CASE NO. LC 44/2009

SPECIAL INTEREST

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ERICKSON NANGOLO
APPLICANT

and

METROPOLITAN NAMIBIA LTD **1ST**
RESPONDENT

ALEXANDER FORBES NAMIBIA T/A
ALEXANDER FORBES FINANCIAL SERVICES **2ND**
RESPONDENT

CORAM: HOFF, J

Heard on: 2010.07.23.

Delivered on: 2010.08.13

Reasons on: 2010.08.31

JUDGMENT

HOFF, J: [1] On 13 August 2010 this Court dismissed with costs points raised *in limine* indicating at that stage that my reasons would be provided in due course. These are now the reasons.

[2]In an application brought on notice of motion the applicant inter alia applied for the payment of pension benefits accrued through his employment

with first respondent and invested with second respondent which at the time he deposed to his founding affidavit stood in the amount of N$149,999,50.

[3]This application was opposed by the respondents. Mr Gebson Shipena the regional manager of the Ondangwa region of first respondent during the years 2005 until 2007 and subsequently the Human Resources Executive, deposed to the answering affidavit on behalf of first respondent.

[4]Mr Shipena in his answering affidavit stated that he was duly authorised to depose to the affidavit and duly authorised to oppose the applicant's application on behalf of first respondent.

[5]The applicant in his replying affidavit *inter alia* replied as follows on this point:

> "*Locus standi*
>
> First respondent has averred in paragraph 1 of his answering affidavit that he is authorized to depose to the affidavit and further that he is duly authorized to oppose the application launched by the applicant.
>
> 7.1 I am advised which advised (sic) I verily believe that where the deponent does not act personally, but in the representative capacity, a requisite authority must be conferred upon the deponent beforehand. Since the first respondent is an artificial person, such authority can only be taken by the first respondent through a resolution taken at a meeting.

7.2 Accordingly, it is my submission that the deponent to the answering affidavit did not have the requisite authority to oppose the application and depose to the affidavit in the manner he did. As such, the answering affidavit and its confirmatory affidavits stand to be struck out due to lack of *locus standi*."

This affidavit was signed by the applicant on 4 September 2009.

Poinst in limine

[6]The points *in limine* taken by Mr Mbaeva who appeared on behalf of the applicant was firstly that the special power of attorney has not been approved by the board of directors of first respondent. Consequently the legal practitioners appointed do not have authority to represent the first respondent and secondly, Mr Shipena and the other employees who deposed to affidavits did not have the requisite authority to do so, consequently, all the affidavits deposed to on behalf of the first respondent stand to be struck.

[7]In response to the points *in limine* raised by the applicant in his replying affidavit the first respondent filed documents referred to as *"Delegation of*

Authority” and *“Power of Attorney”.*

[8]The document with the title *“Delegation of Authority by the Managing Director”* reads as follows”

“I,

JASON NANDAGO

in my capacity as **Managing Director** hereby delegate my authority to **GEBSON DENNIE SHIPENA** in his capacity as **Regional Manager : Ondangwa** to take all the necessary steps to oppose **CASE NO LC 44/09** and in particular to sign all affidavits and documentation so necessary, lodged by **ERICKSON NANGOLO** against **METROPOLITAN LIFE NAMIBIA LIMITED** in the Labour Court of Namibia.

I ratify all instructions given by **GEBSON DENNIE SHIPENA** to attorneys **VAN DER MERWE-GREEFF INCORPORATED** to oppose **CASE NO. LC 44/09** in the Labour Court of Namibia.

I also authorise **GEBSON DENNIE SHIPENA** to appoint attorneys **VAN DER MERWE-GREEFF INCORPORATED** to do, and take whichever step necessary, to oppose the application and ratify what has been done by **VAN DER MERWE-GREEFF INC.** in the abovementioned application since the commencement of the abovementioned application.

This delegation of authority is done in terms of paragraph 4.1 of Annexure “A” hereto.

DATED at WINDHOEK this 24th day of SEPTEMBER 2009.”

[9]This document was thus signed by the Mr Nandago after the filing of the replying affidavit.

[10]Paragraph 4.1 with the title *“Managing Director may delegate his powers”* reads as follows:

> *“4.1 Any powers delegated to the Managing Director by the Board through the operation of this delegation process may be sub-delegated by the Managing Director to any one or more officials of MetNAM or its holding company, MHL, provided that before the delegation is made the Board has approved the document setting out the delegation.”*

[11] Paragraph 5.4 of the same document reads as follows:

"5.4 At the Board meeting following the date of the round robin decision the company secretary must report fully on the decision so taken by the Board, identifying the directors who voted against the resolution. The company secretary must also record the documentation in the minute book."

