

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**DIDHARD MUDUNI MPARO**

**1<sup>st</sup> APPLICANT**

**FRANS KAFULA**

**2<sup>nd</sup> APPLICANT**

**SILVESTER HAINGURA**

**3<sup>rd</sup>**

**APPLICANT**

**PAULUS MANGUNDU**

**4<sup>th</sup> APPLICANT**

**ERASMUS NGHIALWA**

**5<sup>th</sup>**

**APPLICANT**

**KAUTEUA MUMUANHUMBI**

**6<sup>th</sup> APPLICANT**

**ISADOR MUKUVE**

**7<sup>th</sup>**

**APPLICANT**

**HENDRIK CHRISTIAN**

**8<sup>th</sup>**

**APPLICANT**

**HEWAT BEUKES**

**9<sup>th</sup> APPLICANT**

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**1<sup>ST</sup> RESPONDENT**

**MINISTRY OF FINANCE**

**2<sup>ND</sup> RESPONDENT**

**NDJAURA TJOZONGORO**

**3<sup>RD</sup> RESPONDENT**

**ALEXANDER FORBES**

**4<sup>TH</sup> RESPONDENT**

**MOMENTUM GROUP LIMITED**

**5<sup>th</sup>**

**RESPONDENT**

**REGISTRAR OF PENSION FUND**

**6<sup>TH</sup> RESPONDENT**

**HAR (BOB) MEIRING**

**7<sup>TH</sup> RESPONDENT**

**CORAM: SHIVUTE, J**

Heard on: 2010 February 12 - 16, 2011 January 24 - 26

Delivered on: 2011 March 18

**RULING ON APPLICATION FOR SUMMARY JUDGMENT**

**SHIVUTE, J:** [1] The applicants (as plaintiffs in the main action) instituted action against the respondents (as defendants in the main action) praying for an order couched in the following terms:

"CLAIM 1

Wherefore plaintiffs claim from 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants jointly and severally the one paying the other to be absolved.

1. Payment in the amount N\$117, 879, 000.00.
2. Interest on the amount of N\$117, 879, 000.00 at the rate of 20% per annum from February 1998 to date of payment.
3. Costs of suit.
4. Further and/or alternative relief

CLAIM 2

Plaintiffs claim from 7<sup>th</sup> defendant:

1. Payment in the amount of N\$70 million.
2. Interest on the amount of N\$70 million at the rate of 20% per annum from February 1998 to date of payment.
3. Costs of suit.
4. Further and and/or alternative relief'

[2] All the Applicants appeared in person while Ms Potgieter appeared for the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents. Mr Visser appears for the 4<sup>th</sup> Respondent, while Mr Smuts SC with him Ms Engelbrecht appear for 5<sup>th</sup> Respondent. Mr Titus appears for the 7<sup>th</sup> Respondent.

[3] The parties to the action are identified in the particulars of claim as follows:

1. "The First Plaintiff is Didhard Muduni Mparo a former member of Gold Field Namibia Provident Fund, residing at Erf 3239, Goreangab, Katutura, Windhoek.
2. The Second Plaintiff is Frans Kafula a former member of Gold Field Namibia Provident Fund, residing at Erf 3239, Goreangab, Katutura, Windhoek.
3. The Third Plaintiff is Silvester Haingura a former member of Gold Field Namibia Provident Fund, residing at Erf 3230, Goreangab, Katutura, Windhoek.
4. The Fourth Plaintiff is Paulus Mangundu a former of Gold Field Namibia Provident Fund, Erf 3230, Goreangab, Katutura, Windhoek.
5. The Fifth Plaintiff is Erasmus Nghihalwa a former member of Gold Field Namibia Provident Fund, Erf 3239, Goreangab, Katutura, Windhoek.
6. The Sixth Plaintiff is Kauteua Mumuanhumbi a former member of Gold Field Namibia Provident Fund, residing at Erf 3239, Goreangab, Katutura, Windhoek.
7. The Seventh Plaintiff is Isador Mukuve a former member of Gold Field Namibia Provident Fund, residing at Erf 3239, Goreangab, Katutura, Windhoek.
8. The eighth Plaintiff is Hendrik Christian, an independent pension consultant residing at Abt Street No.4, Windhoek-North, appointed by the former members of Gold Fields Namibia Provident Fund to recover pension monies in exchange for a payment of 2.5% commission of the total recovered value.
9. The ninth Plaintiff is Hewat Beukes, an independent labour consultant who in this capacity provides service to the public and appointed by the former members of Gold Fields Namibia Provident Fund, in his personal capacity to recover their pension monies in exchange for 2.5% commission of the total recovered value residing at Erf 4479, Cnr. Of Kroonweg and Dodge Avenue, Khomasdal, Windhoek.
10. The First Defendant is the Government of the Republic of Namibia with its representative's place of business at 10<sup>th</sup> Floor, Sanlam Centre, Windhoek, c/o Attorney-General's office.
11. The Second Defendant is Ministry of Finance with its principal place of business at 6<sup>th</sup> Floor, Fiscus Building, c/o Government Attorneys, Sanlam Centre, Windhoek.
12. The Third Defendant is Ndjaura Tjzongoro who was employed as deputy

