REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2018/00456

In the matter between:

UNISTRAT PROPERTY DEVELOPMENT FIVE SEVEN TWO SEVEN (PTY) LTD	**APPLICANT**

and

THE CHAIRPERSON OF THE COUNCIL FOR THE MUNICIPALITY OF WINDHOEK	**FIRST RESPONDENT**
THE COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**SECOND RESPONDENT**
THE CHAIRPERSON OF THE MANAGEMENT COMMITTEE	**THIRD RESPONDENT**
THE CHIEF EXECUTIVE OFFICER	**FOURTH RESPONDENT**

Neutral citation: *Unistrat Property Development Five Seven Two Seven (Pty) Ltd v The Chairperson of the Council for the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2018/000456) [2020] NAHCMD 149 (6 May 2020)

Coram: ANGULA DJP

Heard: **22 October 2019**

Delivered: **6 May 2020**

Flynote: Applications and Motions – Review– Rule 76 not peremptory to follow – Company Law – Section 42 of the Companies Act, No. 28 of 2008 – Pre-incorporated contract – Procedure to adopt or ratify such contract following a company incorporation – Failure to follow the prescribed procedure will result in the collapsing of the contract – *Locus standi* – An incorporated entity to whom a contract has not been ceded has no *locus standi* to enforce the rights acquired in respect of that contract by the agent or promoters who incorporated it – Joinder – Unincorporated Joint Venture has no juristic personality therefore is not capable of being joined to legal proceedings as a necessary party.

Summary: The applicant brought review proceedings to set aside the decision by the Council for the Municipality of Windhoek, which cancelled an allocation of a vacant erf to a Joint Venture ('the JV') for development following the JV's failure to furnish the Council with a bank guarantee – The applicant sought to challenge the manner in which the Council cancelled the allocation of the property to the JV – The applicant alleged amongst other things that when the Council cancelled the allocation of the property to the JV, it had failed to comply with the terms of its own tender documents, which served as a binding agreement between the parties; that the notice of cancellation was a nullity; that the Council abused its power; and that the Council had failed to grant the applicant a hearing before it cancelled the award.

The Council raised a number of points in law *in limine* including, that the applicant lacked the *locus standi* to bring the application; and that the applicant had failed to join the JV, as a party to the proceedings. In response, the applicant contended in essence, that it was always the intention of the members of the JV to incorporate it with the intention to take over the rights and obligations of the members of the JV arising from the contract with the Council.

Held that, since the contract between the Council and the JV had been concluded before the incorporation of the applicant, the only mode or manner in which the rights and obligations which vested in the members of the JV through the contract, could be ceded to the applicant was through the provisions of s 42 of the Companies Act, 2008 or through the common law principles.

Held further that, the applicant had failed to prove that the members of JV ceded or transferred their rights and obligations arising from the contract with the Council, to the applicant.

Held further that, the applicant had failed to prove that there was a legal nexus between it and the JV.

Held therefore that, the applicant had failed to prove that it had the necessary *locus standi* to bring the application.

Held further that, a JV being an unincorporated entity is not a juristic person and for that reason it is not capable of being joined to the proceedings as a necessary party.

ORDER

---

1. The application is dismissed.

2. The applicant is ordered to pay the respondents' costs of suit.

3. The matter is removed from the roll and is considered finalized.

JUDGMENT

ANGULA DJP

Introduction

[1] The dispute between the parties in this matter arose from the award of a tender by the Council of the Municipality of Windhoek, ('the Council'), allegedly to the applicant concerning a vacant piece of land being Erf No. 5727, Bahnhof Street, for development ('the property'). The award was subject to the fulfilment of certain

conditions by the successful tenderer, in particular the furnishing of a bank guarantee. After passage of a considerable period of time without the bank guarantee being furnished, the Council cancelled the award.

[2] The applicant took issue with the manner in which the Council cancelled the award and made representations to the Council to reconsider its decision to cancel the award. Thereafter the Council suspended its cancellation of the award, subject to the applicant complying with the requirement relating to the furnishing of the bank guarantee within a specified period. The JV again failed to furnish the bank guarantee, whereupon the Council lifted its suspension of its former cancellation cancelling the award in question.

