SUMMARY **REPORTABLE**

CASE NO.: A 361/2009

LA ROCHELLE (PTY) LTD AND OTHER v RACHEL NATHANIEL-KOCH AND OTHERS

PARKER J

2009 NOVEMBER 18

Practice- Application and motion – Application proceedings –Principle concerning proof of authority to institute proceedings in a long line of cases confirmed – Principle that deponent of affidavit need not prove her or his authority to depose to affidavit in a long line of cases confirmed – Court confirming difference between deposing to affidavit and instituting of proceedings.

Practice- Application and motion – Application proceedings instituted by a Trust – Court finding that all the trustees need not file affidavits to prove authority to institute proceedings – Court, however, finding in instant case that trustees can only take decision, including decision to institute proceedings on behalf of the Trust, strictly

in accordance with relevant provisions of the Trust's deed of trust – Court finding that in terms of the deed of trust applicants have not satisfied the Court they have authority as trustees to institute the instant proceedings – Court, therefore, striking off application.

Practice - Application and motion – Application proceedings by artificial person – Court finding that sole Director entitled to bring application on behalf of the artificial person (1st applicant) – Court finding, however, that the so-called sole Director has not offered any proof of his appointment as sole Director when such appointment was challenged – Consequently, Court finding that 1st applicant has not instituted any application proceedings – Accordingly, Court striking off application.

Practice- Application and motion – Interim interdict – Interim interdict granted by agreement between parties in circumstances where applicants have no authority to bring application – Court striking off the application from the Roll – Court concluding that there is no rule *nisi* existing in law to determine on some return date whether to confirm – Accordingly, Court discharging rule *nisi.*

Practice- Rule 6 of Rules of Court – Authentication of document executed outside Namibia for use within Namibia under Rule 63 – Court finding that signature affixed to resolution in Germany not authenticated – Consequently, Court refusing to admit the resolution.

Held, that all trustees need not sign affidavits to show authority to institute proceedings on behalf of the Trust but resolution granting authority to trustees to institute proceedings must be passed in strict conformity with the Trust's deed of trust.

Held, further, that caution typifies the object of Rule 63 of the Rules of Court and so the rule must be interpreted strictly so as to promote the interests of justice and also to protect the interests of all parties.

Held, further, that where a rule *nisi* has been granted by agreement between the parties in circumstances where applicant is not properly before the Court and there is no authority to bring the application it serves no purpose to allow such rule *nisi,* which is null and void *ab initio*, to stay for the Court to determine on some return date whether to confirm such legally non-existent rule *nisi.*

REPORTABLE

CASE NO.: A 361/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LA ROCHELLE (PTY) LTD	**1st APPLICANT**
EVERHARDUS PETRUS FACKULYN GOUS N.O.	**2nd APPLICANT**
CHRISTOFF TSCHARNKTE N.O.	**3rd APPLICANT**

And

RACHEL NATHANIEL-KOCH	**1st RESPONDENT**
THE MINISTER OF SAFETY & SECURITY	**2nd RESPONDENT**
THE PROSECUTOR-GENERAL, NAMIBIA	**3rd RESPONDENT**

CORAM: **PARKER J**

Heard on: **2009 October 27**

Delivered on: **2009 November 18**

JUDGMENT:

PARKER J

[1] The applicants had brought an application for an interim order against 1st, 2nd and 3rd respondents, and they had moved the Court to hear the application on urgent basis on 21 October 2009. On that date, at the commencement of proceedings and having heard

Mr. Brandt, the then counsel of the 1st respondent, and Mr. Barnard, counsel of the applicants (I will deal with the other counsel in due course), I was satisfied that service of some papers on the 1st respondent had been carried out improperly and at short notice. The papers had been served on the 1st respondent's colleague in the Directorate: Legal Aid in the Ministry of Justice, Windhoek, instead of on the 1st respondent in the Directorate's regional office in Oshakati where the respondent works as a public servant. On such service of papers in urgent application proceedings, I had this to say in *Hewat Beukes t/a MC Bouers and another v Luderitz Town Council* Case No. A 388/09 (Unreported) at p.5:

> Thus, in deciding whether the requirements in (1) and (2) of rule 6 (12) have been met, that is, whether it is a deserving case, it is extremely important for the Judge to bear in mind that the indulgence – and indulgence, it is – that the applicant is asking the Court to grant, if the Court grants it, would whittle away the respondent's right to fair trial guaranteed to him or her by the Namibian Constitution.

