NAMIBIA EXPORT SERVICES v S&G FISHING ENTERPRISES CC AND THE OWNERS OF THE VESSEL. MVF "EVGENEY POLYAKOV"

PRACTICE AND PROCEDURE

Motion proceedings - anticipation of return day - deponent's lack of authority to oppose and anticipate on behalf of artificial person - nature of applicant's "rights" acquired by raising point *in limine* **- respondent's competence to ratify lack of authority - court's discretion in allowing respondent leave to supplement**

CASENO.:A.284/96

IN THE HIGH COURT OF NAMIBIA

in the matter between:

NAMIBIA EXPORT SERVICES CC. **Applicant**

and

S & G FISHING ENTERPRISES CC. **First Respondent**

THE OWNERS OF THE VESSEL , MFV "EVGENEY POLYAKOV" **Second Respondent**

CORAM: MARITZ, A.J.

Heard on: 1996-11-12 + 13

Delivered on: 1996-11-14

JUDGMENT

MARITZ. A.J. This matter, in which my brother Strydom, **J.P'.**, had issued a *rule nisi* coupled with an interim interdict and an order allowing substituted service, came

before me on 12 November 1996 when the second respondent (the owners of the MFV "Evgeney Polyakov" anticipated the return day of 29 November 1996 on twenty four hours notice to the applicant, Namibia Export Services CC. When the matter was called Mr Koep, counsel for the second respondent, advanced a number of submissions why the *rule nisi* against the second respondent should be discharged. Only after completion of his argument Mr. Dicks, counsel for the applicant, rather belatedly, moved an application from the bar for an extension of the anticipated return day to allow the applicant sufficient time to file a replying affidavit. The second respondent opposed that application. In the absence of an application for such extension properly brought on notice and supported by an affidavit furnishing reasons why and for how long the extension was being sought, I was only amenable to extent the anticipated return day to 13 November 1996. On that date the applicant brought an application on notice for an order dismissing the second respondent's anticipation of the return day and, in the alternative, for a further extension thereof to file its replying affidavits.

The principal ground on which the applicant attacked the second respondent's right to anticipate the return day was based on the apparent lack of authority of the deponent Roussanov to oppose the application on behalf of the second respondent; and to depose to affidavits in support of such opposition and, on the basis thereof, anticipate the return day

After the deponent's lack of authority had been raised *in limine* by Mr Dicks on behalf of the applicant, Mr. Koep's first submission was that no such authority had to be alleged in the answering affidavits. In addition he took the point that the applicant had also

failed to annex a resolution authorising the launching of the application in the first instance.

The law, as regards the required authority of artificial persons in proceedings of this nature, has been clearly stated by Watermeyer, J. in **Mall (Cape) (Pty) Ltd vs Merino Ko-operasie Bpk,** 1957 (2) SA 347 (D) at 351 D to 352 B.

> *"/ 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 the Court to show that the applicant has duly authorised the institution of notice of motion proceedings (see for example Royal Worcester Corset Co v Kesleris Stores, 1927 CPD 143; Langeberg Ko-operasie Beperk v Folscher and Another, 1950 (2) SA 618 (C)). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions 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.*
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> *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 Arcache, 1927 NPD 139, and the other cases mentioned in Herbstein and van Winsen, Civil Practice of the Superior Courts in 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 brought in the name of the applicant are in my view insufficient. The best 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 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 unauthorised person on its behalf."

The same principle applies when an artificial person seeks to oppose an application. This does not mean that it is always necessary for an artificial person to attach a resolution to its founding or answering affidavits, as the case may be. This was held by Strydom, J. in South West **African National Union** vs **Tjozongoro and Others**, 1985 (1) SA 368 (SWA) at 381 D to E. It is only when there is a *bona fide* challenge to the authority of the deponent purporting to be acting on behalf of the artificial person that it would, depending on the circumstances of the case, be required to produce such a resolution. See Nahrungsmittel **GmbH** vs. **Otto**, 1991 (4) SA 414 (C) at 418 D.

The objection against the applicant's authority to initiate this application raised by Mr Koep from the bar during the course of argument yesterday, is without substance. In the first paragraph of the applicant's founding affidavit, the deponent Taylor alleges that he is a member of applicant; that he is duly authorised by the applicant to bring the application and to make that affidavit on the applicant's behalf. The second respondent did not deny that allegation in the answering affidavit of Roussanov or the supporting affidavit of Volkov. In the absence of such a challenge and faced only with a bare complaint from the bar, I am satisfied that, the statement of Taylor concerning his authority is good enough in the circumstances.

