

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-GEN-2019-000195

In the matter between:

M G M PROPERTIES (PTY) LTD

APPLICANT

and

BANK WINDHOEK LIMITED

RESPONDENT

Neutral Citation: *M G M Properties (Pty) Ltd v Bank Windhoek Limited* (HC-MD-CIV-MOT-GEN-2019-000195) [2020] NAHCMD 511 (5 November 2020)

CORAM: **MASUKU J**

Heard: 22 October 2020

Delivered: **05 November 2020**

Flynote: Application for stay of proceedings — Application to stay made by way of motion — Applicant bears the onus to establish standing with evidence — The Applicant bears the onus to prove the existence of that authority to act on behalf of a juristic person when challenged— Applicant failed to discharge the onus — Application struck from the roll for want of authority to institute proceedings.

Summary: The applicant instituted an application for the stay of liquidation proceedings brought by the respondent against the applicant pending the finalisation of an action brought by the applicant against the respondent. The applicant filed the interlocutory application to stay the proceedings on the grounds that it is equitable to stay the liquidation proceedings pending the civil action instituted against the respondent. The respondent opposed the application for the stay of proceedings, and raised a point *in limine* that the deponent on behalf of the applicant lacked authority to bring the application and cited abuse of process. The application for the stay of proceedings was struck from the roll with costs.

Held: that where authority to act on behalf of a juristic person is challenged the applicant bears the onus to prove the existence of that authority.

Held that: the lack of authority to bring proceedings could be ratified retrospectively but in the instant case, the applicant did not, despite the issue being raised, applicant could have filed its authority, even in reply.

Held further: that in terms of the law, he who alleges must prove and that the best evidence available, must be placed before court and in the instant case, the best evidence that a party has been authorised to institute proceedings on behalf of a legal *persona*, is the resolution.

The application was thus struck from the roll with costs for want of authority to institute the proceedings for stay.

ORDER

1. The Applicant's application for a stay of liquidation proceedings instituted by the Respondent, pending the finalisation of case HC-MD-CIV-ACT-CON-2020/01839, is struck from the roll for want of authority to institute the proceedings for stay.
2. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal

practitioner, but subject to the provisions of Rule 32(11) of this Court's Rules.

3. The application for liquidation is postponed to 19 November 2020, at 08:30 for a case management conference hearing.

RULING

MASUKU J:

Introduction

[1] The question for determination in this matter revolves around the propriety of the staying of opposed liquidation proceedings instituted by the respondent against the applicant. The application for stay is sought pending the finalisation of an action for damages instituted by the applicant against the respondent under case number HC-MD-CIV-ACT-CON-2020/01839.

[2] It is important to point out that the application for stay is opposed by the respondent.

The parties

[3] The applicant is M G M Properties (Pty) Ltd., a juristic person, with its registered offices situate at first floor, Moth Centre Building, Windhoek, within the Republic of Namibia. The applicant will, in this ruling, for ease of reference, be referred to as such, alternatively, as "MGM".

[4] The respondent, Bank Windhoek Limited, is also a juristic person, namely, a public company, duly registered as a commercial bank. Its principal place of business is situate at 6th Floor, CIH House, Kasino Street, Windhoek. The respondent will, for the sake of convenience, be referred to as such, or simply as 'the Bank'.

Background

[5] The Bank, by notice of motion dated 6 June 2020, moved an application on notice, seeking the winding up of the applicant in the hands of the Master of the High Court, together with an order for costs to be in the winding up. Needless to say, the applicant opposed these proceedings and on grounds that need not be traversed in the current proceedings.

[6] The liquidation application has reached the stage where the parties are due to file a proposed case management order, all the sets of affidavits having been filed by the parties. It must be stated in this context that the matter stalled at some stage due to attempts to settle the dispute out of court and some minor misunderstanding between the parties' representatives.

[7] It is while the matter was due for case management that the applicant then brought the interlocutory application for the stay of the liquidation proceedings, as stated, pending the finalisation of an action that the applicant has instituted against the respondent. In the action, the applicant sues for payment of damages in the amount of N\$ 61 Million. That action is defended by the respondent.

Point *in limine*

[8] Before getting to the crux of the application for the stay of proceedings sought, the court has been halted in its tracks by a point *in limine* raised by the Bank, namely, that Mr. Nathan Pieter Mbutu, who deposed to the affidavit allegedly on behalf of the applicant lacks the authority to act on behalf of MGM and to bring the proceedings for stay. It is this issue that must first be decided before the court proceeds, if at all, to determine the propriety of the application for stay of proceedings.