registrar of pension funds by the first defendant and presently employed as executive officer at NASRIA.

13. The Fourth Defendant is Alexander Forbes, a liquidator of Gold Fields Namibia Provident Fund, with its principal place of business at Alexander Forbes House, Dr Kurz Street, Windhoek.

14. The Fifth Defendant is Momentum Group Ltd which was the administrator of Gold Fields Namibia Provident Fund of which 1<sup>st</sup> to 7<sup>th</sup> Plaintiffs were members.

15. The Sixth Defendant is the Registrar of Pension Funds who is statutorily charged with supervision of Gold Fields Namibia Provident Fund.

16. The First and second Defendants are sued as vicariously liable for the wrongs committed by third defendant acting in his capacity and within the scope of his authority as employee of first defendant.

17. The Third Defendant is sued in his capacity as the employee of first defendant for the wrongful acts he has committed in the course and scope of his employment as the Deputy Registrar of Pension funds.

18. The Fourth Defendant is sued in its capacity as the liquidator and as a person managing the business of Gold Fields Namibia Provident Fund.

19. Namibia Provident Fund, which arranged all withdrawals, in total N\$127 879 000.00.

20. The Sixth Defendant is sued in his/her capacity as a statutory employee tasked with the supervision of the pension industry.

21. The Seventh Defendant is sued in his capacity as a liquidator of the remaining capital of Gold Fields Namibia Provident Fund.

[4] According to the particulars of claim, no relief is sought against 4<sup>th</sup> and 6<sup>th</sup> Respondents.

[5] Combined Summons was served on the Respondents on 17 November 2009. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a notice of intention to defend with the Registrar on 9 December 2009 and it was served to the 9<sup>th</sup> Applicant's daughter at the 8<sup>th</sup> Applicants address at Erf 4479, Corner of Kroon Road and Dodge Avenue, Khomasdal in respect of all Plaintiffs on 28 November 2009. The

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4<sup>th</sup> Respondent filed a notice of intention to defend on 3 December 2009, 5<sup>th</sup> Respondent filed a notice of intention to defend on 1 December 2009 and 7<sup>th</sup> Defendant filed a notice of intention to defend on 26 November 2009.

[6] The Applicants applied for Summary Judgment on 28 January 2010. Opposing affidavit was filed on 9 February 2010 on behalf of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents by Mr Schlettwein.

[7] The 8<sup>th</sup> and 9<sup>th</sup> Applicants raised points in *limine* in respect of 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Respondents. In respect of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> Respondents the points *in limine* are to the following effect:

1. That the deponent to the opposing affidavit Mr Schlettwein, the Permanent Secretary of the Ministry of Finance (the 2<sup>nd</sup> Respondent) lacks *locus standi*. He is not a party to the application and there was no confirmatory affidavits from 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> defendants stating that they have authorized him to depose to the said opposing affidavit and to oppose the Summary Judgment.

2. That Mr Schlettwein acted *ultra vires* the Public Service Act, 1993 (Act No. 13 of 1993) when he deposed to the opposing affidavit on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> Respondents without authorization to do so.

