

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2022/00104

In the matter between:

<b>THE TRUSTEES FOR THE TIME BEING OF THE VPB</b>	
<b>NAMIBIA GROWTH FUND TRUST</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>TEMO CAPITAL (PROPRIETARY) LIMITED</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>NAMIBIA INSTITUTE OF PATHOLOGY</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>MBINGANYI ANTHONY SIWAWA</b>	<b>4<sup>TH</sup> APPLICANT</b>

and

<b>ONGWEDIVA MEDIPARK (PROPRIETARY) LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>ONGWEDIVA MEDIPARK INVESTMENTS (PROPRIETARY) LIMITED</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>ONGWEDIVA MEDIPARK PARTNERS (PROPRIETARY) LIMITED</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>GABRIEL STEPHANUS DU TOIT</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>ERONGO MEDICAL SERVICES GROUP (PROPRIETARY) LIMITED</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>SAD CONSULT (PROPRIETARY) LIMITED</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>ONGWEDIVA MEDIPARK INVESTORS (PROPRIETARY) LIMITED</b>	<b>7<sup>TH</sup> RESPONDENT</b>

**Neutral citation:** *The Trustees for the time being of the VPB Namibia Growth Fund Trust v Ongwediva Medipark (Proprietary) Limited* (HC-MD-CIV-MOT-GEN-2022/00104) [2023] NAHCMD 661 (18 October 2023)

**Coram:** PARKER AJ  
**Heard:** 1 August 2023  
**Delivered:** 18 October 2023

**Flynote:** Company – Shares – Transfer of shares indicated in share certificates – Evidence of transfer of shares and ownership thereof – Register of share ownership kept in registered office of company concerned – Applicants alleging transfer of shares was a sham – Respondents filing share certificates and share register to prove ownership of shares in the company in question – Court finding that applicants have not placed before court evidence contrary to respondents' evidence – Court finding that applicants have failed to establish genuine dispute of facts, necessitating referral to oral evidence or trial in terms of the rules of court.

**Summary:** Applicants launched application of declaration that acquisition of sixth respondent and second respondent by Staten Island Investments (Pty) Ltd (not a party to the proceedings) allegedly owned by a subsidiary company of fifth respondent constituted a change in control of third respondent and seventh respondent as contemplated in the parties' Shareholders Agreement. The central issue to be determined was whether fifth respondent acquired the shares in Staten Island Investments (Pty) Ltd lawfully and as a beneficial owner of the shares and not a nominee owner thereof. Having realized that they have not made out a case on their affidavits, the applicants applied in terms of rule 67(1) of the rules of court for referral to oral evidence or trial. The court found that the applicants failed to place before the court their contrary version to make out a case on their affidavits. The court stated that for that reason, the applicants would not be allowed to lead oral evidence to make out a case which was not already made out on their affidavits. That being the case, there was a lack of any indication as to what evidence was to be led. The court found that on the papers, there was no real dispute of facts necessitating referral to oral evidence or trial. The application for referral to oral evidence on trial was accordingly refused.

The court concluded that if there was any genuine dispute of facts as claimed by the applicants, it would be resolved by calling in aid the *Plascon-Evans* approach. To avoid a piecemeal approach to litigation and to attain the overriding objective of the rules of court, and in the circumstances of the case, the court considered both the interim application and the main application all together in the instant proceedings. Having considered the papers and the authorities, the court dismissed both the interim application and the main application with costs.

*Held*, in motion proceedings a party will not be allowed to lead oral evidence to make out a case which is not already made out on his or her affidavits.

*Held, further*, the court has a duty to decide issues of fact on affidavits where justice so requires.

*Held, further*, share certificates and the share register, produced in compliance with statutory requirement under the Companies Act 28 of 2004, provide sufficient and satisfactory primary source of evidence of the share structure or ownership of the company in question.

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### ORDER

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1. The interlocutory application and main application are dismissed with costs, including costs of one instructing counsel and two instructed counsel.
2. The matter is finalised and removed from the roll.

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### JUDGMENT

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PARKER AJ:

[1] The applicants, represented by Mr Kauta, have approached the seat of the judgment of the court for relief in terms set out in the notice of motion filed on 17 March 2022. The primary order sought is a *declaration* and seemingly consequential orders. The fourth, fifth and sixth respondents ('the respondents'), represented by Mr Tötemeyer SC (with him Mr Gibson SC) have moved to reject the application. Counsel on both sides of the suit filed comprehensive heads of argument. I have distilled from the authorities relied on where they are of assistance on the points under consideration.