The situation as regards the second respondent's authority is, however, different. I am unable to find any allegation in the answering affidavit that Mr. Roussanov has been authorised to oppose the application on behalf of the second respondent or, for that matter, to anticipate the return day. It is clear from that affidavit that neither Roussanov

nor Volkov is the owner of the vessel. Roussanov, at best, only alleges that he was authorised by Desgate Management Ltd to depose to the affidavit. Desgate is not a party to the proceedings and is merely the charterer of the vessel.

Mr Koep sought to overcome this problem by handing up from the bar a "Power of Attorney letter". In terms thereof, PPP 'Yugrybpoisk', represented by one Zintchenko, purported to give a power of attorney to Desgate Management Ltd, represented by one S D Rossanov, to *"manage and supervise common business operations provided by the Agreement N1/7-29/26 of 29 July 1996, including juridical actions and Bank transactions involving the PPP 'Yugrybpoisk' Bank account ... and to go into contracts of value up to USD250 000 and ...to represent the Agreement Signatories' interest before a third party and in court etc."* Mr Dicks objected to the power of attorney being handed up without it having been introduced on affidavit. That objection, it seems to me, is sound for a number of reasons. The power of attorney is not accompanied by a resolution of PPP "Yugrybpoisk" authorising Zintchenko to sign or issue it. Moreover, nowhere in any of the affidavits is it alleged that PPP "Yugrybpoisk" is the owner of the vessel, MFV "Evgeney Polyakov". The power of attorney only extends to the management and supervision of the common business operations contemplated in a specific agreement. A copy of that agreement is not before the Court and I am unable to ascertain from the power of attorney whether that agreement relates in any way to the charter of MFV "Evgeney Polyakov". In the premises, the power of attorney is disallowed.

As a last resort, Mr. Koep submitted that the point *in limine* concerning the second respondent's authority had been raised for the first time less than an hour before the

matter was called yesterday. He stated that the requisite resolution could be obtained if an opportunity would be afforded to the second respondent to amplify its answering affidavits. Relying on **Moosa and Cassim NNO v Community Development Board,** 1990 (3) SA 175 (A), he submitted that it was competent to ratify the deponent's lack of authority in such a manner. To this Mr Dicks objected, submitting without reference to any authority that, the objection of *locus standi* having been taken *in limine,* the deponent's lack of authority cannot be cured by such ratification.

Mr. Dicks' submission is not without some authority. In **South African Milling Co. (Pty) Ltd vs Reddy,** 1980 (3) SA 431 (SE) Kannemeyer, J. held that, once an objection has been taken on the ground of a lack of *locus standi,* the objector acquired a vested right to have that objection determined and that a later unilateral ratification cannot cure the initial lack of standing.

This approach, notwithstanding the criticism expressed in later judgments to which I shall refer to hereunder, was followed by Hattingh, J. in **Inter Board SA (Pty) Ltd vs Van den Berg,** 1989 (4) SA 166 (O) at 1068D-J and by Jansen, J. in **South African Allied Worker's Union and Others vs De Klerk NO and Others,** 1990 (3) SA 425 at 432B-C.

In **Baeck and Co SA (Pty) Ltd vs Van Zummeren and Another,** 1982 (2) SA 112 **(W),** Goldstone, J. respectfully differed from and criticised the reasoning of Kannemeyer, **J.** in the **South African Milling** case. He held (at 119 **in fine)** that *"the 'right to move for the dismissal of the application on the ground of lack of locus standi' is, with respect, hardly what one would envisage as constituting a 'vested right".* Dealing, as he did,

with a matter where the deponent incorrectly alleged that he had authority to represent the applicant in application proceedings, he concluded (on 119C-D):

> *"If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach."*

This line of reasoning was approved and followed in **Evangelical Lutheran Church in Southern Africa (Western Diocese) vs Sepeng and Another, 1980 (3) SA 958 (B) at 966A-C; Moosa and Cassim NNO vs Community Development Board,** supra at 181A-B; **Merlin Gerin (Pty) Ltd vs All Current and Drive Centre (Pty) Ltd and Another,** 1994 (1) SA 659 (C) at 661E-F and **National Co-op Dairies Ltd vs Smit,** 1996 (2) SA 717 (N) at 719B-C.

I find myself in respectful agreement with the latter line of authorities and in particular with the opinion of Conradie, **J.** in Merlin Gerin **(Pty) Ltd vs All** Current and **Drive** Centre **(Pty) Ltd,** supra where he dealt as follows with the objector's so-called "vested right" to move the dismissal of the application on the ground of lack of *locus standi* (at 660B-F).

