CASE NO.: A 119/04

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE MUNICIPALITY OF WALVIS BAY
APPLICANT

and

THE RESPONDENTS SET OUT IN ANNEXURE "A" HERETO BEING THE OCCUPIERS OF THE CARAVAN SITES AT THE LONG BEACH CARAVAN PARK, WALVIS BAY, REPUBLIC OF NAMIBIA
RESPONDENTS

CORAM: HANNAH, J

HEARD ON: 12/04/2005
DELIVERED ON: 20/06/2005

JUDGMENT

HANNAH, J.: In this application the applicant primarily seeks declaratory relief relating to the lawfulness and enforceability of individual, but substantively identical, lease agreements concluded in

1993 and 1994 by the Council of the Municipality of Walvis Bay and the fifty one respondents in respect of caravan sites at the Long Beach Caravan Park in Walvis Bay.

Amongst the several points of opposition raised by the respondents is the question of the applicant's *locus standi* to bring the application and the authority of the Chief Executive Officer of Walvis Bay to institute the proceedings. At the outset of the hearing counsel for the respondents submitted that it would be convenient if the Court were to determine these two points first together with an application by the Council of the Municipality of Walvis Bay, (to which I shall refer as "the Council") to intervene in the main application. I upheld this submission and argument was therefore limited to these matters.

The point relating to *locus standi* was raised for the first time in the heads of argument of Mr Henning who appeared on behalf of twenty respondents. It is unnecessary to identify them. Mr Arendse, who appeared for the applicant and the Council, submitted that the point should have been raised in the answering affidavits so as to afford the applicant the opportunity to deal with it in its replying affidavit. Mr Henning countered this submission by contending that the respondents are entitled to argue any legal point arising from the recited facts. In support of this contention Mr Henning referred the Court to *Allen v Van der Merwe* 1942 WLD 39 where Solomon J. said the following at 47:

> *"My opinion is that the petition might have omitted any mention of the applicant's legal contentions, and might have contented*

> *itself with a recital of facts and the prayer that, on the facts so recited, the applicant was entitled to cancel the contract. On such a petition Mr Vieyra would have been entitled to argue any legal point which arose from the recited facts. Because the petition has advanced two legal contentions based on the facts, is Mr Vieyra confined to these and debarred from raising a third? I think not."*

I respectfully agree with those observations. Legal contentions need not be set out in evidence, whether oral or written. And in my view, what applies to an applicant must also apply to a respondent. Any party is entitled to make any oral legal contention open to him on the facts as they appear on the affidavits. See *Simmons, N.O v Gilbert Hamer and Co. Ltd* 1963 (1) SA 897 (N) at 903 D.

Mr Henning's submission on the question of the *locus standi* of the applicant, a submission supported by both Mr Wepener and Mr Nel each of whom appeared for various other respondents who oppose the relief sought, was that the applicant is a non-existent entity. The starting point of Mr Henning's argument was section 1 of the Local Authorities Act, No 23 of 1992, as amended by the Local Authorities Amendment Act, No 24 of 2000. The section, as amended, provides that:

> " *'municipality' means a municipality declared as such under section 3(1) or deemed to be so declared under section 3(5)(i)".*

Section 3(1) of the Act, as amended, provides that:

> *"(1) Subject to the provisions of this section, the Minister may from time to time by notice in the Gazette establish any area specified in such notice as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such notice."*

I should mention, in passing, that the only changes made to the subsection by the amending legislation was to substitute "Minister" for "President" and "notice in the Gazette" for "Proclamation".

Mr Henning contended that it is clear from the legislation just referred to that a municipality is an area. Further confirmation of this is provided, so the argument went, by section 2 of the Act which provides that:

> "*For purposes of local government as contemplated in Chapter 12 of the Namibian Constitution, there shall be local authority councils in respect of-*
>
> (a) municipalities;
> (b) towns;
> (c) villages,
>
> *the areas of which are declared as such under section 3 or deemed to have been so declared."*

Mr Henning submitted that a clear distinction is made in the Act between a municipality, which is an area, and the council of a municipality which is its governing body. This he said, is in accordance with Article 102(3) of the Constitution which provides that:

> "(3) *Every organ of regional and local government shall have a Council as the principal governing body, freely elected in accordance with this Constitution and the Act of Parliament referred to in Sub-Article (1) hereof, with an executive and administration which shall carry out all lawful resolutions and policies of such Council, subject to this Constitution and any other relevant laws."*

Turning again to the Local Authorities Act, No 23 of 1992, section 6, as amended, provides that:

> "(1) *The affairs of-*
> *(a) a municipality shall be governed by a municipal council consisting of such number of members, but not less than seven and not more than fifteen, as may be determined and specified by the Minister in the notice establishing the municipality."*
> *(3) A municipal council, town council and village council shall under its name be a juristic person."*

Again I should mention in passing that subsection (3) was simply renumbered as such by the Local Authorities Amendment Act, No 3 of 1997.