[2] In the course of events, the applicants filed a 'Notice of application in terms of rule 67(1) of the rules of court' whereby they prayed for an order for a 'referral of certain issues to oral evidence, alternatively to trial'. The respondents have moved to reject that application, too.

[3] It is noted that the issue of prescription which might have affected the applicants' claim is not persisted in.

[4] The main issue for determination, as Mr Kauta rightly put it, is whether Erongo Medical Services Group (Pty) Ltd (the fifth respondent) acquired the shares in Staten Island Investments (Pty) Ltd ('Staten') lawfully and as a beneficial owner of the shares. By the way, Staten is not a party to the instant proceedings.

[5] In all this, I find that the bone and marrow of the applicants' case is set out neatly and concisely in Mr Dandi Mtonga's replying affidavit to the respondents' supplementary answering affidavit. He stated:

'27.2 I dispute that the share certificates upon which the respondents rely are genuine and authentic. It is the applicants' case that these have been created in order to provide the respondents with a defence to the application. The referral of the factual disputes to oral evidence will allow the applicants to obtain all of the evidence which is relevant to this question and to demonstrate that EMG was the beneficial holder in Staten.'

[6] One significantly crucial aspect and conclusion thereanent emerge irrefragably from Mtonga's statement. It is this. By their own admission, the applicants have failed to place before the court the applicants' contrary version to make out a case on their affidavits. In that event, the law is that '[A] party will not be allowed to lead oral evidence to make out a

case which is not already made out in his affidavits'.<sup>1</sup> The *raison d'être* of the principle has been stated by the Appellate Division in *Docimar NV v Kotor Overseas Shipping Ltd*<sup>2</sup> to be that there is an increased difficulty in making -

'a favourable assessment of prospects of oral evidence tipping the scale in favour of the applicant where (as is in the instant proceeding) there is a lack of any indication as to what evidence is to be led. And the more the scales are depressed against the applicant the less likely the court would be to exercise the discretion in his favour.'<sup>3</sup>

[7] In that regard, it should be recalled, in *Konrad v Ndapanda*,<sup>4</sup> the Supreme Court found that, on the respondent's papers in the proceedings in the High Court –

'Although the respondent did not make a formal application to have the "marriage" declared a putative marriage, in substance she raised the issue in her answering affidavit.'<sup>5</sup>

[8] For that reason, the Supreme Court decided that the declaration of the invalidity of the marriage (the appellants version) and that of a invalidity of the marriage (the appellant's version) and that of a putative marriage (the respondent's version), which was properly raised in her papers, should be determined *in tandem* and not in isolation. That called for the need to refer that dispute of fact to trial to resolve the matter justly, expeditiously and cost effectively.

[9] The applicants' enthusiastic reliance on *Konrad v Ndapanda* is misplaced. The applicants in the instant matter have not made out a case in their affidavits, as aforesaid, by their own admission. Indeed, tellingly, the applicants state in their affidavit that they now wish through referral to evidence or a trial, 'to obtain all the evidence which is relevant to this question and to demonstrate that EMG (the fifth respondent) was the beneficial holder of Staten'. I reiterate the point that by their own admission, though not in so many words, the applicants have not made out a case on their affidavits, and now pray for a referral to oral evidence or a trial to obtain the evidence they need. But that offends the law, as I have mentioned previously in para 6 above.

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<sup>1</sup> HJ Erasmus *Superior Court Practice* (1994) at B1-47 and the cases there cited.

<sup>2</sup> *Docimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (AD).

<sup>3</sup> At 587 E-F.

<sup>4</sup> *Konrad v Ndapanda* 2019 (2) NR 301 (SC).

<sup>5</sup> Para 11.

[10] What is disturbing in the applicants' case is this. They failed to put forth their version to make out a case, as aforesaid. Indeed, they could have – if minded to do so – to have invoked their right under s 120 of the Companies Act 28 of 2004 ('the Act') to inspect the register of the share account of Staten at the registered office of the company. That could have assisted them to put up their version or contention and to enable them to make out a case on their papers. They did not, as I have said more than once. They have themselves to blame for such failure.