[9] Mr. Mbutu, in his founding affidavit states that he is 'duly authorized to institute this interlocutory application in support of the relief the applicant seeks, and competent to depose to the facts herein stated in support of the application.'¹ In its answering affidavit, the respondent takes issue with the

¹ Para 1.3 of the founding affidavit.

question of the deponent's authority by denying that Mr. Mbutu is duly authorised by the applicant to institute the interlocutory proceedings.²

[10] In its replying affidavit, the applicant, in response to the contents of para 13 of the answering affidavit, challenging the applicant's authority to launch the proceedings, Mr. Mbutu states as follows:

'The respondent has put up a weak and unspecified challenge, unsupported by any fact, and I do not know how to respond thereto. The respondent does not say on what basis it is alleged that I am not authorized to institute this application, and thus I restate with reference to the founding papers, both herein and in the main application, my authority. I also further refer to paragraph 1 *supra*.'

[11] On 21 October 2020, the eve of the hearing of the interlocutory application, the applicant filed with the court a status report of even date, in which the applicant appears to have had a change of mind regarding the stance on the issue of authority raised by the respondent. The applicant attached a resolution of the applicant authorizing the deponent, Mr. Mbutu to institute the proceedings on the applicant's behalf.

[12] On the date of hearing of the application, i.e. 22 October 2020, the applicant again filed another status report in which it indicated that it was withdrawing the previous status report and the resolution it had filed 'due to some errors and mistakes in the Resolution.' Ms. Garbers for the respondent indicated that in the light of the latest status report, her client had no issue with the withdrawal of the resolution for correction, but that the applicant could, in due course, file the corrected resolution, devoid of the mistakes alleged.

[13] I was, in view of those developments, of the considered opinion that the question of the authority to institute the application had been put to bed once and for all but I was wrong. Mr. Diedericks changed tack and argued that the applicant was not obliged to have filed the resolution after all. He insisted

² Para 13 of the answering affidavit.

that the applicant would not file any resolution and that it was unnecessary for it to have attempted to have done so in the first place.

[14] In fairness to him, Mr. Diedericks stance appears consonant with the relevant contents of the replying affidavit quoted in full above, namely, that because the respondent had not put up any facts supporting the challenge to authority, the challenge was weak and thus liable to be dismissed. This is the line of argument Mr. Diedericks adopted in his oral submissions. He laid much store in this regard on *Nangolo v Metropolitan Namibia Limited and Another*.³

[15] He argued that the challenge to the applicant's authority in this case, was not supported by any factual allegations. In this regard the court was referred to the matter of *Nangolo* where this court stated that '...since the applicant made a bare denial of lack of authority based on legal advice received. It is indeed the legal position that where a litigant acts in a representative capacity, he or she must have the requisite capacity. [33] It however depends upon what factual allegations, if any, are put before Court which will determine the response by the opposing party and whether a Court will subsequently be satisfied that enough has been placed before it or not, regarding the issue of authority'.

[16] In conclusion, the court, in *Nangolo* summed up the position and concluded as follows at para [34] and [35]:

'In the present matter the applicant did not refer to any *fact* upon which he based his *submission* that the first respondent did not have the requisite authority to oppose the application.

[35] A minimum of evidence would thus in my view be required by the first respondent to refute the submission of lack of authority...'

[17] I need to make one or two observations regarding the excerpts quoted above and on which the applicant relied on in *Nangolo*. First, it is clear that the party taking issue with the question of authority in that judgment, did not

³ (LC 44/2009) [2010] NALC 2 (13 August 2010).

raise the issue propitiously. It was only raised in the replying affidavit, which is generally impermissible, particularly as that was done without applying for and being granted leave.

[18] Secondly, whilst I agree that issues of authority should not become the hotbed of spurious attacks on proceedings, it must not be forgotten that there are two legal propositions that should always guide matters of this nature. First, it is a trite principle of the law that he who alleges must prove. Following upon that, where a party alleges that he or she is authorised to institute or defend proceedings on behalf of a legal person, the onus is on the deponent to prove that allegation, particularly if the issue of authority is questioned.

[19] Third, a party to proceedings must place before court the best evidence available. Where a party alleges that he or she has authority to institute or oppose proceedings, it is incumbent, particularly where the opposite party takes issue with the allegation of authority even made under oath, to place the best evidence of that authority before court, even in a replying affidavit.

