REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: Pupkewitz Holdings Proprietary Limited v Frederick Christoffel Truter	Case No.: HC-MD-CIV-ACT-CON-2020/01329 **Division of Court:** Main Division Windhoek
Heard before: Honourable Mr Justice Ndauendapo	**Delivered on:** 26 April 2021
Neutral citation: *Pupkewitz Holdings Proprietary Limited v Truter* (HC-MD-CIV-ACT-CON-2020/01329) [2021] NAHCMD 208 (26 April 2021)	
The order: 1. The point in limine is upheld. 2. The application for summary judgment is struck from the roll. 3. The matter is postponed to 10 June 2021 at 14h15 for status hearing.	
Reasons for the order:	
Ndauendapo, J [1] This is an application for summary judgment. The application is opposed. The	

Applicant issued summons against the Respondent in respect of four claims, namely: -

Claim 1: - Payment in the sum of N$6 590 090.00 (Six Million Five Hundred and Ninety Thousand Namibian Dollars), being the balance due and payable in respect of the sum of N$6 000 000.00 advanced by the Applicant to the Respondent in terms of a written loan agreement after certain credits, and accrued interests at 2.5% below the Prime Lending Rate charged by FNB Namibia, calculated and charged monthly, were brought into account, together with mora interest on the amount of N$6 590 090.003, at the rate of 20% per annum a tempore morae, calculated from 25 September 2019 to date of payment, being the date immediately following on the date of resignation of the Respondent from the Applicant on 24 September 2019;

Claim 2: - Payment in the sum of N$6 410 000.00 (Six Million Four Hundred and Ten Thousand Namibian Dollars), together with mora Interest on the amount of N$6 410 000.00, at the rate of 20% per annum a tempore morae, from date of demand, being 25 March 2020, to date of payment, being losses and/or damages suffered by the Applicant, as a result of the Respondent's failure to indemnify the Applicant and hold it harmless from and against the losses and/or damages arising from various breaches on the part of the Respondent of certain of his representations, warranties, agreements, undertakings and obligations in terms of clause 23.4 of the Employment Contract;

Claim 3: - Payment in the sum of N$2 111 172.00 (Two Million One Hundred and Eleven Thousand One Hundred and Seventy-Two Namibian Dollars) together with mora interest on the amount of N$2 111 172.00 at the rate of 20% per annum a tempore morae, from 25 September 2019 to the date of payment in full, which payment, being the equivalent of 6 months' remuneration, the Applicant became entitled to claim, ex lege, from the Respondent in lieu of 6 months' notice of termination of employment not having been given by the Respondent;

Claim 4: - Repayment of the Sign-on bonus in the sum of N$1 500 000.00 (One Million Five Hundred Thousand Namibian Dollars) together with mora interest on the amount of N$1 500

000.00 at the rate of 20% per annum a tempore morae, from date of demand, being 25 March 2020, to date of payment, in terms of clause 23.5 read with clause 23.4 of the Employment Contract, on the grounds that any breach by the Respondent of the provisions of clause 23 of the Employment Contract would be a material breach of the Employment contract and shall be deemed a repudiation by the Respondent of the Employment Contract, inter alia entitling the Applicant to accept such repudiation, and, at the Applicant's election, to reclaim the Sign-on Bonus;

[2] Claim 2, being a claim for indemnifying of the Applicant by the Respondent in respect of losses and/or damages suffered by the Applicant as a result of various breaches on the part of the Respondent of certain of his representations, warranties, agreements, undertakings and obligations in terms of clause 23.4 of the Employment Contract, is not a claim for a liquidated amount in money and summary judgment is not applied for in regard thereto.

[3] Accordingly, the Applicant applies for summary judgment against the Respondent in respect of claims 1, 3 and 4 only.

Opposing affidavit

[4] The respondent, Mr. Truter, deposed to the opposing affidavit. He denies that he has no bona fide defence and states as follows (I quote verbatim): 'In terms of clause 10 of the employment agreement, at the one year anniversary of my employment with the applicant, I would be eligible to participate in a long-term incentive plan put in place by the applicant, substantially as outlined in the exchange of emails dated 22 February 2015 onwards. (In the event of a trial, I will seek the discovery of these emails)'.