[12] It was submitted by Mr Mbaeva that since these two procedures prescribed in paragraph 4.1 and 5.4 of first respondents internal delegation of decision making powers of the board of directors have not been complied with that both the legal practitioners of record as well as the officials of first respondents who deposed to affidavits are not properly before Court.

[13]It was further submitted by Mr Mbaeva that any defect referred to *supra* should have been cured by way of an affidavit. Thus in the absence of any affidavit in this regard there is no evidence curing the defects referred to *(supra).*
As authority for the proposition that where lack of *locus standi* has been raised the opposing party must deal with such lack of *locus standi* by way of affidavit this Court was referred to the case of *Commercial Bank of Namibia v Mybourgh and another 1996 NR 330 HC.*

[15]It was not disputed that the procedure set out in paragraph 4.1 was not complied with.

[16]Mr Schikerling who appeared on behalf of the first respondent submitted that a valid resolution to oppose the application had been taken by the board of first respondent.
[18]In this regard this Court was referred to paragraph 5 of the document *"Delegation of Decision – Making Powers of the Board of Directors"* (which includes paragraph 5.4 referred to *(supra*)) and in particular paragraph 5.3 which reads as follows:

"DECISIONS TO BE TAKEN BY ROUND ROBIN PROCEDURE

Should the need arise for an urgent decision to be taken by the Board and due to urgency, the matter cannot be postponed until the next Board meeting, then the required decision may be obtained by following the process as set out hereunder:

5.1 ….

5.2 The company secretary must e-mail or fax the documentation to each director and advise directors of the time and date when a written response is required;

> 5.3 For a decision to be legitimately taken by round robin procedure, the support of the majority of the directors is required in writing and signed by them (and for the purposes of this procedure, communication by fax will be regarded as in writing)."

[19]Attached to the documents filed (referred to *supra)* were the replies by seven directors (out of a total of nine) who approved the delegation of authority by Mr Jason Nandago to Mr Gebson Dennie Shipena.

[20]I agree with Mr Schickerling that paragraph 5.4 is not a prerequisite for legitimacy in respect of any board meeting of first respondent but an internal procedure to maintain proper record keeping. It is paragraph 5.3 which affords legitimacy where a board decision is taken by way of round robin procedure as was done in the present case.

[21]The legal advice relied on by the applicant (referred to *supra*) to the effect that where a litigant acts in a representative capacity the requisite authority must be conferred upon the deponent *beforehand* cannot be left unqualified.

[22]Ratification of an unauthorized act of bringing or opposing application proceedings operate retrospectively to cure the original lack of authority.

[23](See *Commercial Bank of Namibia v Myburgh and Another 1996 NR 330 HC; Smith v Kwanonquebela Town Council 1999 (4) SA 947 (SCA); Otjozondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka and Two Others Case No. LC 1/2009 unreported judgment delivered on 22 July 2009; Merlin Gerin (Pty) Ltd v All Current And Drive Centre (Pty) Ltd and Another 1994 (1) SA 659 CPD.* In the *Smith* matter (*supra*) Harms JA said the following regarding the issue of ratification at 954 D:

> *"I am in general in agreement with the analysis and conclusion reached in Merlin Gerin. Apart from making perfectly good sense and being practical, it is legally sound. A party to litigation does not have the right to prevent the other party from rectifying a procedural defect."*

[24]In the Commercial Bank matter Hannah J said the following in respect of ratification at 334 B:

> *"But if it resolves the matter in a simple, straight forward manner I can see*

no objection allowing the applicant the opportunity of putting his case in order ...”

[25]Is it therefor fatal if the ratification of the authority to institute or defend application proceedings is not embodied in an affidavit? The answer to this question lies in my view in the nature and form in which the *locus standi* of a litigant is challenged by the opposing party.

[26]In *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)* the Court said the following at *351 H – 325 H:*

> “This seems 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 court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance ... . The best evidence that the proceedings have been properly authorised will be provided by an affidavit made by the official at the company annexing a copy of the resolution but *I do not consider that form of proof 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 unauthorised person on its behalf.”

(Emphasis provided).

[27]In *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration 2005 NR 147 HC* Hannah J referred with approval to the *Mall (Cape)* decision in which Watermeyer J stated *inter alia* at *352 A – B* as follows:

“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 of evidence will be required from the applicant.”

(Underlining mine).

[28]Normally, where the issue of lack of authority is raised in the answering affidavit an applicant would have the opportunity to deal with such allegation in the replying affidavit, depending on what evidence is provided in support of such an allegation.