I stated further at pp 9 – 10 as follows:

> I for one do not wish to have anything to do with a perversion of rule 6(12) of the Rules of Court, as has occurred in the instant case, because such misuse of the rule puts the respondents beyond the pale of constitutional protection of Article 12(1) of the Namibian Constitution.

[2] Thus, in order to ensure that the 1st respondent was not put beyond the pale of constitutional protection of Article 12(1) of the Namibian Constitution because of the way 'service' had been effected in the proceedings, I decided not to hear the application; and I made an order ('the 21 October order') in which I gave the 1st respondent up to 23 October 2009 (inclusive) to file additional affidavit, if she so wished. On this point, I

wish to make it abundantly clear that it was not up to Mr. Barnard to object or not to object to the postponing of the hearing of the application in order to give the 1st respondent her constitutionally guaranteed right to be heard in civil proceedings: I would, therefore, not have taken cognizance of any such objection, anyway. In sum, in not objecting to the postponement Mr. Barnard was not giving the 1st respondent any concessionary largesse: it is the 1st respondent's constitutional entitlement to be heard. That is exactly the essence of my judgment in *Hewat Beukes t/a MC Bouers and another* supra.

[3] The aforegoing are meant to drive home the point that it is of no consequence (contrary to what Mr. Barnard submitted), as far as I am concerned, if the position taken by the 1st respondent in her 23 October answering affidavit is completely different ('dramatic charge', Mr. Barnard characterizes it) from the position she had held in the answering affidavit she had filed before I gave her the opportunity to file such additional affidavit, as aforesaid. It is also worth noting that in the interest of fairness, the applicants were also permitted to file additional replying affidavits, if they so wished; and that they did on 26 October 2009.

[4] In these proceedings, I do not concern myself with the 1st respondent's counter-application and statements in the applicants' replying affidavit that are in response to the counter-application which the 1st respondent launched (using also the answering affidavit as a founding affidavit, too). What has relevance to the instant proceedings is the issue of the points *in limine* that the 1st respondent has raised in her answering affidavit.

[5] Before I leave the 21 October 2009 order, I should make the following point. Apart from the order permitting the filling of further affidavits, I granted a rule *nisi* in terms prayed for in the notice of motion filed by the applicants, upon agreement between the applicants and the 1st respondent. That the rule *nisi* was granted by agreement between the 1st respondent and the applicants is so crucial that it must be highlighted and flagged for further significant treatment in due course.

[6] In this connection, it is important to note that in view of the answering affidavit that had been filed by the Prosecutor-General (the 3rd respondent), Ms. Van der Merwe stated that she would not oppose any final order being granted against the 3rd respondent that concerns the 3rd respondent in the applicants' prayers in the notice of motion. In the same vein, counsel informed the Court that likewise, she would not oppose any such final order being granted against the 2nd respondent. That being the case the rest of this judgment affects only the 1st respondent.

[7] In view of what the 1st respondent states in para. 32.2 of her answering affidavit and what the 3rd applicant says in paras. 63 and 64 of his 26 October 2009 replying affidavit, I wish to set the record straight for the purposes of these proceedings by signalizing the point, as I have done previously, that the rule *nisi* was granted on 21 October 2009 by agreement between the parties; and the 1st respondent was represented by counsel; and furthermore, that 'no point was effectively disposed of and dismissed by the Honourable Court hearing the application on 21st October 2009', contrary to what the

applicants now contend. No hearing of the application took place on the merits. The rule *nisi* was granted for the interim period that further affidavits were being filed; nothing more, nothing less. In sum, the rule *nisi* was granted not because I had found that the applicants had made out a case for the grant of the interim order. I cannot emphasize it enough that, as I have said more than once, I did not hear any arguments either way thereanent; and neither would I have done so, considering my view clearly and inexorably articulated in

Hewat Beukes t/a MC Bouers and another v Luderitz Town Council supra.

[8] Doubtless, I must unavoidably take into account the compelling and cogent conclusion I have made concerning the constitutional confirmation of the common law principle of *audi alteram partem* rule of natural justice under Article 12 (1) of the Namibian Constitution in *Hewat Beukes t/a MC Bouers and another v Luderitz Town Council* supra when considering the interim order that was granted, by agreement between applicants and the 1st respondent on 21 October 2009.

