Case No.: A 385/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE MINISTRY OF AGRICULTURE, WATER AND FORESTRY **Applicant**

and

UVUNGU-VUNGU CLOSE CORPORATION **Respondent**

CORAM: **SILUNGWE, AJ**

Heard on: 09/01/2009

Delivered on: 12/01/2009

JUDGMENT:

SILUNGWE, AJ: [1] This is an urgent application in which the applicant seeks an order in the following terms:

1. Condoning the applicant's non-compliance with the requirements related to form and service and directing that the matter be heard as one of urgency as contemplated in Rule 6(12) of the Rules of the Court.

2. Declaring the agreement between the applicant and the respondent dated 23 July 2003 duly cancelled, alternatively, ordering that such agreement is herewith cancelled.

3. Ordering the respondent to hand over custody and control of the Uvungu-Vungu Project, situated in Rundu, Okavango Region, to the applicant.

4. Ordering the respondent to vacate the Uvungu-Vungu Agricultural Project.

5. Directing that should either of the parties to the management agreement intend to claim damages, such party institutes arbitration proceedings in accordance with clause 14 of the agreement.

6. Ordering the respondent to pay the costs of this application.

The application is opposed.

[2] The applicant is represented by Advocate Narib, instructed by Conradie & Damaseb; and the respondent is represented by Advocate Schickerling, assisted by Advocate Van Vuuren, and instructed by Theunissen, Louw and Partners.

[3] At the outset of the hearing, a point *in limine* is raised by Mr Schickerling, namely, that the application is not urgent at all.

[4] A brief background of this matter is that, on July 13, 2003, the parties entered into a management agreement in terms of which the respondent was to provide full-time management of the Uvungu-Vungu Agricultural Project (Project) located some 10 kilometres east of Rundu, as "service provider". The said agreement was for a period of 12 years. It is not in dispute that, since the inception of the management agreement, the applicant has made several capital contributions towards the project. The respondent claims to have invested about N$9 000 000-00 into the project. Mr Chris J Lewis is the sole member of the respondent.

[5] On December 7, 2005, Mr L Hugo, in his capacity as Team Leader of Green Scheme Agency, addressed a letter to the applicant's Permanent Secretary informing him that the respondent was "in dire need of funds to really get off the ground and to become fully operational". In concluding the letter, he stated, *inter alia*:

> "7 It has become crucial that financial support is given to the scheme to reach full production. An agreement with the manager must be reached as soon as possible to avoid the situation becoming out of control.
>
> 8 It is suggested that the Ministry pays back to the manager what he has invested, provide funds to bring the scheme to full operational level and to *take ownership* of all property."

(Emphasis is provided).

[6] On May 16, 2007, in a report compiled by Mr J K Kavaria, Deputy Director: Audit Services, in the Auditor General's Office, and addressed to the applicant's Permanent Secretary, it was recommended, *inter alia*, that:

> "The Accounting Officer should initiate an investigation into the activities carried out by the project. Emphasis should be placed on the following:
>
> (a) The fact that no action was taken by the Ministry despite the fact that the project is still making a loss after four years in operation;
>
> (b) …."

[7] On February 14, 2008, the applicant's Permanent Secretary wrote to the respondent threatening to terminate the management agreement in the event of the respondent's failure to submit a sound management proposal within seven working days. The respondent's proposal was duly submitted.

[8] A letter addressed by the applicant's legal representative of record to the sole member of the respondent, dated August 13, 2008, and headed: "NOTICE OF TERMINATION OF VUNGU MANAGEMENT PROJECT AGREEMENT" (which is annexed to the applicant's founding affidavit, marked CJL 6, as well as to the respondent's answering affidavit) reads:

> "We act on behalf of the Ministry of Agriculture, Water and Forestry, and the Management Agreement concluded on the 23rd of July 2003 has reference.
>
> It is our instructions to give you notice of our client's intention to terminate the said Agreement in terms of Clause 13.2 of the Agreement.
>
> Conradie & Damaseb as well as Grand Namibia Auditors are appointed to investigate the situation with regard to:
>
> 1. overall management of the project in terms of the Agreement;
>
> 2. the total contributions made by the Government ex contractual and otherwise, and the application thereof;
>
> 3. the total contributions by the service provider and the application thereof; and
>
> 4. the general compliance in terms of the agreement.
>
> It is our understanding that the project has certain obligations towards third parties and in order to mitigate the effects of such termination, vis-à-vis such third parties, we would like to propose the following settlement:

> "(a) that the parties agree to the cancellation with immediate effect with due reservation of their respective rights in terms of the Agreement"
>
> We await to hear from you in this regard, soonest."

