

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b>  SEAL PRODUCTS (PTY) LTD APPLICANT  v INSPECTOR GENERAL OF THE NAMIBIAN POLICE 1 <sup>ST</sup> RESPONDENT INSPECTOR FELIX NDIKOMA 2 <sup>ND</sup> RESPONDENT	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2024/00133
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO	<b>Date of hearing:</b> 18 April 2024
	<b>Delivered on:</b> 10 May 2024
<b>Neutral citation:</b> <i>Seal Products (Pty) Ltd v Inspector General Of The Namibian Police</i> (HC-MD-CIV-MOT-GEN-2024/00133) [2024] NAHCMD 221 (10 May 2024)	
<b>Results on merits:</b>  Merits not considered.	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The preliminary point raised on authority is upheld.</li><li>2. The application is struck from the roll with costs.</li></ol>	
<b>Reasons for orders:</b>	
Prinsloo J:	

## Introduction

[1] The applicant, Seal Products Pty Ltd (Seal Products), approached this court on an urgent basis seeking relief against the Inspector General of the Namibian Police and Inspector Felix Ndikoma (Inspector Ndikoma) in the following terms:

- '1. Condoning the applicant's non-compliance with the Rules of this Court pertaining to time periods and service of the application, as well as giving notice to parties, as contemplated in terms of Rule 73 of the Rules of this Court; and directing the application to be heard on an urgent basis;
2. That a rule nisi is hereby issued calling upon the respondents to show cause, if any, on a date to be determined by this honourable court, why an order in the following terms should not be granted;
3. Declaring that the warrantless seizure and continued detention of Applicant's 501 boxes, which contain around 285 kilograms of seal products were unlawful and setting it aside;
4. Directing the first respondent to immediately restore possession of the 501 boxes which contains around 285 kilograms of seal products to Applicant;
5. Directing the respondent to pay the applicant's costs of suit on the scale as between attorney-own-client; and
6. Alternative or other relief.'

## Background

[2] Seal Products is a company that owns two seal harvesting and processing factories situated in Henties Bay and Lüderitz. It has been harvesting and processing seal products since 1994. The applicant exports seal products internationally and sells some of the products locally.

[3] According to the applicant, some of these seal products were stored in its warehouse situated in Lafrenz, Windhoek, where containers of seal products were seized by Inspector Ndikoma without a search warrant or valid court order.

[4] Inspector Ndikoma is a member of the Blue Rhino Task Team, which was established to combat and investigate wildlife crimes in Namibia. This task team comprised of a coalition between several government agencies, which includes the Namibian Police Force, Protected Resources Division, Forestry and Tourism, Namibian Defence Force and the Namibian Revenue Agency (NAMRA).

[5] On or about 10 January 2024, NAMRA had a coordinated intervention at a warehouse situated at Erf 233, Sun Industrial Park, Lafrenz, Windhoek. The warehouse is alleged to be

shared between Seal Products and Golden Lion Investment CC. One Mr Hou Xue Cheng (Mr Cheng) is seemingly a director of Seal Products and the majority shareholder of Golden Lion Investments CC.

[6] During the operation, NAMRA seized a number of wildlife products and ammunition. Amongst the wildlife products (skins and ivory), NAMRA recovered seal products, more specifically seal genitals. Inspector Ndikoma was called to the scene by Senior Customs Officer Jesaya Kandove. Mr Kandove handed over the items seized to Inspector Ndikoma.

[7] Inspector Ndikoma conducted a search in the presence of the applicant's legal practitioner and Mr Cheng. During the search, Inspector Ndikoma seized several boxes of seal products, and these seal products are the subject matter of the current application.

[8] As a result of the search, Mr Cheng was arrested and charged inter alia with contravening the Controlled Wildlife Products and Trade Act 9 of 2008. The matter was subsequently withdrawn against Mr Cheng. The matter was re-enrolled at the Katutura Magistrate Court via summons for 25 April 2024.