[9] In the instant proceedings, I deal with only the point *in limine* raised by the 1st respondent, as aforesaid; and I deal with the second point *in limine* first. The bone and marrow of this point is that the applicants are not properly before this Court; and this, therefore, raises the question of *locus standi.* Why does the 1st respondent say the applicants are not properly before the Court? Mr. Namandje, counsel for the 1st respondent, submitted that one trustee cannot act independently in instituting proceedings

in the name of the La Rochelle Ranch Trust ('the Trust'). In support of his contention, Mr. Namandje referred to *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C); Thorpe *and others v Trittenwein and another* 2007 (2) (SA 172 (SCA); Resner *v Lydia Swanepoel Trust* 1998 (2) SA 123 (W); *Mariola and others v Kaye – Eddie and others* 1995 (2) 728 (W). I have perused the cases and those referred to me by Mr. Barnard, and I have distilled those principles that are of assistance to the point under consideration and have taken them into account in my consideration of the point *in limine.*

[10] Mr. Barnard submitted the other way. Mr. Barnard responded that the 1st respondent's contention that for the trustees to prove their authority all the trustees should have made affidavits has no legal basis. Mr. Barnard's submission falls to be rejected for two reasons. First, Mr. Barnard's submission that this Court on 21 October 2009 did 'effectively' dispose of and dismiss such point has no basis. I did not do any such thing. As I have said *ad nauseam*, I did not hear any arguments on any such point or any point resembling that point. Second, that is not what the 1st respondent contends. The contention of the 1st respondent, as articulated by her counsel in his submission, is what I have dealt with *infra* as regards the only two ways by which a decision of the Trust can have force and effect: it arises from the interpretation and application of the Trust's own deed of trust – by a resolution passed at a meeting or a resolution that is not passed at a meeting but signed by all the trustees. That is to say, as Mr. Namandje correctly submitted, one trustee has no hue of authority to act independently of the other trustees and institute proceedings for and in the name of the Trust. Indeed, there is no need to

seek authority to support this conclusion. As I have shown below, the conclusion is supported by the interpretation and application of the relevant provisions of the Trust's deed of trust, which I have dealt with below. Additionally it has been held by Innes, CJ in *Schierhout v Union Government* 1919 AD 30 at 44 that:

> When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body (*Billings v Prinn,* 2 W. B1., p. 1017). And the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them (see *Cook v Ward,* 2 C.P.D. 255; Darcy *v Tamar Railway Co.,* L.R. 3 Exch, p. 158, etc.), for otherwise they would not be acting in accordance with the provisions of the Statute.

[11] I do not see any good reason why the principle enunciated in *Schierhout* supra should not apply to the Trust, when the Trust's own deed of Trust requires that a decision of the Trust may be taken either at a meeting (or by a resolution), so that the decision taken is 'the joint action' of 'all' the trustees. This point is treated further.

[12] As I say, Mr. Namandje buttressed his submission with reference to the deed of trust of the Trust on whose behalf the 2nd and 3rd applicant allege they have authority to bring the present application. Clause 20 of the deed of trust provides for 'Meetings of Trustees and Resolutions'. From the deed of trust it is clear to me that a decision of the Trust may only have effect if such decision was taken via either of two alternative ways. The first is by a resolution passed at a meeting at which there is *a quorum* (and two trustees, of whom one must be the first trustee, constitute *a quorum*), and for which meeting a proper notice had been given in terms of Clause 20.1.3. The second is

contained in Clause 20.2; that is to say, by 'a written resolution signed by *all* the trustees;' that is to say, as I understand the provision, a resolution passed not necessarily at a meeting.

[13] It is not in dispute that there were three trustees, namely, the 2nd applicant, the 3rd applicant (these are the two other applicants appearing on the Notice of Motion). The other trustee was Martin Kali Shipanga – the '2nd applicant' appearing on Counsel's Certificate of Urgency', but whose name is blackened out on the Certificate: this is significant as will become apparent shortly.

[14] Accordingly, I accept Mr. Namandje's submission that when the present application was filed with the Registrar, there were three trustees, namely the 2nd applicant, the 3rd applicant and Mr. Shipanga who had been the 2nd applicant, as I have mentioned previously. The relevancy of this uncontradicted fact will be indicated in due course.

