

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: ARCHIE MBAKILE & ANOTHER // PATRICE URAYENEZA & 2 OTHERS	Case No: HC-MD-CIV-ACT-OTH-2023/01061
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 19 July 2023
	Delivered on: 8 August 2023
Neutral citation: <i>Mbakile v Urayeneza</i> (HC-MD-CIV-ACT-OTH-2023/01061) [2023] NAHCMD 486 (8 August 2023)	
Order: 1. Summary judgment is granted with costs against the first and second defendants, the one paying, the other to be absolved, in the following terms: (a) Payment of N\$326 000 into the account of the third defendant, plus interest on the said amount at the rate of 20 per cent per annum <i>a tempora morae</i> from 1 March 2023 to the date of full and final payment; and (b) Costs of suit. 2. The matter is finalised and removed from the roll.	
Reasons for the above order: 	

PARKER AJ:

[1] The plaintiffs have instituted a derivative action under Case No. HC-MD-CIV-ACT-OTH-2023/01061. The instant matter is an application for a summary judgment order against the first and second defendants.

[2] The particulars of claim in substance carry the hallmark of a derivative action in virtue of the joinder of the majority shareholder and one of the directors (the alleged wrongdoer) of the company as the first defendant, and the company as the third defendant when no relief is claimed against it, which the plaintiffs have claimed against the first defendant. The claim is against the second defendant, who is the financial manager, of the company, too. He has been joined because he did the unlawful bidding of the first defendant which is the cause of action in this matter.

[3] Relying on textual authority, the Supreme Court formulated the principle of derivative action in the following terms:

‘If the company cannot or will not act against those who wronged it, a derivative action on behalf of the company may be instituted in certain circumstances. Such an action will have to be instituted against the wrongdoers by somebody acting on behalf of himself and all the other shareholders other than the wrongdoers. The company being unable to act as a plaintiff must be joined as a nominal defendant so that it is a party to the proceedings and any order of the court can be made applicable to it.’¹

[4] A variety of wrongdoers are conceivable, and they include majority shareholders and board directors, among others.²

[5] The plaintiffs, represented by Mr Bangamwabo, have brought a summary judgment application. The first and second defendants, represented by Ms Jakob, have moved to reject the application.

[6] In resisting the application, the first defendant has filed an opposing affidavit and states that he has done so on his own behalf and on behalf of the second and third defendants. The second defendant is the financial manager of the third defendant, an incorporated company.

¹ *Kaese v Schacht and Another* 2010 (1) NR 199 (SC) para 18.

² *Loc cit.*

The first defendant is the majority shareholder of the third defendant, holding 55 per cent of shares. The first plaintiff holds 22.5 per cent of shares of the third defendant and the second plaintiff 22.5 per cent shares.

[7] The shareholding structure is in the particulars of claim. I have no good reason to hold that it is not correct. The first defendant alleges that the legitimacy of the plaintiffs as shareholders is yet to be determined in a separate action under Case No. HC-MD-CIV-ACT-CON-2021/00463. That may be so. But that should not concern this court. This court is seized with the action under Case No. HC-MD-CIV-ACT-OTH-2023/01061.

[8] As Mr Bangamwabo stressed in his submission, the plaintiffs, as minority shareholders, have instituted a derivate action to enforce the company's rights. A minority shareholder is entitled to sue where a wrong has been done to the company to restrain its continuance, or to recover the company's assets. The courts have recognised that a derivate action may be instituted by an individual shareholder where the company has failed, as is the case in the instant matter, to do so.³

[9] As respects the purpose of rule 60 of the rules of court and the burden of the defendant who wishes to resist the summary judgment order, I stated in *Bank Windhoek Limited v Nicodemus* thus:

[3] The purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain a summary judgment swiftly without trial, if the plaintiff has a clear case and if the defendant is unable to set up a bona fide defence, which is good in law or raise an issue against the claim which ought to be tried.