[9] Mr Charles Jiang (Mr Jiang) deposed to the founding affidavit in the current application, purportedly in his capacity as the General Manager of Seal Products.

#### Purpose of the application

[10] The applicant is seeking an order that the court declare the seizure and continued detaining of some 501 boxes containing 285 kilograms of seal products belonging to the applicant unlawful. The application is further aimed at obtaining an order to return these items to the applicant.

[11] At this point, it should be noted that the parties are at odds regarding the number of boxes and products that were seized. The applicant claims the return of 510 boxes, whereas Inspector Ndikoma alleges that he confiscated 39 boxes (containing 382 sachets) weighing 217.1 kilograms of dried seal genitals.

#### *Preliminary points*

[12] The respondents opposed the application and raised a number of points in limine, which

are:

- a) Mr Jiang brought the urgent application without a validly signed board resolution by the directors of the applicant, authorising him to do so.
- b) The applicant has not established locus standi as the seal products were seized at a warehouse purported to belong to Gold Lion Investment CC.
- c) That the deponent to the application, Mr Jiang, is not an employee of Seal Products.
- d) The legal practitioner of the applicant has not presented a power of attorney appointing or bestowing him with the authority to represent the applicant in the current proceedings.
- e) Criminal proceedings are pending before the Katutura Magistrate's Court pertaining to the seizure of the seal products, and the cause of action in both proceedings are the same, i.e. search and seizure conducted on 10 January 2024.

#### Discussion on the points in limine

[13] One of the main points raised by the respondents is the issue of Mr Jiang's authority to bring the current application.

[14] The parties are not in agreement on whether Mr Jiang, who deposes to the founding affidavit, is an employee of the applicant and whether he could have deposed to the founding affidavit.

[15] The reason for this dispute of fact between the parties in this regard is the fact that the respondents filed a confirmatory affidavit of one Mr Gabriel Uahengo (Mr Uahengo), who stated that he is a director and shareholder of Seal Products and owns 45-per cent shareholding in the company. Mr Uahengo further states that the other directors and shareholders are Mr Josias Petrus Swart (now deceased) and Mr Zacharias Petrus Cilliers. Mr Uahengo indicated that he is the only active shareholder of Seal Products as Mr Celliers resigned from the company. Mr Uahengo denied that Mr Jiang is an employee of Seal Products or that he was authorised to depose to the founding affidavit or to bring this urgent application.

[16] The respondents also filed the Business and Intellectual Property Authority record of the Company Registrar's records dated January 2024, which reflects Mr Uahengo as the majority shareholder of Seal Products.

[17] The applicant filed a confirmatory affidavit of Mr Cheng, who states that he is the majority shareholder and director of Seal Products. He alleged that Mr Uahengo, the minority

shareholder in the applicant, had been obstructive to the operations of the applicant, and as a result, the applicant instituted the current proceedings through its managing member. Mr Cheng also filed a share certificate indicating that he owns 55 per cent shares in the applicant as well as a letter directed to NAMRA from ENS Africa Legal Practitioners, that it holds funds in its trust account paid by Mr Hou Cheng in favour of Mr Uahengo. This letter states that the 'funds constitute the purchase price for shares in Seal Products Limited being purported to be sold' by Mr Uahengo to Mr Hou.

[18] Given the fact that Mr Cheng refers to Mr Uahengo as the minority shareholder of the applicant, it would be safe to infer that the sale of Mr Uahengo was not finalised and that Mr Uahengo's supplementary affidavit cannot be disregarded.

[19] Mr Khadila advanced an argument that Mr Jiang stated that he was duly authorised to bring the application and to deposed to the founding affidavit but conceded that after the respondents raised the issue of authority the applicant failed to file the resolution authorising the institution of the application.

[20] Mr Khadila argued that documents have also been attached to the replying affidavit, demonstrating that the deponent with the founding affidavit is the applicant's general manager. He submitted that a confirmatory affidavit has been filed that demonstrates that the deponent of the founding affidavit has the authority to launch the application.