3. That the 6<sup>th</sup> defendant can only act in the Summary Judgment if such is duly authorized in terms of the Namibian Financial Institutions

Supervisory Authority Act, 2001 (Act No. 3 of 2001).

4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> Respondents failed to comply and serve their opposing affidavits, in accordance with the provisions of Rule 4 of the Rules of this Court in that: The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents have not served opposing affidavits on the 1<sup>st</sup> to 7<sup>th</sup> Applicants.

5. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents failed to comply and give their notices of intention to oppose the Summary Judgment Application in accordance with the provisions of Rule 6 (5) (d) of the Rules of this Court in that they had not served notices to oppose the said application.

In respect of 5<sup>th</sup> Respondent:

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6. That the deponent to the opposing affidavit on behalf of the 5<sup>th</sup> Respondent, legal practitioner Mr H D Bossau, lacks *locus standi* because he is not a party to the application and the 5<sup>th</sup> Respondent did not file a confirmatory affidavit or a resolution, specifically that it had authorized Mr Bossau to depose to the opposing affidavit and to oppose the Summary Judgment application on behalf of the 5<sup>th</sup> Respondent.

7. Mr Bossau lacks a proper mandate to act on behalf of the fifth Respondent in that-

- a) The resolution dated 20 November 2009 is invalid and of no force or effect; and
- b) The power of attorney purportedly given on the strength of this resolution is therefore, invalid and of no force or effect.

[8] In respect of 7<sup>th</sup> Respondent, it was contended that the Namibia Financial Supervisory Authority acted *ultra vires* its competence in terms of Act 3 of 2001 read with the Pension Funds Act, 1956.

[9] In turn the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents raised the following points in *limine*:

A *Locus Standi* of 8<sup>th</sup> to 9<sup>th</sup> Applicants was raised based on the following contentions:

1. That it must appear *ex facie* the pleadings that the parties to the proceedings have the necessary *locus standi*;
2. *Ex-facie* the Plaintiffs' summons and particulars of claim it appears that the 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs were appointed by the former members of the Gold Fields Namibia Provident Fund to recover money which is alleged to have been unlawfully withdrawn from the Provident Fund in exchange for the payment 2.5% commission of the total value recovered.
3. The 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs lack a direct and substantial interest in the litigation which is required in order to establish legal standing.

B. *Locus Standi* of 2<sup>nd</sup> Defendant:

4. The 2<sup>nd</sup> Defendant as cited by the Plaintiffs, is not a legal person and cannot be sued.

5. In any proceedings against the State, the Minister responsible for the Ministry concerned must be cited as the nominal Defendant or Respondent

6. The proceedings against the 2<sup>nd</sup> Defendant as cited, is *void ab initio* and the application for Summary Judgment against the 2<sup>nd</sup> Defendant should be dismissed.

C. Summary Judgment Application brought late.

7. In terms of Rule 32(2) of the Rules of the High Court, the application for Summary Judgment must be brought within 15 days after the date of delivery of the notice to defend.

8. The Notice to Defend by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants was filed on 9 December 2009 and the Application for Summary Judgment was served on 28 January 2010. The Notice to defend on behalf of the 6<sup>th</sup> defendant was filed on 19 January 2010 but no relief is sought against the 6<sup>th</sup> Defendant.

D. Non compliance with Rule 32(1).

9. A plaintiff is only entitled in terms of Rule 32(1) to claim Summary Judgment if the Plaintiff's claim falls within one of the following categories:

- (a) A claim for a liquidated amount in money;
- (b) A claim based on a liquid document;
- (c) A claim for the delivery of specified movable property, and
- (d) A claim for ejectment

[10] As earlier stated, the 8<sup>th</sup> and 9<sup>th</sup> Applicants challenge the *locus standi* of Mr Schlettwein, the then Permanent Secretary of the Ministry of Finance who

deposed to the opposing affidavit on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents. They have also challenged the *locus standi* of Mr Bossau the Legal

Practitioner for the 5<sup>th</sup> Respondent on the basis that Mr Bossau is not a party to the application and the 5<sup>th</sup> Respondent "did not file a confirmatory affidavit".