[4] It follows inexorably that to resist a summary judgment order, the defendant bears the onus of satisfying the court that he or she has set up a bona fide defence which is good in law or that he or she has raised an issue which ought to be tried. To establish these requisites, the defendant must fully disclose the nature and grounds of the defence and the material facts upon which that defence is founded, in the sense that there need to be factual material placed before the court sufficiently placing in doubt that the plaintiff's claim is unanswerable.⁴

[10] In the instant matter, the factual material that the first defendant has placed before the

³ LCB Gower *The Principles of Modern Company Law* 3 ed (1969) at 587; and *Kaese v Schact and Another* footnote 1 para 17.

⁴ *Bank Windhoek v Nicodemus* [2023] NAHCMD 376 (5 July 2023), relying on *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* [2019] NASC (10 April 2019) para 37.

court in his attempt to resist summary judgment is the following verbatim:

'(1) I am the majority shareholder in and of the Third Defendant, with 55% shares.

(2) On or about 01 May 2020, I instructed the Second Defendant, sole signatory to the Third Defendant's account in Namibia to make a payment of N\$326 000 from the Third Defendant's account of Squirrel Investment CC.

(3) I am the sole owner and Managing Director of Squirrel Investment CC, and it owns the Forklift that was rented out to the Third Defendant.

(4) This transfer was for a partial payment of money in the amount of N\$1,800,000.00. This was in line with a board meeting thereon. Attached hereto are the minutes to (of) the meeting held on 5 December 2019 and marked as Annexure "C".'

[11] It is important to note that the first defendant is a shareholder and one of the directors of the company. The director bears fiduciary duties to the company, that is, the duty to act bona fide and the duty to avoid a conflict of interest. Breach of any of the duties results in liability for the director. The duty to act bona fide is a subjective overarching duty. The bone and marrow of this duty is that the director must act honestly.⁵ The fiduciary duty to avoid a conflict of interest requires the director to exercise the duty in the interests of the company.⁶

[12] In the instant matter, the allegation is that the first defendant unlawfully and fraudulently transferred out of the bank account of the company (the third defendant) to a close corporation external to the company an amount of N\$326 000. The first defendant admits unambiguously that he instructed the second defendant to effect the aforementioned transfer, and he is the owner and the managing director of the aforesaid external entity, Squirrel Investment CC. Doubtless, the transfer of the funds amounted to an expropriation of assets of the company.⁷ That undoubtedly resulted in the breach by the first defendant of his fiduciary duty, which includes exercising the duty in the interests of the company.⁸

[13] The first respondent's reliance on Annexure 'C' to his answering papers (ie the Board

⁵ Piet Delpont *New Entrepreneurial Law* (2014) at 141.

⁶ *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA).

⁷ LCB Gower *The Principles of Modern Company Law* footnote 3 at 588.

⁸ *Da Silva v CH Chemicals (Pty) Ltd* footnote 6.

Meeting Minutes) does not even begin to get off the starting blocks. No where in the Minutes is there a record that the Board resolved that the first defendant could transfer the aforementioned amount to his close corporation. Indeed, during her oral submission, Ms Jakob was invited by the court to point to such item of resolution. Ms Jakob failed to point to such item in Annexure 'C'.

[14] It follows irresolutely and is well-grounded that the first defendant has not placed before the court any factual material to establish that he has a bona fide defence which is good in law; neither has he raised a triable issue that ought to be tried and, thus, 'sufficiently placing in doubt that the plaintiffs' claim is unanswerable'.⁹ The second defendant stands in the same boat.

[15] In my view, on the facts, the delivery of notice to defend the action was done solely as a mere delaying tactic, amounting to an abuse of the process of the court.¹⁰

[16] Based on these reasons, I conclude that the plaintiffs have made out a case for summary judgment against the first defendant and the second defendant. In the result, I make the following order:

1. Summary judgment is granted with costs against the first and second defendants, the one paying, the other to be absolved, in the following terms:
 - (b) Payment of N\$326 000 into the account of the third defendant, plus interest on the said amount at the rate of 20 per cent per annum *a tempora morae* from 1 March 2023 to the date of full and final payment; and
 - (b) Costs of suit.
2. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.

⁹ *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* footnote 4 para 37.

¹⁰ *First National Bank of Namibia v Yeung Tai Foodstuff & Trading C* [2022] NAHCMD (28 March 2022).

Counsel:	
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