REPORTABLE

CASE NO.: SA 06/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MANFRED MODER **APPELLANT**

And

FARM AUDAWIB (NEU SCHWABEN) (PTY) LTD **RESPONDENT**

Coram: Shivute CJ, O'Linn AJA *et* Mtambanengwe AJA

Heard on: 2005/06/21
Delivered on: 2007/11/19

APPEAL JUDGMENT

SHIVUTE CJ: [1] This is an appeal from a judgment of Mainga J, granting an order *inter alia* ejecting the appellant from a farm named Audawib, No 148, in the district of Karibib. The appeal is said to be against "the whole of the judgment" and not a single ground of appeal has been advanced. The submissions made on behalf the appellant (as respondent) in the Court below were essentially repeated in this Court.

[2] Mr Bloch appeared for the appellant while Mr Coleman argued the appeal

on behalf of the respondent-company.

[3] The respondent filed an application for condonation for the late filing of the Power of Attorney, which was granted. Although the respondent's application for condonation was unopposed, Mr Bloch raised a point *in limine* contesting the validity of the resolution and Power of Attorney to oppose the appeal. Mr Bloch argued in this regard that the appellant was a shareholder of the respondent-company and that as such, he should have been invited to a meeting at which a resolution was taken to oppose the present appeal and to authorise the signing of the Power of Attorney. It follows, so the argument goes, that any resolution taken at a meeting at which the appellant was excluded was invalid and any Power of Attorney signed pursuant to such resolution was void and of no effect. The argument advanced on the point *in limine* and the issues raised on behalf of the appellant as detailed in paragraph [6] below are intertwined. As such it would be convenient to consider the point *in limine* together with those issues.

[4] The facts on which the Court *a quo* based its decision are sufficiently stated in the judgment, so are the various issues that fell to be decided in the Court *a quo*. They can be summarised briefly. On 26 August 1991 the appellant and the respondent entered into a written agreement of lease of 3 years duration in terms of which the respondent as lessor, leased the farm to the appellant as lessee. It was a further term of the agreement that six months prior notice of termination had to be given in writing, failing which the lease would be automatically extended for a further three years. The lease provided that the tenant would have a vote as a

shareholder. Appellant took occupation of the farm, the property of the respondent, in July 1991.

[5] The respondent gave the appellant notice for the termination of the lease on 25 November 1996 and again on 20 January 1997 as well as on 15 December 1999, which latter notice was served on appellant on 5 January 2000.

[6] The issues raised by the appellant in the eviction proceedings in the Court *a quo* included contentions that several notices of termination were issued by respondent when respondent had been deregistered and had no capacity to institute the proceedings in question and that appellant as a fully qualified shareholder had not been given notice of a shareholder's meeting that took the decision to terminate the lease.

[7] Mainga J correctly identified the real issue between the parties as being whether the appellant was properly notified in terms of clause 2 of the lease to vacate the farm. He considered the other issues canvassed on behalf of the appellant and found them to be irrelevant to the enquiry. These issues were-

(i) that the matter should have been brought by way of action and not in motion proceedings because the parties' sworn translations of clause 2 of the lease differed[1];

[1] The learned Judge correctly did not find the two interpretations to differ as contended.

(ii) that the appellant had a lien entitling him to resist ejection until compensated for improvements allegedly made by him on the farm[2];

(iii) the deregistration of the respondent company which he dealt with comprehensively in rejecting the argument that the respondent had no capacity to institute the proceedings seeking the eviction of the appellant from the farm.

[8] On the issue of the deregistration it was common ground between the parties that the company by inadvertence had been deregistered. Upon the erroneous deregistration of the company being brought to his attention, the Registrar of Companies purported to restore registration contrary to the provisions of section 73 (6) of the Companies Act, No 61of 1973 (the Act).[3] Ultimately an application to restore the company's registration was successfully brought in the High Court.