[21] In *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd*,<sup>1</sup> in an application by a company, the respondent took an objection in limine that there was no proper proof before the court that the application had been duly authorised by the applicant. The applicant contended that it was implied in the affidavit of the managing director, who was also the majority shareholder. The question of authority having been challenged in the opposing affidavit, the applicant had produced a further affidavit by the managing director stating that the board of directors consisted of himself and three others who were all aware of the application and the circumstances surrounding it and had authorised his bringing the application on behalf of the applicant.

[22] Corbett J said the following:<sup>2</sup>

"In the present case the founding affidavit makes no express mention of authorization by the Company acting through its board of directors. The question of authority has been challenged in the

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<sup>1</sup> *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (CPD).

<sup>2</sup> *Supra* at 252 F.

opposing affidavit, and thus the onus is upon the applicant to show that the application has been authorised by the directors of the Company. In as much as no contrary evidence had been placed before the Court by the respondent, the “minimum of evidence” to use the words of Watermeyer J in Mall’s case will suffice.’

[23] The Chief Justice went on to raise some unanswered questions to come to a conclusion that the proceedings by the applicant were not authorised:<sup>3</sup>

‘If, as seems possible, no formal resolution of the board of directors was taken, then in what way was this application authorised? And, if the board did purport to authorize the application in some manner other than by formal resolution, was such manner of authorization in accordance with the constitution of the applicant?’

[24] The learned Judge concluded that to simply aver that directors have authorised an application amounts to an assertion of a legal conclusion rather than a factual allegation. The court proceeded to refer to *Mall (Cape) (Pty) Ltd v Merino Ko-operative Bpk*,<sup>4</sup> wherein the question as to authority to institute legal proceedings on behalf of an artificial person such as a company was considered by Watermeyer J, who stated as follows:

“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 Court to show that the applicant has duly authorised the institution of notice of motion proceedings. (see for example *Royal Worcester Corset Co. v Kesler’s Stores*, 1927 C.P.D. 143; *Langeberg Ko-operasie Beperk v Folscher and Another*, 1950 (2) S.A. 618 (C)). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolution 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 had 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 authorised 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 authorised by the company to do so (see for example *Lurie Brothers Ltd v Archache*, 1927 N.P.D 139, and the other cases mentioned in Herbstein and van Winsen, *Civil Practice of the Superior Courts in*

<sup>3</sup> Supra 255G-H.

<sup>4</sup> *Mall (Cape) (Pty) Ltd v Merino Ko-operative Bpk* 1957 (2) SA 347 (CPD) at 351-352.

South Africa, at pp. 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before Court, then I consider that a minimum evidence will be required from the applicant (cf. *Parons v Barkly East Municipality*, supra; *Thelma Court Flats (Pty) v McSwigin*, 1954 (3) S.A 457 (C))."

[25] The decision in *Mall (Cape) (Pty) Ltd* was referred to with approval by Ogilvie Thompson JA in *Pretoria City Council v Meerlust Investments Ltd*,<sup>5</sup> where the learned Judge of Appeal stated as follows:

'The question of authority having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council; that it is the Council which is prosecuting the appeal, and not some unauthorised person on its behalf (cf. *Mall (Cape) (Pty.) Ltd. v Merino Ko-operasie Bpk.*, 1957 (2) SA 347 (C) at pp. 351 - 2). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above-mentioned onus, the petitioner ought to have placed before this Court an appropriately worded resolution of the Council.' (my emphasis)

[26] In the matter in casu, the founding affidavit makes no express mention of authorisation by the company acting through its board of directors. There is merely a general statement that he was authorised to file the application on behalf of the applicant. The question of authority has been challenged in the opposing affidavit, and thus the onus is placed upon the applicant to show that the application has been authorised by the directors of the applicant.