[20] It would be the incorrect end of principle to require a party who faces a bare allegation on oath that the other party has authority to institute proceedings, without observing the requirements of the best evidence rule, to then throw out that challenge because there are no factual allegations placed before the court in regard thereto. In my view, where the deponent alleges authority to act but does not attach the resolution, it is within the rights of the opposite party to take issue with that bare allegation, and insist on proof of the authority. This is important because purporting to act on behalf of a legal entity, as is well known, is a serious matter that must be shown to have been properly authorised by appropriate officers of the legal person concerned.

[21] It also becomes difficult to understand what factual allegations a party in the respondent's shoes should make in circumstances as the present where the deponent makes a bare allegation and does not, in the affidavit, attach proof of the authority, in line with the principle that he who alleges, must prove. In my considered view, there are limited circumstances in which a party in the respondent's shoes would be able to make factual allegations

regarding the authority or lack thereof. One that comes to mind is if the person taking issue with the authority has knowledge of the inner policies and procedures of the company instituting or opposing the proceedings in issue.

[22] Where the deponent has not passed the hurdle of proving the allegation of authority, when it is challenged, it would be asking a lot of a respondent to place facts before court in support of the challenge, when the reason for the challenge is that the deponent has made a bare allegation, unsupported by any proof of the allegations and in violation of the best evidence rule. Where a bare allegation of authority is made, the opposite party should be able to challenge that because the onus is not on the other party but the one who alleges authority to prove that authority by placing admissible evidence before court. The concept of a reverse onus does not apply in this case.

[23] It would be incorrect to saddle the other party with the burden of making factual allegations on oath in that particular scenario. A different consideration may follow where the proof of authority is attached onto the affidavit and the other party still makes bones about that. It would, in my considered view be in those circumstances that the party taking issue would have to make factual averments as to why it persists with the alleged lack of authority in the light of the resolution filed.

[24] I accordingly do not agree with Mr. Diedericks' position in this matter and I respectfully differ with the reasoning and conclusion in *Nangolo*. In this case, the applicant was thrown the lifeline in at least two respects. One, it could have filed the resolution in reply. It however, chose not to do so. Secondly, well after the papers were filed, it purported to file a resolution but then withdrew it, arguing as now appears to be the position, that the resolution did not contain errors but it was totally unnecessary to file it.

[25] Even a tender by Ms. Garbers that the matter proceeds on the basis that the resolution, in its corrected form could be filed belatedly, was not sufficient to persuade the applicant to abandon its argument on authority in the form it chose. In the premises, I am of the view that the applicant has shot

itself in the foot. It could still have maintained its argument that the resolution was unnecessary but still filed it *ex abundanti cautela*. In that event, the matter would have proceeded and even if the applicant's position predicated on *Nangolo* was not upheld as correct in law, as has been the case.

[26] I should pertinently point out that *Nangolo* is a judgment of a single Judge of this court but which appears to go against the tide of judicial opinion adopted by this court for a considerable period of time. To illustrate this point, in *AJ Jacobs t/a Southern Engineering v The Chairman of the Board of the Namibia Power Corporation (Pty) Ltd and Another*⁴ Silungwe AJ dealt with this very issue.

[27] At para 7 of the cyclostyled judgment, the learned Judge reasoned as follows:

[7] Where the alleged authority is challenged by an applicant, as in casu, then the onus of proof rests upon the respondent(s) to confirm that such authority was duly given. See *National Union of Namibian Workers case, supra*⁵, at 669D-E. As Patel J, aptly observed in *Eleveth*⁶, *supra*, at 1227C:

"It is trite law and practice that where one person . . . is authorised by another, then the person so authorizing is required to confirm that authority when that authority is challenged."

[8] An artificial person can, of course, take decisions only by the passing of resolutions in accordance with its regulatory framework such as articles of association, a constitution, rules or regulations. Proof of authority would then be provided in the form of an affidavit deposed to by an official of the artificial person, annexing thereto a copy of the resolution, or an extract of minutes of a meeting at which the resolution was taken which confers such authority or delegation.'

⁴ Case No. A 140/2007

⁵ 2006 (2) NR 659.

⁶ *Eleveth v Minister of Home Affairs and Another* 2004 (11) BCLR 1223 (T).