[3] It is not the applicant's case that it or the JV has complied with the award's conditions, but its case is directed at the manner in which the Council cancelled the award. The applicant alleges, *inter alia* that when the Council cancelled the award, it had failed to comply with the terms of its own tender documents, which served as a binding agreement between the parties; that the notice of cancellation was a nullity; that the Council abused its power; and that the Council had failed to grant the applicant a hearing before it cancelled the award.

[4] The Council denies the applicant's allegations and in addition raises a number of points *in limine*.

The parties

[5] The applicant is Unistrat Property Development Five Seven Two Seven (Pty) Ltd, a company duly registered and incorporated in terms of the laws of the Republic of Namibia, with its principal place of business situated at No. 7, Newton Street, Ausspannplatz, Windhoek, Namibia.

[6] The first respondent is the Chairperson of the Council for the municipality of Windhoek, sued in his capacity as such, with his work address situated at No. 80, Independence Avenue, Windhoek.

[7] The second respondent is the Council for the Municipality of Windhoek, a juristic person established by the Local Authorities Act, Act No. 3 of 1992, with its principal place of business situated at No. 80, Independence Avenue, Windhoek.

[8] The third respondent is the Chairperson of the Management Committee of the Municipality of Windhoek, sued in his capacity as such, whose work address is No. 80, Independence Avenue, Windhoek.

[9] The fourth respondent is the Chief Executive Officer of the Council for the Municipality of Windhoek sued in his capacity as such and whose work address is also No. 80, Independence Avenue, Windhoek.

[10] In this judgment, unless the context indicates otherwise, instead of referring to all the respondents, I will only refer to the second respondent as 'the Council'. I do so for the reason that the Council is the only juristic person amongst the respondents, which is capable of being sued in its own name. The other respondents are mere functionaries of the Council and whatever functions they might have performed relating to the present matter, they had done so far and on behalf of the Council. Their actions do not attract personal liability.

Factual background

[11] The facts are by and large common cause between the parties. I should mention that the various dates regarding the progress of the transactions are stated for the mere fact that it is ultimately submitted by the Council that there was an undue delay by the applicant in bringing this application

[12] The factual background can briefly be summarized as follows: During 2013 the Council issued an invitation for the expression of interest in the purchase and development of the property, described in para [1] above. Four entities, including Unistrat Property Investment Joint Venture ('the JV'), with a name similar to that of the applicant, submitted bids. The bid by the JV, was accepted by the Council.

[13] On 11 November 2013, the Council notified the JV in writing that its bid was successful and that the property would be allocated to it for a consideration of the

sum of N$12 million. On 24 March 2014, the Council forwarded a Deed of Sale to the JV for signature, subject to the JV furnishing the Council with proof of payment of the purchase price or a bank guarantee. The understanding appears to be that the allocation was, in law, subject to a suspensive condition that the JV would furnish a valid bank guarantee to the Council.

[14] On 28 January 2014, the JV accepted in writing the allocation of the property by the Council to it. The JV was advised by the Council that pending the signing of the Deed of Sale, the letter from the Council to the JV; the letter of acceptance of the allocation by the JV and the tender documents, would operate as a binding agreement between the parties.

[15] On 25 March 2015, the Council sent a letter to the JV in which it pointed out that in terms of clause 2.4.1 of the Deed of Sale, the agreement between the parties would become null and void should the JV fail to finalise the sale transaction within the agreed time period. It pointed out further that, a period of 12 months had since passed since the allocation of the property to the JV. The Council then gave the JV, thirty days to finalise the transaction failing which it would cancel the allocation.

[16] Thereafter, the JV failed or delayed to finalise the transaction, particularly insofar as the furnishing of a bank guarantee acceptable to the Council was concerned. As a consequence, on 29 November 2016, after a period of three years since the property was allocated to the JV, the Council resolved to cancel the allocation of the property to the JV. The JV was informed of the Council's decision by letter dated 8 December 2016.

[17] In response to the Council's aforementioned letter, the JV, through its lawyers addressed a letter to the Council on 16 January 2017, where it alleged, *inter alia*, that the Council's cancellation of the allocation of the property to the JV was unlawful for the reasons, *inter alia*, that the decision to cancel the allocation was taken without affording the JV an opportunity to be heard; that the Council had become *functus officio* and therefore could not reconsider its previous decision; that the JV had not been in breach of any term of the agreement; and that the meeting of the Council at which the decision to cancel the allocation of the property to the JV had not been

properly constituted. The letter concluded by calling upon the Council to revoke its decision to cancel the allocation.