[15] In *Wlotzkasbaken Home Owners Association and another v Erongo Regional Council and others* 2007 (2) (NR) 799 AT 805F-806C I dealt with the settled rule of practice respecting the question of authority to depose to affidavits to be used in application proceedings and authority to institute and prosecute proceedings in the following passages:

> The golden thread that runs through these cases, starting from *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (CPD) *supra, is* set out succinctly in the

following passage, *per* Strydom, J (as he then was) from *South West Africa National Union v Tjozongoro and others (*1985 (1) SA 376 (SWA)) *supra,* at 381E:

> In all these cases (i.e. cases the learned Judge referred to) the Courts concluded that in motion proceedings by an artificial person, although prudent, it is not always necessary to attach to the application the resolution authorizing the institution of proceedings and that a deponent's allegation that he was duly authorized would suffice in the absence of a challenge to his authority. Thus, from *Tjozongoro and others,* it seems to me clear that where such authority is challenged, there is no rule of practice preventing the deponent from proving such of his or her authority by annexing the resolution authorizing the institution of proceedings to his or her replying affidavit.

…

> To the principle in *Tjozongoro and others, supra,* should be added the principle in *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA)) supra, in the following passages at 615G-H:
>
> > In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorized to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorized to depose to the founding affidavit on behalf of the respondent, and he did not admit that Hanke was so authorized and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to deposed to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized.

[16] After citing with approval the above-quoted passages from *Wlotzkasbaken Home Owners Association and another v Erongo Regional Council and others* supra in *The Council of the Municipality of the City of Windhoek v D B Thermal (Pty) and Ziton (Pty)*

Ltd Case No. I 1997/2004 (judgment of 28 October 2009) I added the following at pp. 4 and 5:

> To the aforementioned authorities should be added *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration* 2005 NR 147; *JA Jacobs t/a Southern Engineering v The Chairman of the Nampower Tender Board and another* A 140/2007 (unreported); *Otjozondjupa Regional Council v Dr. Ndahafa Aino-Cecilia Nghifindaka and two others* Case No. LC 1/2009 (Unreported); and *Eveleth v Minister of Home Affairs and another* 2004 (11) BCLR 1223(T).

[17] From the submissions made by both counsel and the authorities they referred to me on the point under consideration it is clear to me that the rule of practice thereanent emanating from the authorities is firmly settled. That much both counsel agree.

[18] What is the authority of the trustees to bring the present application? I find that on the papers there is no proof that a meeting, properly constituted in terms of the deed of trust, took place at which a resolution was passed to give authority to Mr. Gous, Mr. Shipanga or Mr. Tscharnkte to institute and prosecute these proceedings on behalf of the Trust. Is there then credible and acceptable proof that a decision by the trustees to bring the present application and to give authority to do so on behalf of the Trust to Mr. Gous, Mr. Shipanga and Mr. Tscharnkte had been taken via the aforementioned alternative route, namely, by a resolution that was not passed at a meeting? Mr. Namandje says there is no such proof, because there is no proper resolution before this Court. Mr. Barnard says there is. I now proceed to test these two mutually exclusive contentions.

[19] The resolution that Mr. Barnard relies on in his submission is 'Resolution of the Trustees of the La Rochelle Ranch Trust'. Immediately below this underlined heading is the following:

> 'In attendance:
> Everhardus Petrus Fackulyn Gous
> Martin Kalie Shipanga'

The following items on the second and last sheet of the so-called resolution are crucial for my present purposes:

> 'Signed at Windhoek on 12 October 2009
>
> (A signature)
> E P F Gous
> In his capacity as Trustee of the La Rochelle Ranch Trust
>
> (No signature)
> M K Shipamga *(sic)*
> Accepted by signing a faxed copy of this Resolution at Reutlingen, Germany
>
> (A signature)
> C Tscharnkte
>
> In his capacity as Trustee of the La Rochelle Ranch Trust'

[20] I cannot, on any plane, accept the so-called resolution for two reasons. The first reason is that in breach of Clause 20.2 of the Trust's own deed of trust the resolution has

not been 'signed by all the trustees'. Realizing this cause of fatality of the so-called resolution, Mr. Barnard sought to rely on Clause 20.4 of the deed of trust which provides:

> The trustees, in their administration of the trust and to enable them to give effect to any formal legal requirement, may authorize one or more of their number to sign all documents required to be signed for the execution of any transaction concerning the business of the trust. Any resolution certified by a trustee to be a true extract from the minutes of a resolution passed by the trustees shall against third parties in all respects have the same legal force as a resolution passed by the trustees.