[28] A close reading of *Nangolo* does not, on the issue in question, cite any authority for that approach and which is binding on this court. That being the case, I am not persuaded that the *ratio decidendi* in *Nangolo* is an accurate reflection of what appears to be a long and settled line of authority in this jurisdiction. Nor can I, from my reading of *Nangolo* come to the conclusion that there was a reason advanced as to why the beaten track and weight of judicial opinion on this issue can be said to have been wrong, thus necessitating the charting of a new course. I accordingly take the view that *Nangolo* is not binding on me.

[29] If there should be any doubt on the proper approach to the question in issue in this jurisdiction, I am of the considered view that the applicable position is authoritatively and finally settled by a recent judgment of the Supreme Court. In the case of *Christian t/ a Hope Financial Services v Namibia Financial Institutions Supervisory Authority*,⁷ the Supreme Court reiterated the principles pertaining to the authorisation to act on behalf of a legal entity as sketched in *Mall (Cape) Limited v Merino Ko-operasie Beperk* 1957 (2) SA 347 (C), namely:

[T] hat the minimum evidence required whenever someone acts on behalf of a corporate entity is a resolution of that entity and that there can be no authorisation in the absence of such resolution.'

[30] It must be recalled that corporate entities do not act on their own. Their hands and feet consist of authorised agents. The authority to act on behalf of a corporate entity needs to be independently verifiable so that one ascertains that the acts, omissions and intentions are those of the entity and not the result of usurpation by an impostor. The very idea that a person can act on behalf of a corporate entity and suggest that only an affidavit such as in these circumstances will suffice to cement the authority is unsustainable in the face of an attack on the issue of authority to act.

⁷ 2019 (4) NR 1109 (SC).

[31] Nkabinde AJA in *Christian*⁸ reasoned that one is not normally privy to the resolution tabled and passed at meetings of a board to know that the corporate actually resolved to so authorize the person so acting. The position is thus very clear and to drive the point home due to many different viewpoints, *Christian* reiterates Article 81 of the Constitution that ‘...th[is] decision is thus not only binding on all other Courts of Namibia but is also binding on this apex Court to its earlier decision.’ This court is therefor bound by *Christian* in this particular regard.

[32] Reverting to the instant case, the moment the authority to bring these proceedings was challenged, it was incumbent upon MGM to provide the proof of authority by filing a resolution of its board of directors. The negation of the challenge by a mere shrug and continuous insistence of that authority by lip service in the affidavit is insufficient to sustain the application.

[33] As pointed out above, the applicant bears the onus to make out the case of standing and authority to institute the proceedings in the founding papers (*Coin Security Namibia (Pty) Ltd v Jacobs* 1996 NR 279 (HC). In the matter of *Pinkster Gemeente van Namibia (Previously Swa) v Navolgers Van Christus Kerk Van SA and Another* 1998 NR 50 (HC), the court held that the lack of authority to bring an application could be ratified retrospectively. Even so, MGM opted to withdraw the resolution it had belatedly filed, leaving the allegation of authority unsupported by admissible evidence, which could have been supplied in reply.

Conclusion

[34] In the premises, the ineluctable conclusion is that the applicant failed to successfully engage the challenge to the lack of authority to bring the interlocutory application (stay of proceedings to the winding up application). There is thus no properly authorised application before court. In the circumstances, the applicant has, by its own hands, paved way to the inevitable destination of this application, namely the striking of the application from the roll.

⁸ Supra

[35] It is, in my considered view inappropriate to dismiss the application in the present circumstances. In *Shetu Trading CC v The Chair of the Tender Board of Namibia*,⁹ the Supreme Court provides the trite learning that where proceedings have not been entertained by the court on the merits, it is generally inappropriate to dismiss the said proceedings. I accordingly heed that clarion call.

Costs

[36] I find there are no persuasive circumstances alleged or apparent, that would render the court entitled to deviate from the otherwise trite principle that costs follow the event. The successful party under these circumstances, namely, the respondent, is entitled to its costs.

Order

[37] In the result, the following order commends itself as appropriate in the circumstances:

1. The Applicant's application for a stay of liquidation proceedings instituted by the Respondent, pending the finalisation of case HC-MD-CIV-ACT-CON-2020/01839, is struck from the roll for want of authority to institute the proceedings for stay.
2. The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner, but subject to the provisions of Rule 32(11) of this Court's Rules.
3. The application for liquidation is postponed to 19 November 2020, at 08:30 for a case management conference hearing.

⁹ 2012 (1) NR 162, p167.

T S Masuku

Judge

APPEARANCES:

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