[9] In his report filed during the application to restore the registration of the company, the Registrar of Companies explained the position thus:

[2] The appellant, as a lessee of a rural tenement, essentially claimed a lien or right of retention (*ius retentionis*) in respect of a rural tenement. This he could not do. Once he had received a valid notification of the termination of the lease, his duty at common law was to give up possession and then claim compensation for the alleged improvements to the property: See the South African cases of *Mackenzie NO v Basha 1950 (1) SA 615 NPD at 619*; *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd 1989 (1) SA 106 (W) at 111C.* See also *H Charny & Co (Pty) Ltd v Segall & Matheson Properties 1995 NR 148 (HC*); *Palabora Mining Co Ltd v Coetzer 1993 (3) SA 306 (TPD)* for an insightful discussion of the question whether or not the provisions of the *Placcaaten* of 1658 and 1659 extended to urban tenements as well.

[3] Section 73 (6) (a) of the Act provides: "The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered".

"1. The Registrar of Companies having noted the circumstances which led to and the deregistration procedures carried out agrees that there is justifiable ground for the application to restore the said company *(sic).*

2. It is noted and agreed by me, in my capacity as Registrar of Companies, that the action for deregistration was hastily taken without ensuring that the directors of the companies were informed at their individual address of the resignation of the company auditors and the fact that their address could no longer serve as the registered office for the company. Oblivious of the above changes, communications erroneously continued to be sent to a wrong address *(sic).*"

[10] Section 73 (6) (a) of the Act *inter alia* and in effect provides that as far as a company is concerned, there is in deed life after death. It will be recalled that the section says that upon restoration of a company, “the company shall be deemed to have continued in existence as if it had not been deregistered”.

[11] The general effect of the restoration of a company to the register of companies was stated by Van Dijkhorst J in *Ex Parte Sengol Investments (Pty) Ltd 1982 (3) SA 474 (TPD)* as follows:

> "The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become *bona vacantia* and such accrued to the State. Likewise debtors and creditors of the company at time of deregistration may upon restoration find their obligations or rights resuscitated".[4]

[12] Furthermore, WA Joubert, the learned founding editor of The Law of South Africa, First Reissue, Volume 4 Part 3, par 95 says:

> "What is more, a restoration order validates retrospectively all acts done in the name or on behalf of the company during the period between its deregistration and its restoration".

[13] But Mr Bloch submits, with reference to Henochsberg on the Companies Act, Fourth Edition, on page 115, that the restoration of a company to the register automatically terminates the office of a director and that it does not automatically restore a former director to office. It is necessary for the company to again appoint directors. Mr Bloch submits furthermore that on the established facts, there was no proof of the reappointment of any of the shareholders as director of the respondent-company and as such the resolution to institute ejection proceedings was null and void and of no force or effect.

[14] Assuming, without deciding, that the contention that the directors were neither reappointed nor were they restored to office with the restoration of the company to the register was correct, as it will soon become evident, the

[4] At 477C-D. See also the judgment of Goldstone J in *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd 1984 (2) SA 372 (WLD) at 374H. Cf. Mouton v Boland Bank Ltd 2001 (3) SA 877 (SCA)*

signatories to the resolution of 10 May 2002 were all shareholders of the company and the resolution evidently constitutes a decision of the company. Moreover, section 208 (2) of the Act provides:

> "Until directors are appointed, every subscriber to the memorandum of a company shall be deemed for all purposes to be a director of the company".

[15] It follows that Mr Bloch's argument in effect that the resolution to institute ejectment proceedings was bad for want of a properly constituted meeting was correctly rejected by the Judge *a quo*.

[16] I have no reason to find fault with Mainga J's reasoning on the issues that he found to be peripheral to the real issue in the case. However, his reasoning on what he correctly perceived to be the real issue between the parties needs further scrutiny.