[11] By a parity of reasoning, the reliance on *Akpabio v Minister of Justice*<sup>6</sup> is also misplaced. There, the appellant (Ms Akpabio) had put forth in her papers in the proceedings before the High Court her version to make out a case that she had produced the official transcript of her LLB degree to the Board for Legal Education. The Board refuted her version. The Supreme Court then decided that the High Court's dismissal of Ms Akpabio's application in the face of a genuine dispute as to whether or not she actually presented the official transcript of her LLB degree to the Board was a misdirection.

[12] I repeat what I said above in respect of *Konrad v Ndapanda* for it applies with equal force to *Akpabio*. Like Ms *Ndapanda* in *Konrad v Ndapanda*, Ms Akpabio also made out a case on her papers. The applicants have not made out a case on their papers. They are looking forward to oral evidence or a trial to do that. I cannot allow that without offending the authorities referred to in para 6 above.

[13] Thus, on the facts, *Konrad* and *Akpabio* are distinguishable. Those cases cannot assist the applicants.

[14] It is my firm view that, as Mr Töttemeyer submitted, the share certificates and the share register, produced in compliance with statutory requirements under the Act, provide sufficient and satisfactory primary evidence of the share structure or ownership of a company.<sup>7</sup> Accordingly, I accept that the share register of Staten is the primary source of evidence of the share ownership of Staten as contended by the respondents. *Pace* Mr Kauta, I hold that oral evidence or a trial craved by the applicants cannot produce any evidence better than what the share certificate and the share register have produced. As I

<sup>6</sup> *Akpabio v The Minister of Justice* (SA 54-2022) NASC (23 June 2023).

<sup>7</sup> LCB Gower *The Principles of Modern Company Law* 3 ed (1969) Chapter 17 *passim*; HR Hahlo and MJ Trebilcock *Hahlo's Casebook on Company Law* 2 ed (1977) at 232 -335; *Denker v Ameib Rhino Sanctuary (Pty) Ltd* (SA 15-2016) [2017] NASC (22 November 2017); and ss 100 and 116 of the Companies Act 28 of 2004.

say, the share register is a statutory document produced under the aforementioned sections of the Act whereby these matters are regulated.

[15] I accept Mr Töttemeyer's further submission that clearly s 99 of the Act relied on by Mr Kauta is not applicable in the instant proceedings. The reason is that the instant proceeding does not concern the allotment of shares but the transfer of shares. In that event, the section of the Act that applies is s 140. That section regulates the transfer of shares and interests. Section 116, 120 and 140, interpreted intertextually and applied contextually, are relevant to the point under consideration.

[16] In sum, from the foregoing analysis and conclusions thereanent, I find that there is no real dispute of facts in the instant matter of the kind found to exist in, for instance, *Konrad and Akbabio*, necessitating a referral to oral evidence or trial. The evidence of the shareholding of Staten are in the documents produced to satisfy statutory requirements of the Act, as aforesaid. The applicants have not established in what manner oral evidence or a trial would change those documents. In words of one syllable, the objective, relevant and admissible evidence overwhelmingly establishes that there is no real dispute of fact known to the law.<sup>8</sup>

[17] Even if there was a dispute of facts, as claimed by Mr Kauta, on the papers and upon the textual authority of the learned HJ Erasmus, relying on case law,<sup>9</sup> I feel no doubt in holding that the applicants have forfeited their entitlement, as propounded by the Supreme Court in *Akpabio*,<sup>10</sup> to refer the matter to oral evidence or trial. Above all, the *Plascon-Evans* approach or test<sup>11</sup> is available to the court to effectively resolve any dispute of facts. The test requires the acceptance of the respondents' version, and in the instant matter, that version is satisfactory and sufficient. It is supported by uncontradicted and uncontradictable documentary proof. In any case, the applicants, I have found above, have not placed before the court any relevant and sufficient version of their own.

[18] The superiority and overwhelming weight of the statutory documentary proof of the ownership of the Staten shares is unaffected by the apparently erroneous financial statements of Erongo Medical Group (Pty) Ltd ('EMG') (the fifth respondent). The

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<sup>8</sup> *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

<sup>9</sup> HJ Erasmus *Superior Court Practice* footnote 1 loc cit.

<sup>10</sup> *Akpabio v Minister of Justice and Another* footnote 5.

<sup>11</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

respondents have provided the share register and share certificate of Staten, as well as source documents underlying the relevant transaction. These undisputed and indisputable documents show in no uncertain terms that Staten is not a subsidiary of EMG and that since 22 February 2016, the shares of Staten have been owned by Mr Matthias Braune, as the beneficial owner.