[18] On or about 5 October 2018, the Council responded to JV's lawyer's letter of 16 January 2017. With regard to the allegation that the JV was not afforded an opportunity to be heard before the decision to cancel the allocation was heard, the Council referred to its numerous letters to the JV requesting it to furnish the Council with the bank guarantee, but the JV failed to do so. As for the allegation that the Council became *functus officio* and could thus not revoke its previous decision to allocate the property to the JV, the Council pointed out that it has the right to revoke its previous decision to allocate the property to the JV. About the allegation that the JV did not breach the agreement, in this regard, the Council pointed out that the JV had failed to sign the Deed of Sale; and finally regarding the allegation that the decision to cancel the allocation was taken at a Council's meeting which had not been duly constituted, the Council denied the allegation and stated that the meeting had been duly constituted.

[19] In the meanwhile, a string of correspondences ensued between the parties. These are attached to the papers before court but it is unnecessary to burden the judgment with the narration of the contents thereof. The tenor of the letters depicts acrimonious relations which had developed between the parties. Eventually, during May 2018, the JV filed an appeal with the Council against the decision of the Council of 29 November 2016, amongst other things. On or about 13 September 2018, the Council suspended its decision and granted the JV 30 calendar days to finalise the sale transaction at an revaluated purchase price of N$26 639 000 of the property, failing which, the allocation would automatically be cancelled. The JV once again failed to comply with the Council's decision, whereupon the transaction collapsed.

Relief sought

[20] The applicant seeks the following relief in its amended Notice of Motion:

> '1. That the decision made by the First and Second Respondents dated 29 November 2016 communicated to the Applicant on 8 December 2016, be and is hereby reviewed and set aside;

2. That the decision made by the First and Second Respondents dated 5 September 2018 communicated to the Applicant on 13 September 2018, be and is hereby reviewed and set aside;

3. That the First and Second Respondents are directed to enter into an agreement of sale with the Applicant, in respect of Erf 5727, Windhoek, on terms and conditions contained in the decision made by the First and Second Respondents and on 11 November 2013 awarding the Applicant the tender to purchase Erf 5727, Windhoek, within 30 [days] of this order: and

4. Further and/or alternative relief.'

[21] I should mention that the amended notice of motion was filed after the Council raised the point that the applicant had failed to comply with rule 76 in terms of which review applications are dealt with; and that instead the application had been brought in terms of rule 65(4), which deals with ordinary applications. The applicant the amended its form of the notice of motion. In response to the amended notice of motion, a supplementary affidavit was filed on behalf of the Council. It was correctly pointed out on behalf of the Council that following the amendment of the notice of motion, there was no longer a correlation between the prayers in the amended notice of motion and the content of the founding affidavit. In other words the prayers in the amended notice of motion were not borne out by allegations in the founding affidavit; there was a disconnection between the two. Nothing was done by the applicant to correct the situation. Accordingly, the matter limped along.

Issues for determination

[22] The first question for determination is, whether the applicant has made out a case entitling it to the relief sought. The second question is, given the fact that the Council's decision of 29 November 2016 sought be reviewed and set aside was made against the JV and prior to the incorporation of the applicant, and the Council's decision of 5 September was made after the applicant was incorporated, whether the applicant had acquired rights or interest in matters which are the subject of those decisions and if so how and when.

Submissions on behalf of the applicant

[23] The applicant's main contentions are premised on four main grounds. These are: that the Council did not comply with the provisions of the tender documents when deciding to cancel the tender award; that the Council's conduct was contrary to the provisions of Article 18 of the Namibian Constitution; that the applicant had a legitimate expectation as a result of established practice by the Council in adjudicating appeals by other tenderers in situations similar to the applicant's, such legitimate expectation was denied the applicant by the Council; and that the Council's meeting of 29 November 2016 was not properly constituted as required by the governing provisions.