[17] The Judge said:

> "[The] crucial issue between the parties is whether the respondent was properly notified in terms of clause two of the lease agreement to vacate the farm. If he was that is the end of the matter between the parties and the respondent should vacate the farm. The lien which the respondent claims over the farm which the respondent raised in his answering affidavit but abandoned in the heads of argument is not a defence to the applicant company's application."

[18] Later he said:

> "Turning now to the real issue between the parties, the respondent disputes that the deponent of the founding affidavit on behalf of the applicant company is the managing director of applicant. This denial has no basis and is rejected for that reason alone and warrants no further discussion. So is the contention that the applicant company did not properly decide to cancel the lease agreement and the contention that the director who launched the application was not properly authorised to do so."

[19] On their face value these statements and conclusions seem unsupported as in the judgment of the Court *a quo* no reference is made to extracts from affidavits made in the proceedings. However, a reading of the affidavits in the case clearly shows that the statements made and conclusions arrived at by the learned Judge were entirely justified. I find it necessary to quote at some length from the relevant paragraphs of the affidavits to illustrate the point.

[20] The affidavits show that the contentions challenging the authority of Wolfram Schwarz, the deponent to the applicant's founding affidavit are advanced in paragraphs 8, 9, 10, 11 and 12 of the appellant's answering affidavit. In those paragraphs appellant respectively states:

> "8. I deny the authority of the said Wolfram Schwarz to depone *(sic)* to the Founding Affidavit and to bring the application on behalf of the company. I state that no meeting of shareholders of the company was held to authorise the company to make the application. In this regard I refer this Honourable Court to paragraph 5 of the original German language lease agreement entered between me and the company on which the action is based and which is annexed to the founding affidavit marked "WS1". The attention of this Honourable Court is particularly drawn to line 27 on page WS1 (d) which, in German reads as follows:

> ‘Dem Pächter wird das Stimmrecht eines Vollgesell*schafters eingeräumt*’

9. The translation of that line is reflected in the sworn translation “WS2” annexed to the Founding Affidavit as follows:

> ‘The lessee has the vote of a full shareholder’

10. I must however refer this Honourable Court to the 5th line on page “ST4” of the second translation of the lease which states:

> ‘The rights of a fully qualified shareholder to vote is herewith granted to the lease’

11. No notice was ever given to me as a ‘shareholder’ of any meeting at which this matter would be discussed or considered. Accordingly no resolution could have been passed authorising the deponent or the company to give me notice or to take legal steps of any nature. As such I respectfully suggest that the Deponent Schwarz has no authority to bring this application either on his own behalf or in the name of the Applicant Company.

12. In particular I bring it to the notice of this Honourable Court that no certified copy of a resolution of the members of the company nor certified copy of a resolution of the Directors of the Company is annexed to the Founding Affidavit which confirm that the Deponent was authorised to sign the Founding Affidavit or to make the application as such”.

[21] In paragraph 5 of its replying affidavit respondent, per the deponent to the founding affidavit, states:

> “5. I note that this deponent denies my authority without putting up a single relevant fact in support of such denial of authority. A meeting of shareholders is not necessary to authorise this action. All that is necessary is a meeting of directors. I enclose a copy of the directors’ resolution authorising the bringing of this application, marked “WS1”. The respondent’s suggestion that I have no authority to bring this application on behalf of applicant-company is accordingly without substance. Respondent has at no stage relevant hereto been a shareholder of applicant-

company".