Mr Henning submitted that it must follow from the foregoing that the application should have been brought by the Council, not the applicant. The applicant is a place. It is not a juristic person and has no *locus standi*.

The counter-argument of Mr Arendse commenced with a reference to Article 102(1) and Article 111 of the Constitution. Counsel submitted that in terms of these two Articles primary recognition is given to local authorities and not to their councils. Article 102(1) provides that:

> "(1)For purposes of regional and local government, Namibia shall be divided into regional and local units, which shall consist of such region and Local Authorities as may be determined and defined by Act of Parliament."

Article 111(1) provides that:

> "(1) Local Authorities shall be established in accordance with the provisions of Article 102 hereof."

To deal with counsel's argument, it is, of course, stating the obvious to say that you must first have a local authority before you can have a council to govern its affairs. But, in my view, that fact does not assist in determining whether a local authority, such as a municipality, is a legal personality with capacity to sue. Nor, in my view, does it assist that the council of a municipality is inextricably linked to its

municipality and cannot exist separately. That still begs the question whether a municipality is, *per se,* a juristic person.

Mr Arendse further submitted that this Court should have regard to substance, not form. The Council was at all times informed of the application and supported it. The Council has, so the submission went, in substance and effect, been part of the application. This again, in my opinion, side-steps the real question: which is does the Municipality of Walvis Bay have the capacity to sue in that name?

I am prepared to agree with Mr Arendse that Mr Henning went too far when he submitted that the Municipality of Walvis Bay is a non-existent entity. The Municipality of Walvis Bay exists as much as the cities of London and New York exist. They all are places on the map of the world. But does the Municipality of Walvis Bay exist as a legal personality with capacity to sue? The answer to that question lies, in my view, in the legislation which created local authorities as required by the relevant Articles of the Constitution, namely the Local Authorities Act, No 23 of 1992. That Act specifically provides that a municipal council "shall under its name be a juristic person." Had the Legislature intended that a municipality should also be a juristic person it would, in my view, have said so in express terms in the same piece of legislation. It did not. I am therefore of the opinion that a municipality has no capacity to sue as a municipality. The applicant has no *locus standi.*

I should mention, simply as a matter of interest, that this also appears to have been the view of the Council itself. In a resolution made in 2001 it delegated to the Chief Executive Officer authority for:

> *"Institution of legal action in the normal course of business on behalf of Council."* (My emphasis).

In view of the foregoing conclusion it is unnecessary to address the argument which was directed to the question of the authority of the Chief Executive Officer to bring the application on behalf of the applicant. I can turn instead to the application brought jointly by the applicant and the Council:

> "*Granting the COUNCIL OF THE MUNICIPALITY OF WALVIS BAY ("the Council) permission to intervene, and joining it as the second applicant in the main application under the current case number ("the main application") pursuant to Rule 12 of the Rules of Court."*

There is also an application to amend the notice of motion in the main application for consequential changes if such leave is granted. And there is a further application for leave to file a further affidavit deposed to by the Chief Executive Officer if leave is granted. This affidavit is described as the affidavit in support of the application to intervene. If that is the case then, insofar as the affidavit sets out facts or grounds in support of the application to intervene, it is obviously unnecessary to seek leave to file it. It is the founding or supporting affidavit in that particular application.

The affidavit just mentioned is in fact fairly uncontroversial. It annexes the minutes of a Council meeting held on 22nd February, 2005 at which various resolutions were passed. Some of these pertain to the *locus standi* of the applicant in the main application and the authority of the Chief Executive Officer to launch the application. I have already made my finding regarding *locus standi* and I therefore ignore this material. Then there is a resolution confirming that while the Municipality of Walvis Bay was cited as applicant in the main application it was "in fact and in law" the Council which was before the Court. It was resolved that the Chief Executive Officer be authorised to take all necessary steps for the Council to intervene as a second applicant. Further, that the Council:

> "*will adopt and confirm the approach of the Municipality. The Council adopts the factual allegations averred to by the Municipality. The Council will thus not seek to file further papers in the application save for an affidavit deposed to by the CEO indicating the Council's approach and attaching a copy of this resolution...*"

The affidavit of the Chief Executive Officer contains a certain amount of argumentative material concerning the circumstances in which the *locus standi* of the applicant was raised by some of the respondents. This no longer has any relevance in view of my finding on the question of *locus standi*. The rest of the affidavit deals essentially with the Council's standing in the main application and why it should be joined as an applicant.