[21] None of the two sentences in the above-quoted Clause can assist Mr. Barnard. In terms of the deed of trust, the trustees can only 'authorize' in one or both of two exhaustive ways, as I have demonstrated previously; that is, through a resolution passed at a meeting or by resolution not passed at a meeting. *In casu*, there was no meeting to pass a resolution; and there is no resolution not passed at a meeting, as I have found above. And to the second sentence; a trustee can only certify 'a resolution'; not anything that masquerades, legally speaking, as a resolution. If there is no resolution as I have found; then logically, there is no resolution to certify. The result is that Clause 20.4 is of no assistance on the point under consideration.

[22] The second reason is this: the applicant have sought to place 'resolution' (even if, for argument's sake, it were to be accepted as a resolution) before this Court in clear violation of rule 63 of the Rules of Court which deals with the authentication of documents executed outside Namibia for use within Namibia. As I said in *The Council of the Municipality of the City of Windhoek v D B Thermal (Pty) Ltd and Ziton (Pty) Ltd* supra at p. 9, if I did not apply rule 63 strictly, 'I would be throwing caution to the winds; caution, that typifies the object of rule 63 of the Rules of Court', and, more important,

that would not be in the interest of justice or of the parties, particularly of the 1st respondent.

[23] Indeed, the imperative need to be cautious in this case is even put in sharper focus if regard is had to some of the evidence placed in the affidavits concerning the reason – reason not too pious – why all the shares in La Rochelle (Pty) Ltd were transferred to the Trust; and what is more, it is alleged in the papers that the 2nd applicant 'was the one that recommended' the scheme to Mr. Hans Koch, the late husband of the 1st respondent. This was at a time when Mr. Hans Koch was a claimed person in an on-going extradition proceedings and was, therefore, in custody awaiting the outcome of the extradition request by Germany, the requesting State; and the 2nd applicant together with one 'Van Vuuren were the first trustees of the newly created' Trust. It is also alleged in the papers filed of record that before his death, Mr. Hans Koch had given instructions 'to the law firm Dr. Weder, Kauta & Hoveka to institute action against' the 2nd applicant in which Mr. Hans Koch (and others) sought the removal of the 2nd applicant 'from being a purported trustee' of the Trust.

[24] It follows from the above analysis and conclusions that I find that the 1st respondent's second point *in limine* succeeds. The 2nd and 3rd applicants have no authority to institute these proceedings and prosecution thereof on behalf of the Trust. The inescapable consequence is that all the affidavits made by the 2nd applicant (Gous N.O.) and the 3rd applicant (Tscharnkte N.O.), together with the so-called resolution, are struck off. It follows indubitably that any affidavit whose object is to confirm Gous

N.O.'s and Tscharnkte N.O.'s affidavits is otiose; it is as if such affidavit does not exist because a confirmatory affidavit is irrelevant on its own if there is no affidavit to confirm. This conclusion affects the confirmatory affidavits of Mr. Klaus Tietz, Josias Andries Agenbach and Martin Kali Shipanga inasmuch as those affidavits seek to confirm the affidavits of Gous N.O.

[25] But that is not the end of the matter. Mr. Barnard produces yet another card. It is this: 'The first applicant is duly before the Court. It is a private company with limited liability. Its Director is before the Court: it is Mr Knouwds.' Mr. Barnard continued, 'That averment was never attached by any of the Respondents. It is a fact that should be accepted for purposes of this application.' I accept the submission in principle; but so long as Mr. Knouwds was in truth the sole Director of the 1st applicant. If, indeed, he was such a Director at the time of the launching of the application, then I accept Mr. Barnard's submission that since Mr. Knouwds's authority to institute the proceedings have not been challenged by the respondents, it is too late in the day for the 1st respondent to challenge it now. All this is good proposition, if there is uncontradicted or unchallenged evidence on the papers that Mr. Knouwds was, indeed, the sole Director of the 1st applicant as at 14 October 2009 when the present application was launched. What, in my view, cannot now be challenged by the 1st respondent now is the averment that Mr. Knouwds, in his capacity as the sole Director of the 1st applicant, has authority to institute these proceedings on behalf of the 1st applicant. As I see it, in law, that averment is polar apart from whether in truth Mr. Knouwds was the sole Director; apart from Mr. Knouwds *ipse dixit* of such matter.