[22] The resolution attached to the replying affidavit reads as follows:

> "EXTRACT FROM THE MINUTES OF THE MEETING OF THE BOARD OF DIRECTOS OF FARM AUDAWIB PTY LTD. HELD AT WINDHOEK, THIS 10 MAY 2002
>
> ---
>
> RESOLVED:
>
> THAT the application in the High Court of the Republic of Namibia ejecting Manfred Moder from Farm Audawib No 148, District of Karibib, plus costs of the application, as well as further and/or alternative relief is hereby ratified and confirmed.
>
> AND THAT Messrs ENGLING STRITTER & PARTNERS, Attorneys of Windhoek, be instructed to act on behalf of the company in such action.
>
> AND THAT WOLFRAM SCHWARZ, EIKE BECKER-KRüGER and GERHARD SCHNEIDER in their capacities as DIRECTORS and SHAREHOLDRES authorize Wolfram Schwarz and ratify that he may sign and is authorized to sign any documents necessary or requisite for the due institution of the application and/or any action to its determination and for the purpose of giving effect to the aforegoing Resolution.
>
> ---
>
> CERTIFIED TO BE A TRUE COPY
>
> (signed)
> WOLFRAM SCHWARZ
>
> (signed)
> EIKE BECKER – KRüGER
>
> (signed)
> GERHARD SCHNEIDER"

[23] In his written heads of argument Mr Coleman correctly submitted that the appellant had no right to be notified of or attend a shareholders' meeting

concerning the cancellation of the lease agreement for the following reasons:

> "1. The lessee of the farm is given the right to vote as a shareholder in terms of the lease agreement with the company;
>
> 2. His name does not appear on the register of shareholders nor is he a party to the shareholders agreement of the company;
>
> 3. In terms of the lease agreement certain decisions regarding the running of the farm, such as, exceeding an expense limit have to be made by shareholders. Furthermore, the lease agreement contains very strict requirements as to how the farm had to be managed;
>
> 4. The lease agreement effectively gives the appellant the authority as manager of the farm;
>
> 5. As a result the intention was that he participates – with the vote of a shareholder – in the decision-making process regarding the management of the company; and
>
> 6. Furthermore, the articles of association of a company normally identify those entitled to notice and subject thereto only shareholders registered as such are entitled to notice of a shareholders' meeting.
>
> *Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656 [C.A.] at 670C-D*.
>
> Joubert LAWSA Vol 4, Part 2 (first reissue) para 19, note 13
>
> As a consequence, it is submitted that the statement in the letter dated 25 November 1996 by Kinghorn Associates [the erstwhile legal practitioners of the respondent]:
>
> '(O)ur offices received instructions from shareholders, holding 100% of all issued shares...
>
> read with the allegation in the replying affidavit on behalf of the respondent that a shareholders' meeting did take place authorising the cancellation of the meeting [should surely read agreement] constitute adequate evidence that the shareholders of the respondent decided to cancel the agreement. *Mall* (*Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 at 352A".'

[24] Mr Coleman concluded his submission on this issue by stating that:

> "The resolution dated 10 May 2002 signed by all the shareholders and directors of the respondent ratified any defect that may have existed in the decision making of the respondent regarding the cancellation of the lease agreement. *Mall* (*Cape) (Pty) Ltd*, *supra"*

[25] The case of *Allen v Gold Reefs of West Africa Ltd (supra)*[5] concerned *inter alia* the validity of a special resolution taken at a meeting of the directors of the defendant company in terms of which the company's articles of association were altered so as to adversely affect shares standing in the name of a deceased share-holder named Zuccani. The Judge at first instance held that the resolution was bad because the notice of the meeting was addressed wrongly. On appeal, Sir Nathaniel Lindley, M.R. with whom the rest of the members of the Court agreed on this point, stated:

> "Notice convening these meetings was sent addressed to Zuccani at his registered address; and the notice came to the knowledge of his executors. The directors knew he was dead; but I cannot agree with the learned judge that the resolution was invalid by reason of any defect in the notice. Notices of meetings have only to be given to members and the executors were not members".[6]

[26] In the *Mall* (*Cape) (Pty) Ltd (supra)* case it was held:

> "The best evidence that the proceedings have been properly authorised would be proved by a copy of the resolution but I do not consider that that

[5] Also reported [1900-3] All ER 746

[6] At 749C-D of All ER

> 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 unauthorised person on its behalf".[7]

[27] In his answering affidavit appellant referred to a meeting held on 26 March 1987 whereby he says:

> "[T]he original parties to the creation of the applicant company (being three German citizens including the deponent to the Founding Affidavit) entered into an agreement of association relating to the formation of the company and the rules governing the relationship between parties. In terms of the agreement it was agreed that each of the three would hold 33⅓ % each of the issued share capital of the Company".

