misdemeanours. Nothing is lost to the applicant to raise the contempt alleged directly in the substantive proceedings and in which the applicant can be granted the wherewithal to place its case fully before court, and if necessary, oral evidence and other curial tools may be employed to get to the root of the matter. Recognition *qua* recognition takes nothing away from this court being able to deal with the allegations on their merits, provided with a better and more conducive forum for that exercise.

[46] I may mention, *en passant*, that the allegations levelled against the applicant in relation to the contempt, do not appear, from the papers to ground a proper case for contempt of court to readily attract a sanction. I say so for the reason that for a party to be found to be in contempt, certain allegations need to be made and proved.¹⁰ In the *Ndemuwenda* judgement, Ueitele J, quoted with approval what was stated in *Fakkie N. O.*¹¹, namely, that a deliberate disregard of a court order is not enough for a case of contempt of court, as the alleged contemnor may mistakenly but subjectively believe that he or she is entitled to act in the way alleged to be contemptuous. These are allegations and possible defences that may be part of a full case of contempt, appropriately canvassed in the papers. This case may yet be pursued, if the applicant is so advised, at the main hearing for relief on the merits.

[47] The last contention raised against the granting of the recognition, is an alleged fraud perpetrated by the applicant in not making disclosure of certain secret settlement negotiations that were made during the arbitration and which have a bearing on the arbitration. The applicant vehemently denies these allegations and claims that the agreement referred to involved parties who are not involved in the present matter; in a different jurisdiction the (United States of America) and that it was in respect of a different subject matter altogether.

¹⁰ *Ndemuwenda v The Government of the Republic of Namibia (Ministry of Health and Social Welfare)* HC-MD-CIV-MOT-GEN-2017/00336 [2018] NAHCMD 67 (23 March 2018).

¹¹ *Fakkie N, O. v CCI Systems (Pty) Ltd* 2006 (4) SA 326 at para 9.

[48] The applicant, in support of his vehement denial, annexes to his replying affidavit, an affidavit deposed to by a Mr. Richard A. McGuirk, an attorney-at law, who states on oath that he was involved in the proceedings referred to which were between Belgian Word Airlines SA and United Technologies Corporation. The proceedings, he deposes, were lodged in the District Court of Connecticut. He places the facts giving rise to the said litigation and states the allegations giving rise to same. They are not related, it would appear, to the matter that served before the arbitrator.

[49] I am of the considered view that this is another matter that need not be resolved in these proceedings. It can be raised and dealt with at the stage of the application for the enforcement of the awards and need not, in my view, detain this court where all that is required for present purposes is an order for recognition. The refrain is still the same – the respondents are at large to raise this issue if they are properly advised. It is not suited to be resolved in this particular forum, regard being had to the peculiar and limited nature of the relief sought.

[50] I must state, besides what has been recorded above, that I do not lose sight of what the contents of the applicant's replying affidavit are,¹² where he states as follows under oath, in part:

'For clarity, the applicant certainly does not intend raising in subsequent proceedings before this Court, that the Court has already pronounced itself on aspects such as *locus standi* (save of course, in as far as same pertains to the recognition aspect) or that the award is enforceable, and/or that the applicant may, by Court order, enforce and prosecute the award in any manner it deems fit. These and all the other further issues referred to in paragraph 26 are, with respect, clearly aspects which belong to the merits of the proceedings sought to be initiated once I am duly recognized for the purpose of initiating same, and which the respondents)if so advised) are at liberty to raise. The purpose of this application is clear. I again refer to the founding papers, and also point to paragraph 13 of the founding affidavit.'

[51] The applicant has clearly nailed his true colours, to the mast. He has made an undertaking on oath that he will not treat the granting of the application for recognition,

¹² Para 57 of the Replying Affidavit, p. 853 of the Record.

as rendering the defences the 1st respondent has and intends to raise *res judicata*. He also appears to appreciate the limited nature of the relief he seeks presently and the expansive nature the forum afforded all the parties, if recognition is finally granted, to ventilate all those issues, including the issue of *locus standi* to obtain the main relief he seeks, namely, the enforcement of the arbitral awards.

[52] To return to the metaphor employed by the court in *Miller*, (*op cit*), the applicant seeks to announce himself and to seek conditional admission into the Namibian homestead. He cannot, whilst standing outside the family gate and perimeter wall fence, commence shouting his instructions on the issues on the agenda that, it must be added, would have seen him travel thousands of kilometres. If he does so, he runs the risk of disturbing the peace of the neighbours, who would be entitled not to take kindly to the 'noisy' visitor.

[53] He should be admitted into the homestead, which does not necessarily mean that his admittance amounts to the success of his mission. Once inside, the talks about the real issues in dispute will commence in earnest. At the end of the 'talks', he may be successful or unsuccessful. A possibility may also exist that he records partial success, meaning a degree of partial failure as well. The jury on that one is out.

Conclusion

[54] I have, notwithstanding Mr. Heathcote's argument, come to the considered view, and in exercise of the discretion vested in this court, that this is a proper case in which the applicant, whatever imperfections the 1st respondent may point to or harbour about his case, should, however, be granted recognition, as this admission will not result in the evaporation of the defences the 1st respondent intends to raise once recognition is granted. The present proceedings provide a preparatory step which will enable the respondents, if so advised, to deal fully with the defences at their disposal in a final fashion.

Costs

[55] The ordinary principle that applies in such matters, without of course trumping the court's discretion is that costs should ordinarily follow the event. I have considered this matter and I find no basis upon which it would be condign to depart from the general rule. Costs will accordingly follow the event.

Order

[56] Having due regard to what has been stated above, I am of the considered opinion that the following order is appropriate in the circumstances:

1. The Applicant, Mr. Anicet Baum's appointment in terms of the Laws of Belgium, as the sole liquidator of Challengeair S. A. (In Bankruptcy) is hereby granted recognition in the Republic of Namibia, for the purposes of pursuing the litigation referred to below, namely:
 - (b) Declaring that the Applicant shall be entitled to, in his capacity as the 'Sole Receiver' (Curator/Curateur) of Challengeair S. A, (In Bankruptcy)', initiate and where appropriate, prosecute any court proceedings in the Republic of Namibia against the First and Second Respondents, namely, Air Namibia (Proprietary) Limited and TransNamib Holdings Limited for the recognition and enforcement of:
 - (iii) The 'Partial Final Award on Liability' of 6 August 2008 and the 'Final Award' on Quantum, both rendered by Mr. Julian D. M. Lew QC in the arbitration proceedings between Challengeair S. A. (In Bankruptcy) and Air Namibia (Proprietary) Limited and TransNamib Holdings Limited, the 'Partial Final Award on Liability' being fully incorporated into the 'Final Award on Quantum' and jointly referred to as 'the Award'; or
 - (iv) The Order of the Higher Regional Court of Munich, Germany against the Respondents, namely, Air Namibia (Proprietary) Limited and

TransNamib Holdings Limited against the Respondents in favour of Challengeair A. S. (In Bankruptcy), handed down on 12 January 2015.

2. It is specifically recorded that the recognition of the Applicant, recorded in paragraph 1 above, does not serve to extinguish or render *res judicata* the defences that the Respondents have raised in these proceedings and may wish to pursue, in their election, at the hearing of the main case.
3. The First and Second Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and two instructed Counsel.
4. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: Mr. A. Cockrell SC (with him Mr. D. Obbes)

Instructed by: ENS Africa|Namibia, Windhoek.

FIRST RESPONDENT: Mr. R. Heathcote (with him Ms. Van der Westhuizen)

Instructed by: Shikongo Law Chambers, Windhoek.