Mr Henning did not submit, nor in my opinion could he have properly submitted, that the Council does not have *locus standi* as an applicant in the main application. Clearly it does. Mr Henning's opposition to the application to intervene was based on his contention that it is impermissible to join a party to an application in which the sole applicant is a non-existent entity. As I understand it, the contention is that this would effectively bring about a change of parties and that the circumstances set out in Rule 15, which deals with a change of parties, do not exist.

Mr Wepener and Mr Nel supported Mr Henning's opposition to the application to intervene and Mr Wepener, in addition, submitted that the Court should refuse to grant leave for the filing of the supplementary affidavit of the Chief Executive Officer. His argument in this regard was brought about by the curious manner in which the Council brought its application to intervene. It brought its application jointly with the applicant and the affidavit in support, deposed to by the Chief Executive Officer, sets out certain matters which pertain to the *locus standi* of the applicant rather than the interest of the Council in the proceedings. As I have indicated, these matters can be ignored and, when that is done, no question of seeking, or granting, leave arises.

The application to intervene is brought in terms of Rule 12 which reads:

> "12. *Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties,*

> *at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant, and the court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."*

This rule is applied to applications by virtue of Rule 6(14).

In order to ascertain whether a person is entitled to join as an applicant in any application recourse must be had to Rule 10, Subrule (1) of which provides:

> "(1) *Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he or she brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing."*

This subrule is couched in very wide terms. It would, in my view, certainly cover the situation of the Council joining with the applicant at the outset as a second applicant in the main application either jointly and severally or in the alternative or conditionally on the claim of the applicant failing. In these circumstances I can see no objection

to the Council applying for leave to intervene in the main application and for it to be joined as second applicant.

It may well be that as a result of this conclusion there will be, on a practical level, a change or substitution of parties. Again, I can see no objection to this. Rule 15, which deals with change of parties, is concerned with a change in the status of parties. That is not the position in the present case. What the Council is intent upon in the present case is to bring the correct party before the Court. What can possibly be wrong with that? What possible unfair prejudice can the respondents suffer?

The alternative, an alternative suggested by Mr Henning, would be for the Court to dismiss the present application and for the Council to institute a fresh application on identical grounds and allege identical facts to those in the present application. That, to my mind, is not the path which leads to justice. That, in my view, is a path which would lead to a mockery of the law. If this conclusion is in any way perceived to be contrary to the Rules of Court the answer lies in the words of Van Winsen AJA in *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654 C-F. The Rules are not –

> *"an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts."*

In the result, I will grant the Council leave to intervene and join as second applicant. But that is not an end to the matter before me.

Leave is also sought to amend the notice of motion consequentially on leave being granted to the Council to intervene and be joined as second applicant. That relief is apparently opposed by certain respondents but I can see no proper basis for such opposition. The relief sought flows logically from the order which I propose to make.

Then there is the submission made by Mr Wepener that the respondents should be granted the opportunity to file further affidavits. Technically, Mr Wepener is correct. A new party will be joined and insofar as that joinder results in a change in the factual basis of the application the respondents must be given an opportunity to answer. However, in the circumstances of the present case I cannot envisage such a need. Nonetheless, I will give the respondents that opportunity.

As for costs, the situation with which I have had to deal was created by the applicant and the Council. Had the proceedings been brought correctly in the first place none of this would have arisen. I therefore propose to order that the applicant and the Council pay the respondents' costs of the hearing of 12th April, 2005 jointly and severally.

Accordingly, the following orders are made:

1) The relief sought in paragraphs 1,2 and 3 of the Notice of Motion filed on 9th March, 2005 is granted;

2) The first and second applicants are to pay the costs of the respondents incurred for the hearing on 12th April, 2005 jointly and severally such costs to include the costs of two instructed counsel.

3) Any further affidavits to be filed by the respondents must be filed within fourteen days from the date hereof.

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HANNAH, J

ON BEHALF OF THE APPLICANT: ADV ARENDSE SC

ADV BORGSTRöM

INSTRUCTED BY: CONRADIE & DAMASEB

ON BEHALF OF THE 1st GROUP OF RESPONDENTS: ADV HENNING, SC

ADV COETZEE, SC

INSTRUCTED BY: **BEHRENS & PFEIFFER**

ON BEHALF OF THE 2nd GROUP OF RESPONDENTS: ADV WEPENER, SC

INSTRUCTED BY **ERASMUS & ASSOCIATES**

ON BEHALF OF THE 3rd GROUP OF RESPONDENTS: MR T J NEL

INSTRUCTED BY: **VAN DER MERWE-GREEF INC**

ON BEHALF OF THE 49th RESPONDENT ADV HENNING, SC
ADV COETZEE

INSTRUCTED BY: **ETZOLD-DUVENHAGE LP**