

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00172

In the matter between:

ATLANTIC OCEAN MANAGEMENT (PTY) LTD
FISH SPAIN S.L.

1st APPLICANT
2nd APPLICANT

and

THE PROSECUTOR GENERAL
BANK WINDHOEK LTD
BANK WINDHOEK LTD (WALVIS BAY)
BANK OF NAMIBIA

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT

Neutral citation: *Atlantic Ocean Management (Pty) Ltd v The Prosecutor General*
(HC-MD-CIV-MOT-GEN-2017/00172) [2022] NAHCMD 627
(17 November 2022)

Coram: COLEMAN J
Heard: 07 October 2022
Delivered: 7 November 2022

ORDER

1. The application is dismissed with costs to include one instructing and two instructed counsel.
 2. The matter is removed from the roll and regarded as finalized.
-

JUDGMENT

COLEMAN J:

Introduction

[1] This application was spawned as an urgent application on 2 June 2017 with different relief to what is now before me. A number of events followed which are not relevant for current purposes and another notice of motion was super-imposed on the original application on 20 April 2018. Answering affidavits were filed on 21 May 2018. The applicants filed no replying affidavits.

[2] Distilled to its essence, the issue now before me is the release of funds alleged to be in the first applicant's bank account at Bank Windhoek. The fourth respondent (BON) refuses to give permission that the funds be released. The applicants also foresee that the original urgent applicant may have lapsed and ask for reinstatement of the matter as far as may be necessary. The dispute is now between first applicant and BON. I do not understand BON to resist reinstatement and treat it as a non-issue.

The core facts

[3] The first applicant is a Namibian company. During August 2016 BON granted first applicant permission to open and conduct a non-resident CFC account with

Bank Windhoek. According to first applicant BON was aware that this account would be used to receive money on behalf of second applicant, a Spanish company, from Angola and to transfer money to second applicant in Spain.

[4] The use of this account soon ran into difficulties and BON withdrew approval to conduct the non-resident account on 30 November 2016. On 4 January 2017 the first respondent acquired the first preservation order, which was later set aside by this court. The history of the preservation orders are not relevant for the direction I will be taking herein. Suffice it to say that according to BON first applicant breached the conditions under which it was allowed to conduct the non-resident account and it says it acted under its powers in terms of the Exchange Control Regulations, 1961 (the Regulations). First applicant disputes that it breached any conditions.

[5] For the purposes of the hearing before me a number of *in limine* points were raised on behalf of BON. I considered all of them and highlight two here, delay and a subsequent pending action instituted by applicant against BON relating to the same issue.

[6] The delay point is raised in respect of the review relief in prayer 3 of the 'new' notice of motion. The primary relief in this notice of motion is essentially a mandamus ordering BON to give the permission it thus far refused to give for the release of the money. As far as I am concerned the delay has a bearing on this relief as well, especially in light of the subsequent developments I will allude to later herein.

[7] The subsequent action (case number HC-MD-CIV-ACT-OTH-2020/03609) is significant. First applicant is plaintiff, with BON cited as first defendant and Bank Windhoek Limited as second defendant in that action. The relief asked for is an order in the following terms:

1. The Second Defendant shall transfer the amount of USD886 772.20 to the account of Fish Spain S.L.

2. The First Defendant is liable to the Plaintiff for interest at the rate of 20% per annum on the amount of USD886 772.20 from 28 November 2016 until date of payment.

3. In the alternative to prayers 1 and 2 above; that the First Defendant's decision published in the Government Gazette No. 7237, General Notice 222, dated 10 June 2020, be set aside, and:

3.1 The Second Defendant shall transfer the amount of USD886 772.20 to the account of Fish Spain S.L.

3.2 The First Defendant is liable to the Plaintiff for interest at the rate of 20% per annum on the amount of USD886 772.20 from 28 November 2016 until date of payment.

4. And in any of the aforesaid events, the First Defendant shall pay the Plaintiff's costs of one instructing and two instructed counsel taxed on a scale as between legal practitioner and own client.'

[8] In my view prayer 1 of the relief in the subsequent action is substantially what first applicant expects me to decide on in the instant matter. In addition, the particulars of claim in this action reveals that on 10 June 2020 BON had General Notice 222 published in Government Gazette No. 7237 (GN 222). In prayer 3 of the relief set out above the first applicant (as plaintiff therein) asks for BON's decision published in GN 222 to be set aside as alternative relief. There is no such relief before me.

[9] The subsequent action reveals that after the events set out in the application before me, and in particular on 10 June 2020, the money first applicant wants to retrieve from Bank Windhoek had been forfeited to the State in terms of the Regulations. Paragraph 2 of GN 222 stipulates that Bank Windhoek will be instructed to transfer the money into the National Revenue Fund. Whether that had been done I do not know.

Conclusion

[10] The applicants in the matter before me pursue their relief without reference to GN 222. Mr Heathcote, who acted for the applicants, when questioned about the effect of GN 222, essentially submitted that if I am satisfied that BON's withdrawal of the approval to conduct the account and subsequent actions are unlawful the rest of the dominos should fall and topple GN 222.

[11] I am not inclined to accede to such bold approach.¹ This application has in my view become stale. The facts before me reflect events only until 21 May 2018. Applicants are represented by the same legal practitioners that caused the institution of the subsequent action on 3 September 2020. For some reason nothing was done to update this application. No facts are before me regarding the considerations, circumstances and consequences of the publication of GN 222. The money may be in the National Revenue Fund now for all I know. Mr Töttemeyer, who appeared for BON submitted that it would likely render an order that second and third respondents release the money a *brutum fulmen* (which, interestingly, translates into ‘meaningless thunderbolt’). I am inclined to agree with him.

[12] Consequently, I am of the view that the dispute between first applicant and BON would be more justly and adequately adjudicated in the subsequent action. A combination of the delay, which impacts on a necessary challenge of GN 222, the fact that the money in question may by now be in the National Revenue Fund rendering an order by me a *brutum fulmen* and the existence of the subsequent action is at play.

[13] Having considered all the facts and submissions before me I am of the view that the application should be dismissed with costs to include one instructing and two instructed counsel, since there are complexities involved.

[14] In the result, I make the following order:

1. The application is dismissed with costs to include one instructing and two instructed counsel.
2. The matter is removed from the roll and regarded as finalized.

G COLEMAN

Judge

¹ In the exercise of my discretion: *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para [36]. The challenge of GN 222 is neither a collateral nor an indirect challenge.

APPEARANCES**APPLICANTS:**

Heathcote SC, assisted by Jacobs
Instructed by Van der Merwe-Greef Andima Inc
Windhoek

FOURTH RESPONDENT:

Tötemeyer SC, assisted by Obbes
Instructed by Lorentz Angula Inc
Windhoek