[26] In this respect, I take note of the fact that in her answering affidavit of 19 October 2009, the 1st respondent put into dispute the appointment of Mr. Knouwds as the sole Director of the 1st applicant. In my opinion that is undoubtedly a challenge that Mr. Knouwds was what he contended he was; and that challenge has remained unanswered in any replying affidavit or supplementary replying affidavit that is properly before the Court. I did not see or hear Mr. Barnard to make as much as a whimper about this challenge in his submissions. Consequently, I hold that Mr. Knouwds is not entitled to institute and prosecute these proceedings in the name, and on behalf, of the 1st applicant. Mr. Tietz's statement in his affidavit adds no weight at all. As I say, the appointment of Mr. Knouwds as the sole Director of the 1st applicant has been challenged and that challenge has not been answered; and so Mr. Tietz's statements as to what Mr. Knouwds *qua* sole Director of the 1st Director did (or did not do) in relation to the 1st respondent is of no consequence; it is, indeed, with respect, irrelevant.

[27] Even if, for argument's sake, Mr. Knouwds's appointment as the sole Director of the 1st applicant was proven, what do we have? Nothing to write home about. Mr. Knouwds's affidavit cannot even begin to get off the starting-blocks to constitute a founding affidavit, capable of supporting any notice of motion in any application proceedings in terms of the Rules of Court.

[28] From the aforegoing, I hold that the 1st applicant has not instituted any application against the 1st respondent. It is compellingly unavoidable that I take this crucial

conclusion into account when making any order as respects the rule *nisi* that was granted, by agreement between the applicants and the 1st respondent, on 21 October 2009, as aforesaid.

[29] (1) I have held previously that the rule *nisi* was granted by agreement between Mr. Brandt, the previous counsel of the 1st respondent, and Mr. Barnard, the applicants' counsel on behalf of their respective clients. No arguments were heard on the merits; neither could I have heard the application on the merits, given the fact that, as I have said more than once previously, the 1st respondent had been improperly served with papers and at short notice, and so I gave her the opportunity to file any additional answering affidavit, and the applicants were also given the opportunity to file replying affidavits thereto. (2) I have held that the 2nd, 3rd and 4th applicants have no authority to bring this application on behalf of the Trust against the 1st respondent. (3) I have also held that the 1st applicant has not instituted any application against the 1st respondent (and the rest of the respondents, by extension).

[30] From my holdings in (2) and (3) above, the legal fact that remains, as a matter of course, is that no application has been brought against the 1st respondent; a *priori,* the order of 21 October 2009 cannot stand; it has no legal legs to stand on. Consequently, as a matter of law, the rule *nisi* cannot exist. This conclusion is in sync well with Mr. Namandje's submission that if the affidavits of Gous N.O. are struck off that should dispose of the matter (see (2) above. Then came Mr. Barnard's submission that even if those affidavits are struck off that would not dispose of the matter because the 1st

applicant could bring the application as an artificial person. But I have held that as matters stand the 1st applicant has not brought any application before this Court (see (3) above).

[31] From all the aforegoing reasoning and conclusions, I hold that the cumulative effect of (2) and (3), above, is that there is no rule *nisi,* as a matter of law: the rule *nisi* granted on 21 October 2009 is null and void *ab initio;* and it is of no effect. To hold otherwise would be unjust, unfair and wrong. It is, thus, otiose that the rule *nisi* is allowed to stay so that it is argued in due course whether to confirm it. It would fly in the teeth of rudimentary logic for one to suggest that arguments should be heard on the merits on some return date to enable the Court to determine whether to confirm the rule *nisi.* That would be illogical and an exercise in superlative futility; for, there is simply no rule *nisi* in law for the Court to consider whether to confirm. The rule *nisi* is null and void *ab_initio,* as aforesaid. All these conclusions arise indubitably from (2) and (3) above; the effect of which is, as I have said previously, no application has been brought by the applicants and so they cannot be thankful of any order – a temporary interdict or a final interdict. This conclusion, therefore, disposes of the matter – the whole matter.

[32] Should I order costs against any party in this matter? I do not think I should. In the nature of this case and the nature of the proceedings starting from 21 October 2009, I am of the view that it is a proper case where I should exercise my discretion and order that each party pays its own costs.

[33] In the result, I make the following order:

(1) The rule *nisi* granted, by agreement between the applicants and the 1st respondent, on 21 October 2009 is discharged.

(2) The application instituted by Notice of Motion on 14 October 2009 is struck from the Roll.

(3) There shall be no order as to costs.

PARKER J

ON BEHALF OF THE PLAINTIFF: ADV. P. BARNARD

Instructed by: Koep & Partners

ON BEHALF OF THE DEFENDANTS: MR. SISA NAMANDJE

Instructed by: Sisa Namandje & Co.