Submissions on behalf of the respondent

[24] A number of points of law *in limine,* have been raised on behalf of the Council. Those are: First, a wrong applicant is before court in that the Council did not deal or contract with the applicant, but with the JV. Second, that the applicant failed to comply with the provisions of rule 76 of the Rules of this Court which stipulates that a review application must be brought in terms of that rule, but in the present matter the applicant brought this review application in terms of rule 65. Third, that the applicant failed to comply with the provisions of rule 77, thereby depriving the Council the time period for it to file its answering affidavit within the time period prescribed by the said rule. It is alleged that such failure is fatal to the application. Fourth, that the applicant failed to comply with the provisions of rule 65(4) by annexing blank and unsigned copies to the founding affidavit instead of annexing true copies and signed annexures. Fifth that the applicant unduly and unreasonably delayed in bringing the application. And, sixth, that there is no binding contractual relationship between the parties in that the documents annexed to the applicant's founding affidavit do not constitute a contract.

[25] I should point out that the point *in limine* relating to the non-compliance with rule 76 dealing with review applications was partially cured when the applicant filed an amended notice of motion in terms of rule 76. I say partially because, as pointed out earlier, the amendment resulted in a disconnection between the allegations in the founding affidavit and the relief sought in the notice of motion. In any event, the

Supreme Court in *Namibia Financial Exchange (Pty) Ltd v The Chief Executive* Officer *of NAMFISA and Others*[1] held that rule 76 is not couched in peremptory terms and that it exists for the benefit of the applicant who has the right to waive it and does not attract nullity if not used in challenging administrative decision-making body. The court further pointed out that the election for the applicant not to proceed under rule 76 can have adverse consequence for the applicant if the absence of the record leaves the court in doubt as to whether the applicant has made out a case for the review.

Points *in limine* considered

[26] In so far as it needs mentioning, for the benefit of the reader, the Court's usual approach in cases where a number of points *in limine* have been raised, like in the present one, is that, if one point *in limine* succeeds and it is dispositive of the entire application, then in that event, it would not be necessary for the Court to consider the remainder of the points *in limine*. It is with this in mind that I now turn to consider the point *in limine* relating the applicant's standing.

[27] The applicant takes the point that 'a wrong party is before court', because the decision to allocate the property was made in favour of the JV and not in favour of the applicant; and that the JV is a necessary party to the present proceedings and should have been joined. Failure to do so, so the argument concludes, is fatal to the applicant's case.

[28] In response to this point, the deponent to the applicant's founding affidavit filed a supplementary affidavit in which it is conceded that the property was indeed allocated to the JV. He however points out that in terms of the JV agreement; the members of the JV retained the discretion to incorporate the JV into a company in the event the application for the allocation of the property was successful. He further points out that following the successful allocation of the property, the JV was incorporated into a company on 24 June 2016. He attaches a copy of the applicant's certificate of incorporation, together with a copy of the JV agreement. It is to be recalled in this connection that the property was allocated to the JV by the Council's

[1] *Namibia Financial Exchange (Pty) Ltd v The Chief Executive* Officer *of NAMFISA and Others* (SA 43/2017) [2019] NASC 590 (31 July 2019).

resolution of 31 October 2013 and the offer was accepted by the JV on 28 January 2014; thus long before the incorporation of the applicant.

[29] I should immediately point out that courts do not decide whether 'a wrong or a right party' is before court. All that the court determines is whether a party appearing before it has the legal standing to be before it to seek whatever relief it is minded to. It is therefore not legally correct for counsel for the Council to submit, as he does, in his written submissions that a 'wrong party is before the Honourable Court'. As mentioned before, what is to be determined concerning this point is, whether the applicant has the necessary legal standing to bring this application. This is because the Council's case, properly stated, is that it never had any dealings with the applicant, but that it had dealings with the JV. In essence, the Council challenges the applicant's standing to be granted the orders prayed for in the notice of motion. If such orders are granted, they would operate against the Council's interest.

[30] Mr Chibwana, counsel for the applicant argues, in his written submissions that the JV is a necessary party to these proceedings and should have been joined because the Council dealt with the JV and not with the applicant. In support of his submission counsel refers the court to the work of the learned author, Cilliers[2]. The principle is well entrenched in our court's procedures. I have no qualms with it. In my judgment, the argument amounts to putting the cart before the horse. Before the court can order the applicant to join the JV, the applicant must first satisfy the court that it has the necessary standing to be before court and to be granted such an order. Therefore, the issue of the standing of the applicant must first be determined before the court can consider other ancillary matters including whether the JV should be joined as a necessary party.