[5] Around October 2017, the applicant and I agreed on the long-term incentive plan, which was to the effect that, as my total-cost-to-company remuneration was approximately N$3,5 million per year, the applicant would purchase a commercial farm to the value of N$30 million for my benefit. I would then receive ownership of the farm after a period of 10 years'

employment (roughly when I would reach retirement age), which translated into N$3 million per year of a long-time incentive. As I was already employed for two years, it was further agreed that the N$6 million loan would be converted into a long-term incentive of N$3 million a year for the past two years of employment.

[6] The purchase of the farm was completed. I have been occupying the farm and have been farming since then. The ultimate purchase price of the farm was N$35 million, and I contributed N$5 million towards the purchase price, whilst the applicant paid N$30 million.

[7] At that time, the applicant's ultimate shareholders were happy with my performance. I should mention that in my short period of employment, I managed to increase the performance of the company to the extent that the applicant was able to declare large dividends. Therefore, the long-term incentive was not out of the ordinary, also considering that I was earning approximately N$8 million to N$9 million (salary and other benefits, such as share options) per year in my previous employment. I should mention that the applicant is a very large company, with a turnover of N$5 billion per year and operating profits in excess of N$100 million. The long-term incentive of N$3 million per year for the Chief Executive Officer is therefore reasonable and not excessive.

[8] The reason why I joined the applicant as its Chief Executive Officer was based on the inspiration given inter alia by the long-term incentives and the short-term incentives. Previously, I was employed as the Chief Executive Officer of a large multi-national company which is listed on the Johannesburg Stock Exchange (JSE) and operating in more than 14 countries. My average income was approximately N$8 million – N$9 million a year.

[9] The terms and conditions of these agreements are contained in various documents in possession of the applicant, and I would seek the discovery of these documents in the event of a trial.

[10] I accordingly deny that I am indebted to the applicant in respect of claim 1.

[11] Similarly, the applicant repudiated the agreement and I consequently elected to terminate same with immediate effect. Had it not been for the unlawful conduct of the applicant, I would not have terminated the agreement, and hence I am not indebted to the applicant for the notice of 6 months and for the repayment of the sign-on bonus. I therefore deny that I am indebted to the applicant in respect of claim 3 and 4.

[12] I accordingly submit that I have a bona fide defence to the claims of the applicant, and I am confident that I will be successful at an eventual trial in this matter.'

Point in limine

[13] Counsel for the respondent contended that the first point, which is not addressed in the applicant's ("Pupkewitz") heads of argument is the lack of authority of Pupkewitz to make the application for summary judgment.

[14] Counsel argued that Pupkewitz, being the applicant, is an artificial person. The deponent of the affidavit in support of the application for summary judgment, Mr. John Eugen Shepherd states in the said affidavit that he is:

'[d]uly able to depose to this affidavit and authorised to bring the application on behalf of the Applicant in this matter…'

[15] The first part of the above quoted sentence – i.e. the ability to depose to an affidavit – presents no qualms.

[16] Counsel submitted that the second part is problematic: the deponent does not state that Pupkewitz is authorized to make the application, but that he (that is Mr. Shepherd) is authorised to bring the application on behalf of Pupkewitz. In other words, Mr. Shepherd makes the application, and not Pupkewitz.

[17] Unfortunately, Mr. Shepherd does not state why Pupkewitz is unable to make the

application itself. Even if he did, the application must be that of the applicant (i.e. Pupkewitz), and Pupkewitz, being an artificial person, must be duly authorised to make the application – not that someone else must make the application on its behalf.

[18] Further, there is no evidence of the authority – whatever the authority is – attached to the application or the founding affidavit of the application.

[19] Counsel relied on *National Union of Namibia Workers v Naholo* 2006 (2) NR at 669C-E, where the court held that:

'…an artificial person can of course, take decisions only by 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 a resolution, or an extract of minutes of a meeting of which the resolution was taken which confers such authority or delegations. Hence, the mere say so of a deponent (or deponents) does not constitute proof of either authority in the absence of admissible evidence to authenticate the averment(s).'