[28] He attached the 'Agreement of Association' as annexure ST2-1-13 (1-13 being pages thereof). That document provides in paragraph 8.3 as follows:

> "In respect of the following transactions the managers have to obtain the previous *(sic)* consent of the shareholders who <u>have</u> <u>to</u> <u>decide</u> about them by resolution of 66⅔ [per cent] majority of the ordinary shares:
>
> (a) ……
> (b) ……
> (c) ……
> (d) ……
> (e) The conclusion and cancellation of rent agreements and lease agreement as far as they do not concern insignificant objects". (Emphasis added).

[29] The papers before the Court *a quo* show that in an additional agreement it was provided that the appellant should receive 15 per cent of the shares of farm

[7] At 352A-B

Audawib (Pty) Ltd; that he was to pay ZAR 160 000 to Mr Wolfram Schwarz; that he may acquire further shares in respondent up to 33⅓ per cent during the three year term of the lease and that he did indeed pay Schwarz the ZAR 160 000.

[30] However, in a letter addressed to the appellant's legal representative dated 25 November 1996 wherein it was *inter alia* stated:

> "SHAREHOLDING BY YOUR CLIENT
>
> As your client had already fulfilled his contractual obligation towards our client, Mr Wolfram Schwarz, to wit, by effecting payment in the amount of N$160 000.00 (*sic*) (in exchange for obtaining a 15% shareholding in the Company), our said client, Mr Schwarz, has now instructed the Company's auditors to effect transfer of 15% of all issued shareholding in the Company, into your client's name. This is in accordance with the provisions of the Addendum to the Deed of Lease (marked *'ZUSATZ-VEREINBARUNG'*) signed by both these persons. Once information regarding the actual numbers allocated to such shares or of the share certificate had become available to our office these will be forwarded to your offices by our firm",

his legal representative, the same legal representative who argued the appeal, replied on his behalf in a letter dated 4 December 1996 as follows:

> "This payment of N$160 000.00 was always regarded and agreed to be a loan. It will thus serve no purpose for the auditor of the company to transfer shares to my client".

[31] Furthermore, in a letter dated 13 December 1996, the legal representative unequivocally declared:

> "My client owns no shares in the company whether allotted by the company or bought from any shareholder".

[32] It stands to reason that whatever was meant by the provision in the lease agreement that the "lessee has the vote of a shareholder" or "the rights of a fully qualified shareholder to vote is herewith granted to the lessee", respondent is correct to say in paragraph 5 of its replying affidavit:

> "Respondent has at no stage relevant hereto been a shareholder of applicant-company".

[33] It followed that he was not entitled to the notice of meetings including the meeting at which the resolution to oppose the appeal was taken and this finding also disposes of Mr Bloch's argument on the point *in limine.*

[34] The learned Judge *a quo* was therefore correct in rejecting the argument that the respondent had no capacity to institute the proceedings in the court *a quo*. Secondly, I agree with his finding that the difference as to the correct sworn translation of clause 2 of the lease agreement is not a bona fide dispute. It is clear from translations what the terms of that clause are and Mr Bloch's argument in that regard should also fail. Evidently the appellant was given proper notice to vacate the farm and he has no defence to the application for ejectment.

[35] The appeal therefore stands to be dismissed.

[36] The following order is accordingly made:

The appeal is dismissed with costs.

_____
SHIVUTE, CJ

I agree.

_____
O'LINN, AJA

I agree.

_____
MTAMBANENGWE, AJA

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Instructed by:	BASIL BLOCH ATTORNEY
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