[31] Before I proceed to consider the Council's point *in limine*, I should point out that except for the explanation by the deponent to applicant's affidavit as to why the JV was formed and the intention of the members of the JV, no counter-argument has been advanced on behalf of the applicant against the Council's point of law in this regard. I consider the legal position below. I should mention that I did not receive much assistance from counsel regarding the legal position regarding the relationship between pre-incorporation of a company and the pre-incorporation contracts. Neither

[2] The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa.

of them referred the court to the relevant legal provisions. The court had to rely on its own research.

The legal position

[32] The legal position is prescribed by s 42 of the Companies Act, Act No. 28 of 2004. The section reads thus:

> 'Any contract made in writing by a person professing to act as an agent for a company not yet incorporated is capable of being ratified or adopted by or otherwise made binding upon and enforceable by that company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and that contract had been made without its authority, but, the memorandum on its registration, must contain a statement with regard to the ratification or adoption of or acquisition of rights and obligations in respect of that contract, and that two copies of that contract, one of which must be certified by a notary public, have been lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the company.'

[33] The effect and import of s 42 (formally s 35 of now repealed Companies Act, 1973) has been the subject of discussion and comment by well-known authors on the subject of company law in a number of well-known textbooks such as by Cilliers and Benade[3]; Meskin[4]; RC Beuthin and SM Luis[5] and LAWSA Vol. 4 para 20.

[34] The gist of the legal position, as may be gathered from those learned authors can be summarized as follows: At common law, a person cannot conclude a contract on behalf of a non-existent principal. As regards a company, before its incorporation it cannot conclude a contract and cannot be bound by representations made by a person on its behalf. It follows also that, the company cannot be bound by estoppel to anything done before its incorporation. This position relating to companies was changed by the Legislature with the introduction of s 35 of the Companies Act, 1973 (now section 42 of the Companies Act, 2004).

---

[3] Company Law 4th edition at pp 59 to 67;
[4] Henochsberg on the Companies Act, 4th edition Volume 1 pp 51 to 54.
[5] Beuthin's Basic Company Law, 2nd Edition pp 39 to 45.

[35] A company may, within a reasonable time after its incorporation, ratify or adopt any contract made in writing by a person professing to act as its agent or trustee before its incorporation. For a company to exercise that power: its memorandum on, must on its registration contain as an object of the company the ratification or adoption of that particular contract or the acquisition of rights and obligations arising from such contract; and two copies of the contract in writing, one certified by a notary public, must have been lodged with the registrar of companies together with the memorandum and articles of association.

[36] If the third party withdraws from the contract before the newly incorporated company has ratified the contract or the company fails to ratify the contract within a reasonable time, then in that event the contract will collapse.

[37] Applying the foregoing legal principles to the facts of the present matter, it is apparent that neither the applicant nor the members of the JV have complied with the statutory requirements set out in s 42 of the Act. The deponent to the applicant's affidavit contends that the members of the JV 'always retained the discretion' to incorporate the JV into a company. By 'discretion' I understand him to mean the 'intention' to incorporate the applicant. The fundamental challenge facing the applicant in this matter is that, the applicant was not in existence when the members of the JV formed the JV. The applicant cannot therefore testify as to the intention of the members of the JV. The applicant's position is further exacerbated by the fact that the members of the JV are not party to the present proceedings. The JV itself being an unincorporated entity and therefore not a juristic person, cannot, for that reason sue or be sued. The JV is therefore not capable of being joined as a party to these proceedings. This is another reason why, the position advanced by counsel for the Council that the JV should have been joined to the proceedings as a necessary party, is not only fundamentally untenable, it is also bad in law.

[38] The persons who would be qualified, in law, to speak about the intention of the members of the JV, would be the members themselves. The deponent to the applicant's founding affidavit does not profess to speak on behalf of the members of the JV in these proceedings. This much is clear from his affidavit. He says: 'I am a major male, a shareholder of the applicant and I am duly appointed as the Managing Director of the applicant. I have been duly authorised to depose to this affidavit and

to institute this application by the applicant'. Furthermore, that deponent himself is not a member of the JV. It appears from the JV document that he represents 'Black Turnkey Concepts (BTC, a company to be formed)'. Whether Black Turnkey Concepts, has been incorporated, is not apparent from the papers before Court.