> *"It is, with respect, not clear to me what this 'right' is. It would seem to be no more than a 'right' to take a point. The point which is sought to be taken is that the application is fatally defective. That point is only good if the Court refuses leave to the offending party to supplement his papers. What the objecting party acquires is therefore a 'right' to require the Court not to turn his good point into a bad one. It is by the deprivation of this 'right' that the respondent is said to be prejudiced. Since (retrospective) ratification may not operate to the prejudice of a non-party, the Court may, on this reasoning, not deprive the applicant of his point by permitting supplementation.*

> *That the reasoning is fallacious is in my respectful opinion demonstrated by the strange twists and turns into which it leads one. The difficulty is, I venture to think, that the content of the 'right' has been incorrectly analysed. The 'right' - if it is one - is a respondent's right not to be subjected to the risk of litigating against an ostensible applicant when the latter will not be bound by orders made in the litigation, or when it is not clear that the applicant's ostensible agent has authority to conduct the litigation on its behalf. The right is the right to refuse to litigate under such prejudicial circumstances. It is the fundamental right to a fair trial. For the enforcement of this right, the respondent has only one remedy, to move for dismissal of the application. Moving for dismissal is not itself a right, but a remedy for the right not to be unfairly proceeded against."*

Although Conradie, J. remarked on the rights and remedies of a respondent in circumstances where the applicant's lack of authority had been challenged, I am of the opinion that those remarks apply *mutatis mutandis* to the rights and remedies of an applicant when the respondent's authority to oppose an application is being contested by the applicant. In the result I find that it will be permissible for the second respondent to pass a resolution ratifying the actions taken by the deponent Roussanov in opposing the application and anticipating the return day on its behalf.

I now turn to the question whether I should allow the second respondent to supplement its answering affidavit in the circumstances of this case. I am to consider that there is nothing before the Court suggesting any pre-existing authority. The Court only has the assurance of counsel for the second respondent that such authority can and will be obtained. The basis on which such assurance has been given to the Court, has not been disclosed. It may have been given purely on the basis of Roussanov's instructions. The possibility that such authority may not be forthcoming can therefore, at this point in time, not be excluded. Moreover, the second respondent chose to anticipate the return day with the minimum period of notice prescribed by the Rules and, to that extent, it has been the maker of the dilemma it now finds itself in. On the

other hand, the application was originally brought as one of urgency and, given the nature of the *rule nisi* issued and interim relief granted, the second respondent is entitled to have the matter adjudicated as soon as possible. It does not seem to me that the applicant will be prejudiced in a manner which cannot be cured by an appropriate order of costs, if I should allow the second respondent to supplement its answering affidavit. As Conradie, J. pointed out in the case of Merlin Gerin (Pty) Ltd, supra at 660G-I:

> *"An applicant now has two options. If he had no authority to begin with, he would attempt to defeat the remedy by obtaining authority by way of ratification and by putting proof of that before the Court. Or he might put better proof of pre-existing authority before the Court. Once the applicant has done this, he will be bound by an order for costs against him. In this way, ratification would not harm but benefit the respondent, and so would unequivocal proof of pre-existing authority.*
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> *Dismissal and supplementation are two alternative ways open to the Court of helping the respondent out of the dilemma in which the purported agent's unauthorised proceedings or his inadequate proof of authority has placed him. Which of the two ways will ultimately be fair to the litigants will depend on all the circumstances.*
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> *A Court may be disinclined to permit* a *litigant to raise the issue of ratification in reply because, for example, it is likely to lead to a substantial new dispute. Where, however, as in the present case, the resolution of the applicant's board has only to be submitted to be accepted, there is really very little harm in allowing an applicant to put his papers in order in this way."*

The same holds true where the authority of a respondent is being challenged. In the absence of prejudice to the applicant I am inclined to consider the substance of this application rather than preventing the second respondent from litigating its rights because of deficiencies in form. I must, however, stress that these remarks are not to be regarded as an invitation to slackness on the part of litigants and practitioners in the preparation of affidavits. The leave to supplement, which I propose to grant, is given in

the circumstances of this case and should not be regarded as a precedent in matters where the introduction of such additional facts may raise substantial new disputes on the papers.

The second respondent is seeking what essentially amounts to an indulgence from the Court. The applicant should not be prejudiced by the second respondent's failure to pass the requisite resolutions and make the necessary averments in the answering papers concerning the deponent's authority.

In the circumstances I make the following order:

1. Leave is granted to the second respondent to supplement the answering affidavits filed or record within five days from the date of this order by putting proof before this Court that its opposition to this application has either been authorised or has been ratified.

2. In the event that the second respondent so supplements the answering affidavit

    2.1 the applicant shall file its replying affidavit, if any, before or on 26 November 1996;

    2.2 the anticipated return day will be extended until 28 November 1996 at 10h00.

3. The second respondent is to pay the costs occasioned by the proceedings on 13 and 14 November 1996 .

4. The costs of 12 November 1996 are to stand over for determination on the return day.

Meiritz, A.J.