[29]In the present matter the allegation of lack of authority was first raised in the replying affidavit by the applicant.

[30]It is trite law that this Court may in its discretion permit the filing of further affidavits.
(See *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd 2007 (1) NR 222).*

[31]In the present instance first respondent did not apply to Court for the filing of a further affidavit to deal with the allegation of lack of authority. In my view having regard to the circumstances of this matter, it was not necessary to do so.

[32]I say this 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 authority to act in such 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.

34]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. In this regard Muller J in *Otjozondjupa Regional Council (supra)* said at p 14 the following:

> *"It is clear from the authorities that there must be at least something to show that the litigation on behalf of an artificial person has been authorized. In several matters Courts have regarded a statement under oath by a deponent that he or she had been duly authorized to bring the application as sufficient."*

[36]In the present instance the regional manager of first respondent stated under oath that he was duly authorised to oppose the application. In addition, *ex post facto*, a board resolution was filed confirming this statement under oath. I am thus satisfied that the regional manager had the necessary authority from the first respondent to depose to the affidavit and to oppose the application and that it was not necessary to have the said board resolution embodied in an affidavit.

[37]The present matter is distinguishable on the facts from *Duntrust (supra)* where Hannah J expressed himself on the issue of authority as follows at *149 G – I:*

"Ms Angula submitted that the present application falls into the *'minimum evidence'* category and that the combination of the statement, that she was duly authorized to depose to the founding affidavit, and the statement that she had at all relevant times acted on behalf of the applicant, is sufficient to show that the application has been properly authorized. In the *Mall* case *supra* the Court concluded that there was no reason to think that the applicant did not pass a proper resolution authorising the institution of the proceedings against the respondent, but in my view the present case is clearly distinguishable on the facts. As Watermeyer J pointed out at *352 H* there was, in that case, no evidence whatsoever to suggest that there was no resolution or no proper resolution, whereas in the present case the absence of a resolution is squarely put in issue. The inference I draw from the applicant's failure to deal with the *respondent's averment of fact, not belief,* is that it may well be that no resolution was passed by the applicant to institute this application, and that it was not properly authorized."

(Emphasis provided).

(See also *N.U.N.W v Peter Naholo Case No. A 16/2006* unreported judgment of this Court delivered on 7 April 2006 by Tötemeyer AJ, which is distinguishable on the facts from the present application)

[38]In *N.U.N.W (National Union of Namibian Workers) (supra)* one of the issues raised was lack of authority to bring the application and the court dealt with this issue on p. 23 paragraphs 26.1 and 26.2 as follows:

"[26.1] If a respondent offers no evidence at all to suggest that an applicant is not properly before Court, a minimum of evidence will be required from the applicant to establish authority. This is the import of the frequently followed judgment of the **Mall (Cape)** matter, *supra.* In my view, this principle should also apply if respondent avails himself of a mere non-admission or a tactical denial of authority without placing any evidence before Court to suggest that the applicant is not properly authorised.

[26.2] In circumstances where a respondent substantially challenges the authority of the applicant – supported by sufficient evidence

> so as to create a genuine dispute of fact as to whether or not the applicant was properly authorised – the duty is casted on the applicant to refute that evidence. In this case the validity of the particular resolution or extract purporting to confer authority (AVM1) was challenged on specific grounds. It went well beyond a mere non-admission. This challenge was supported by sufficient evidence. The applicant was called upon to properly respond thereto and to refute those allegations. In those circumstances the applicant could not merely be content by simply relying on the text of the resolution (and a bare allegation in the founding affidavit that the deponent of the applicant is duly authorised) without meeting these challenges. The duty was casted on the applicant to show that the relevant resolution has a valid underlaying basis."

[39] This approach is endorsed by this Court.

[40]I am satisfied (since the submission by applicant is a tactical denial of authority) that enough information has been placed before me to satisfy me that it is the first respondent who opposed the application and not some unauthorised person.

[41]It was submitted by Mr Schickerling that the fact that the points *in limine*were taken warranted a special cost order against the applicant since it has become *"an unfounded practice to simply boldly deny authority".* Court may well in future consider a special cost order against a litigant who without any factual foundation boldly denies the authority to institute or to oppose proceedings as a mark of disapproval of such a tactic.

HOFF, AJP

ON BEHALF OF THE APPLICANT:

MR MBAEVA

Instructed by:

MURORUA & ASSOCIATES

ON BEHALF OF THE 1ST RESPONDENT:
ADV SCHICKERLING

2ND RESPONDENT:
NO APPEARANCE

Instructed by:
VAN DER MERWE-GREEFF

INC.