[20] Naholo was approvingly applied in *Namfisa v Ritter* I 2239/09 [2010] NAHC 167, where I stated that:

'In my view, it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized.' (Original underlining retained)

[21] The Court in *Ritter* also referred to *Mall (Cape) (Pty) Ltd v Merino Ko-operasie* BPK3, 1957 (2) SA 347 where, at 351D-H, it was stated:

'I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the Court to show that the applicant has duly authorized the institution of notice of motion proceedings (see for example Royal Worcester Corset Co v Kesler's Stores 1927 CPD 143;

Langeberg Kooperasie Bpk v Folscher and Another 1950(2) SA 618 (C)). 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. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company has resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorized by it. There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized by the company to do so (see for example Lurie Brothers Ltd v Arcache 1927 NPD 139, and the other cases mentioned in Herbstein and Van Winsen Civil Practice of the Superior Courts in South Africa at 37 and 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the application is an artificial person.'

[22] Accordingly, it is submitted that the application for summary judgment falls to be dismissed, with costs. Counsel for the applicant also relied on the Mall (Cape) supra, and where the court said at 352 D:

'…Mr. Knight submitted next that the use of the word "duly" shows that the authority conferred upon de Witt had been properly conferred, i.e. that all necessary formalities prescribed by the applicant society's constitution had been complied with this submission I am also in agreement. "

Similarly, counsel argued that the use of the word "duly" in the affidavit of Mr. Shepherd shows that the authority conferred upon Mr. Shepherd had been properly conferred. Counsel argued that the denial of authority is a bare denial. 'A copy of the resolution of a company authorizing the bringing of an application need not always be annexed.'

[23] Counsel also referred this Court to *Oranjerivierwynkelders v Professional Support Service* 2011(1) NR 184 at 193 para 23; 'The ex parte application in which the interim relief was granted was brought on behalf of Oranjerivierwynkelders Kooperatief Beperk as first applicant and Oranjerivier Wynbemarkers (Pty) Ltd as second applicant. It was held *in Scott*

and Others v Hanekom and Others 1980(3) SA 1182(C) at 1190E-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 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 the knowledge of the applicant and not his opponent. A fortiori is this approach appropriate in a case where the respondent has equal access to the true facts.'

"[24] It is now settled that the applicant need do no 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 authorization. When the challenge is a weak one, a minimum of evidence will suffice to establish such authority."

Discussion

[24] Mr Shepherd who deposed to the affidavit in support of the application stated: 'Duly able to depose to this affidavit and authorised to bring the application on behalf of the Applicant in this matter…' The wording "authorised to bring the application" suggests that Mr. Shepherd, not Pupkewitz, is authorized to bring the application. He is the applicant, which is not correct. In this case, the applicant did not attach a resolution, nor a special power of attorney when the application for summary judgment was instituted. Few days before the application was heard, the applicant, without leave of this court filed a resolution and a special power of attorney. The respondent successfully applied to have the filing of those documents set aside as an irregular step. As a result, no resolution or special power of attorney is before court.

In *National Union of Namibia Workers v Naholo* supra the court held that:

'…an artificial person can of course, take decisions only by 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 a resolution, or an extract of minutes of a meeting of which the resolution was taken which confers such authority or delegations. Hence, the mere say so of a deponent (or deponents) does not constitute proof of either authority in the absence of admissible evidence to authenticate the averment(s).'

I fully agree with the dictum expressed above.

[25] Counsel for the applicant contended that the challenge to authority is a bare denial and a weak one. Even if that is the case, the existence of authority is within the knowledge of the applicant and what more could the respondent have said then denying the existence of such authority. No minimum evidence such as a resolution or minutes was presented to establish such authority. Accordingly, the point in limine should succeed. In light of that conclusion, it is not necessary to consider the merits of the case.

Judge(s) signature	
Ndauendapo, J	
Applicant:	**Respondent:**
Adv. Corbett instructed by LorentzAngula Inc. Windhoek	Norman Tjombe of Tjombe–Elago Inc. Windhoek