[19] I decline to refer the matter to oral evidence or trial. In my view I am able to determine a dispute of facts, if any, on the papers by calling in aid the *Plascon-Evans* approach to avoid a piecemeal finalization of litigation and to attain the overriding objective of the rules set out in rule 1(3) of the rules of court. As to the need to attain the overriding objectives, both counsel agree. The route I have taken to dispose of the matter, that is, the interlocutory application and the main application, is just and expeditious. It answers to the command of rule 1(3) of the rules of court.

[20] In that regard, Mr Töttemeyer submitted that the court was competent to determine the main application in the instant proceedings upon the application of the aforementioned *Plascon-Evans* test. Indeed, that is, as I have said previously, to determine the real dispute justly and expeditiously, as commanded by rule 1(3) of the rules of court<sup>12</sup>. I did not hear Mr Kauta to unequivocally counterpose Mr Totemeyer's submission. It should be remembered, I have found that the applicants have not made out a case on their papers. They now seek to obtain evidence to make out a case. Thus, as the papers stand, there are no prospects of oral evidence or a trial tipping the scale in favour of the applicants.<sup>13</sup> We should not lose sight of the fact that the court has a duty to decide issues of fact on affidavits where justice so requires. Justice so requires in the instant matter.

[21] In *Soffiantini v Mould*<sup>14</sup> Price JP in a unanimous full-bench-court judgment said:

'It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so.'<sup>15</sup>

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<sup>12</sup> *Akpabio v Minister of Justice and Another* footnote 5.

<sup>13</sup> *Docimar NV v Koto Overseas Shipping Ltd* footnote 3.

<sup>14</sup> 1956 (4) SA 150 (E).

<sup>15</sup> *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154.



[22] I have said more than once that the applicants admit that they have not made out a case on their affidavits. It would seem from their heads of argument that the applicants have abandoned the relief sought in their notice of motion, dated 17 March 2022, only pinning their hope on the success of their rule 67(1) application. Having refused that application, I dare say, the applicants have nothing left in their tank, so to say: They have nothing left to sustain the main application.

[23] Based on the foregoing reasons, I conclude that the applicants' main application cannot succeed. It stands to be dismissed.

[24] It remains to consider the matter of costs. Mr Töttemeyer submitted that while the applicants may have had cause to launch the application as a result of the aforementioned incorrect shareholding having been stated in the financial statements of EMG, the correct facts were set out in the answering affidavit as well as the letter from ENS Africa, dated 29 April 2022. The application ought to have been withdrawn during April 2022. The applicants, despite their knowledge of the correct facts, elected to pursue the application, resulting in the incurring of further and unnecessary costs. That may be so.

[25] But I think the applicants' conduct has not reached the bar set by *Serrao*<sup>16</sup> nor the bar set by *Klein*.<sup>17</sup> Different considerations would arise if the respondents had warned the applicants that they were embarking upon a perilous venture that has no merit and the applicant ignored the warning and went ahead without withdrawing the abortive application.<sup>18</sup> Besides, it would be remembered, this matter consists of an interlocutory application to refer the matter to oral evidence or trial and a main application and they have all been heard and determined in the same proceedings to save time and costs. Indeed, the applicants were so sure of the success of the rule 67 application so much so that they even filed a draft order to that effect.

[26] In the circumstances and on the facts, I think it is just and reasonable to order costs on the scale as between party and party.

[27] Based on these reasons, I order as follows:

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<sup>16</sup> *Namibia Breweries Limited v Sevvao* 2007 (1) NR 49 (HC).

<sup>17</sup> *Klein v Caremed Pharmaceutical (Pty) (Ltd)* 2015 (4) NR 1016 (HC).

<sup>18</sup> *Peter v Jacobs* [2016] NAHCMD 11 (28 January 2016) para 17.

1. The interlocutory application and main application are dismissed with costs, including costs of one instructing counsel and two instructed counsel.
2. The matter is finalised and removed from the roll.

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C PARKER  
Acting Judge

APPEARANCES:

APPLICANTS: P Kauta (with him M Kuzeeko),  
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup>

RESPONDENTS: R Töttemeyer SC (with him C Gibson SC),  
Instructed by ENSafrica I Namibia (Inc. as  
LorentzAngula Inc.), Windhoek