[39] The question which arises from the foregoing is this: Is there any legal nexus between the applicant and the JV? The applicant bears the onus to prove that there is a legal nexus. Clause 3.1 of the JV agreement states *inter alia* that:

'The Joint Venture established by the Members in terms of the Agreement is an unincorporated association with the exclusive purpose of securing and/or executing the Contract for the benefit of the Members. The members of the Joint Venture may, however, at their discretion incorporate the association should it secure the Contract. (Underling supplied for emphasis).

"The Contract" is defined in the JV agreement as follows: "Contract means the contract with the City of Windhoek for the purpose of securing and/executing the purchase of Erf 5727, Windhoek, Namibia, for which the Joint Venture has been formed".'

[40] It is clear from clause 3.1 of the JV agreement that the members of the JV contracted with the Council in their respective own right and for their own benefit. Through their dealings with the Council the members of the JV acquired rights and obligations when the property was allocated to them. It is common cause that the applicant was later incorporated even though it is not stated by whom it was so incorporated. It is also not clear from the papers before court whether the members of the JV became or are shareholders in the applicant. Taking all the foregoing factors into account, I hold that the applicant has failed to prove any legal nexus between it and the members of the JV.

[41] The next obvious and logical question is whether there is proof that the rights and obligations acquired by the members of the JV when the property was allocated to the JV were ceded or in any manner transferred to the applicant.

[42] Clause 3.2 of the JV agreement provides for the events and consequences in which the JV terminates. It provides that:

‘3.2 Termination

The operation of the Joint Venture and the validity of the Agreement shall terminate if and when it becomes evident that the Joint Venture will not be awarded the Contract, or, if the Joint Venture secures the Contract, when all obligations and rights of the Joint Venture and Members in connection with the Contract and the Agreement have ceased and or been satisfactorily discharged’.

[43] I think, it fair to say that it is a moot question whether the rights and obligations of the members of the JV in connection with the contract have ceased or have been discharged. As far as the Council is concerned, the rights and obligations of the JV members arising from the contract have been terminated *vis-a-vis* the Council. Nobody can speak for the JV’s members. They are not before Court and as pointed out before, there is no proof that the deponent to the applicant’s affidavit has a mandate to speak on behalf of the members of JV.

[44] The applicant does not claim that the procedure prescribed by s 42 of the Act was complied with whereby the rights and obligations vested in the members of the JV were transferred to it. In particular there is not proof that the memorandum of the applicant contains a statement with regard to the ratification or adoption of or acquisition of rights and obligations in respect of the contract between the Council and the JV, and that two copies of that contract, one of which has been certified by a notary public, have been lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the applicant.

[45] According to the authorities[6], a promoter of a company may make use of the common law contract for the benefit of a third party in which the provisions of s 42 need not be complied with. That will only happen if the promoter acted not as an agent for the company to be formed but he or she acted in his or her own name. After the company has been incorporated, the promoter can cede his or her rights under the contract to the newly incorporated company.

[6] See: Celliers & Benade at p 63 para 4.14.

[46] I am of the firm view that, having regard to the provisions of clause 3.1 of the JV agreement, the common law route is not open to the members of the JV because they acted as agents of the company to be formed and their intention was that once the contract had been awarded to them, they were to transfer the contract to the company after its incorporation. In other words they did not act in their own name without any intention of transferring the benefit to a third party.

[47] In summary and in answer to the questions posed earlier in this judgment, it follows from all the relevant facts and considerations and I hold that the applicant lacks the necessary standing to enforce the rights which vested in the members of the JV when the property was allocated to the JV. Furthermore, there is no evidence that the rights and obligations of the members of the JV were ever ceded or transferred to the applicant at any stage whether in terms of s 42 of the Companies Act, 2004 or in terms of the common law. Accordingly, the point *in limine* succeeds and the application stands to be dismissed.

[48] As mentioned earlier in this judgment, as the result of the conclusion I have arrived at with regard to the point relating to legal standing, it is not necessary for me to consider the remainder of the points *in limine*.

Costs

[49] There is no reason why the normal principle that costs follow the result should not apply.

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

1. The application is dismissed.

2. The applicant is to pay the respondents' costs.

3. The matter is removed from the roll and is considered finalised.

_____

H Angula

Deputy Judge-President

APPEARANCES:

APPLICANT:	T CHIBWANA Instructed by Sisa Namandje & Co. Inc.,Windhoek
RESPONDENTS:	F KWALA Of Kwala & Co. Inc., Windhoek