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<sup>5</sup> *Pretoria City Council v Meerlust Investments Ltd* 1962 (1) SA 321 (AD) at page 325.

[27] In *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd*<sup>6</sup> this court stated as follows:

[51] A distinction must be drawn between matters where authority to launch the application is averred in the founding affidavit and objected to by the opposing party and those matters where absolutely no averments are made regarding authority. In the former instance the principles as set out in *Otjonzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*<sup>7</sup> applies. In the *Otjonzondjupa Regional Council* matter Muller J (as he then was) sets out the principles as follows:

‘(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorization has been placed before Court;

(b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;

(c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;

(d) Each case will in any event be considered in respect of its own circumstances; and

(e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that it is the applicant who is litigating and not some unauthorised person on its behalf.’ (my emphasis)

[28] Given the challenge to Mr Jiang’s authority to file the application, one would reasonably expect that the resolution by the Board of Directors to be filed, but he could not do so as Mr Uahengo, who is also a director, stated in no uncertain terms that there was no such authority. In fact, Mr Uahengo stated that Mr Jiang was not even the general manager of Seal Products. However, I do not intend to dwell on this issue at this stage.

[29] Mr Cheng contended that he, as the managing director, could authorise the filing of the application. However, the official BIPA CM 23 record dated 22 January 2024 does not reflect him as a shareholder in the applicant. In response to the averments of Inspector Ndikoma in this regard, the applicant, through Mr Jiang, merely denied Inspector Ndikoma’s statement that Mr Cheng is not reflected as a director of Seal Products. Mr Jiang refers to two judgments by this court stating that the court held that Mr Cheng is the majority shareholder in the applicant. The cases referred to are *Uahengo v Seal Products (Pty) Ltd and Others*<sup>8</sup> and *Uahengo v Seal*

<sup>6</sup> *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/02613) [2020] NAHCMD 290 (10 July 2020).

<sup>7</sup> *Otjonzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others* (LC 7/2010) [2010] NAHC 29 (26 March 2010).

<sup>8</sup> *Uahengo v Seal Products (Pty) Ltd and Others* (HC-MD-CIV-MOT-GEN-2021/00212) [2021] NAHCMD 351



*Products (Pty) Ltd and Others*<sup>9</sup>.

[30] I have carefully scrutinised the judgments above and could not find any reference in any of the two judgments finding that Mr Cheng is the managing director of the applicant. Both these cases essentially deal with Mr Uahengo seeking orders against the other shareholders, Messrs Celliers and Swart. In HC-MD-CIV-MOT-GEN-2021/00212, he sought an order for the other shareholders to sell him their shares in Seal Products. Similarly, in HC-MD-CIV-MOT-GEN-2021/00442, he again sought an order compelling the other shareholders to sell their shares in Seal Products to him. Mr Uahengo also sought an order to have a lease agreement between Seal Products and Mr Cheng set aside.

[31] The state of affairs in the upper management of the applicant is unclear to this court, and there is a definite dispute of fact in this regard. What is, however, clear from the affidavits of Mr Cheng and Mr Uahengo is that there was no board resolution concerning the current application.

[32] I am of the view that the point on the issue of authority was well taken by the respondents and must be upheld. It is accordingly unnecessary for me to consider the remainder of the points in limine raised by the respondents as the point on authority is dispositive of the application.

Urgency

[33] I do not intend to deal with the issue of urgency as the matter is not properly before this court as a result of my findings above.

[34] My order is as set out above.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Applicant</b>	<b>Respondents</b>
K AMOOMO Of Kadhila Amoomo Legal Practitioners Windhoek	C ENDJAMBI Of Office of the Government Attorney Windhoek

<sup>9</sup> (30 July 2021).

<sup>9</sup> *Uahengo v Seal Products (Pty) Ltd and Others* (HC-MD-CIV-MOT-GEN-2021/00442) [2021] NAHCMD 599 (17 December 2021).