[9] The respondent's legal practitioners responded on September 4, 2008, stating, *inter alia,* that –

> "1. the Auditor General's report of May 16, 2007 had never been disclosed to their client previously;
>
> 2. the project had made a net profit for the past number of consecutive six months periods and their client was not entitled at that point in time to rely on long past loss periods …
>
> 3. sudden termination of the agreement would result in undue hardship to employees in the project …
>
> 4. the respondent was not averse to the idea of terminating the agreement on certain conditions …"

[10] The applicant's legal representatives responded on September 18, 2008, alleging, *inter alia*, that the respondent had failed to comply with clause 13.2.1 of the Agreement; that the applicant had complied with clause 13.2.1 by investigating the matter through the Office of the Auditor General whose report had been brought to the respondent's attention; that the fact that the applicant had not then initiated steps against the respondent should in no way be construed as a waiver of its rights; and that the applicant reiterated its intention to cancel the agreement and to take full control of the project.

[11] In a letter of November 28, 2008, addressed to the respondent's sole member, the applicant's Permanent Secretary communicated the applicant's termination of the management agreement. This was (as a result of the respondent's query), followed by a similarly worded letter by the applicant's legal representatives addressed to the respondent and dated December 9.

[12] Mr Narib contends that the reason for approaching the Court is that the applicant has terminated the management agreement between the parties and that only after the said termination could the applicant seek repossession of the land (upon which the project operates) as well as the project itself, in order to safeguard the applicant's assets. He submits that urgency relates to the repossession of both the land and the project (land) so that the applicant can plant pearl millet (Mahangu) as the planting summer season for maize, which started in October, has since ended. In the applicant's founding affidavit, the Permanent Secretary deposes that as no preparations were made for the planting of maize, which is more profitable, and that since it was too late to plant such crop, the applicant ordered fertilizer and pearl millet seeds in order to salvage the situation. Mr Narib further argues that, if the applicant's application fails, it is going to suffer additional losses. He further argues that the applicant would not have brought this action prior to the termination of the agreement as no relief could then have been sought to repossess the land.

[13] For the respondent, Mr Schickerling argues that the applicant's intention to terminate the agreement is based on the respondent's alleged non-performance, the need to repossess the project and to carry out farming activities to avert further losses. He contends that no urgency has been proved in the matter; that the so-called urgency is self created; that disputes between the parties have existed since December 2005; that the applicant's right to cancel the agreement is derived from the Auditor General's Report of May 16, 2007; that the delay of one year and seven months since then has not been explained; that even after the applicant's threat of August 13, 2008, to terminate the agreement, the applicant delayed to implement the threat until November 28, and December 9, 2008. Mr Schickerling further claims that the argument about the applicant suffering further losses should the urgent application fail is purely

commercial urgency and cites *MWEB Namibia (Pty) Ltd v Telecom Namibia Ltd & 4 Others* Case No.: (P) A 91/2007 (unreported) in aid of his argument.

[14] A proper reading of the papers in the matter clearly shows that disputes that culminated in the institution of these proceedings have come along way, as is evidenced by the Green Scheme Urgency's letter of December 7, 2005. Although the Auditor General recommended in May 2007 that investigations be conducted into the activities of the project, no steps were taken to implement the recommendation, and yet, on August 13, 2008 the first notice to terminate the agreement was issued by the applicant! There is, to date, no telling whether any such investigations were ever undertaken, and, if so what the results thereof are. In September 2008, the applicant, through his legal representatives of record, conceded the fact that no steps had been taken against the respondent, adding that such failure should not be construed as a waiver of the applicant's rights! It was not until November 28, or December 9, 2008, that the applicant communicated to the respondent the alleged termination of the management agreement. Mr Narib now contends that this application could not have been instituted until the termination of the agreement had taken place, but no support for such contention appears in the applicant's founding! Hence, the contention counts for nothing. My opinion is that it was unnecessary to wait for the termination of the management agreement before the applicant could approach the Court.

[15] In any event, no good reason has been shown to persuade the Court that urgency has been established. This, in my view, is a clear case of remissness or inaction on the part of the applicant. Hence, the applicant cannot succeed on the basis of urgency as the alleged urgency is self-created. See: *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 at 51E-F.

[16] In conclusion, I am satisfied that the applicant has failed to establish urgency in the matter. In the result, the following order is made:

1. the point *in limine* is upheld and the application is, therefore, dismissed for lack of urgency;

2. the applicant is directed to pay the costs of the application to the respondent, such costs to include costs of two instructed counsel.

SILUNGWE, AJ

COUNSEL ON BEHALF OF THE APPLICANT:

Adv Narib

Instructed by: Conradie & Damaseb

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv Schickerling

Adv Van Vuuren

Instructed by: Theunissen, Louw and Partners