[11] Although a number of points in *limine* were raised by the 8<sup>th</sup> and 9<sup>th</sup> Applicants as well as by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, I find it convenient to deal first with the *locus standi* of 8<sup>th</sup> and 9<sup>th</sup> Applicants raised by the Respondents.

[12] As already noted, the 8<sup>th</sup> Applicant is described in the particulars of claim as:

"an independent pension consultant residing at Abt Street No. 4 Windhoek-North, appointed by the former members of Gold Fields Namibia Provident Fund in his personal capacity to recover pension monies in exchange for a payment of 2,5% commission of the total recovered value".

[13] Whilst the 9<sup>th</sup> Plaintiff is described as:

"an independent labour consultant who in this capacity provides service to the public and appointed by the former members of Gold Fields Namibia Provident Fund, in his personal capacity to recover their pension monies in exchange for 2,5% commission of the total recovered value residing at Erf 4479, Cnr. of Kroonweg and Dodge Avenue, Khomasdal, Windhoek".

[11] It was argued on behalf of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents that the 8<sup>th</sup> and 9<sup>th</sup> plaintiffs lack a direct and substantial interest in the litigation which is required in order to establish legal standing.

[14] Counsel for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents argued that a mere financial interest is not a basis in law to establish legal standing. In the circumstances the 8<sup>th</sup> and 9<sup>th</sup> Applicants' interest in the action is stated to be that they have been appointed to recover pension monies in exchange for a 2,5 per cent commission of the total recovered value. They would only enjoy a mere derivative right - derived from the other Applicants they do not have a



direct and substantial interest in the relief claimed. This is demonstrated by the fact that it is not stated anywhere in the particulars of claim that the 8<sup>th</sup> and 9<sup>th</sup> Applicants suffered any damages as a result of the alleged conduct of the Respondents.

[15] The "verifying" affidavit in this matter was deposed to by the 8<sup>th</sup> Applicant who is an agent for the 1<sup>st</sup> to 7<sup>th</sup> Respondents. He stated in his "verifying" affidavit that all "files and documentation" relevant to the rules of the Fund in question were under his possession and control and perused by him and he was appraised of "all facts pertaining to this particular case" and accordingly was authorized to sign the affidavit. He purported to verify the cause of action on this basis. Rule 32(2) requires that an affidavit should be made by a plaintiff himself or herself or by any other person who can swear positively to the facts. Counsel for the 7<sup>th</sup> Respondent associated himself with the arguments advanced above.

[16] On the other hand, Mr Mparo, the 1<sup>st</sup> Applicant, in response to the points in *limine* raised by the Respondents submitted that he and the other Applicants did not receive any documents from the beginning of this case. They nominated the 8<sup>th</sup> and 9<sup>th</sup> Applicants to assist or talk on their behalf because 8<sup>th</sup> and 9<sup>th</sup> Applicants were acquainted with the law. The 2<sup>nd</sup> to 7<sup>th</sup> Applicants associated themselves with Mr Mparo's argument.

[17] Mr Christian, the 8<sup>th</sup> Applicant, argued that his *locus standi* appears from the allegations contained in paragraphs 8 and 9 of particulars of claim. Paragraph 8 of the particulars of claim contains the allegation referred to above describing the 8<sup>th</sup> Applicant as "an independent pension consultant ... appointed by the former members of Gold Fields Namibia Provident Fund, in his personal capacity to recover pension monies in exchange for a payment of 2,5 % commission of the total recovered value." Paragraph 9 refers to the 9<sup>th</sup> Applicant and has nothing to do with the 8<sup>th</sup> Applicant. The 8<sup>th</sup> Applicant argued that the former members of Gold Field Namibia Provident Fund ceded 2,5 % of the total recovered value as well as a file to recover their pension

money which has been allegedly stolen.

[18] Mr Beukes, the 9<sup>th</sup> Applicant, in respect of *locus standi* argued that the 8<sup>th</sup> and 9<sup>th</sup> Applicants' *locus standi* is "derived from section 13 of the Pension Fund Act". Their claim was derived from a member of the Fund. Section 13 of the Pension Fund Act, 1956 makes the rules of the Fund binding on them as claimants from members of this fund. Section 14 of the same Act refers to amalgamation and transfer of funds. He argued further that the claim was transferred to them as consultants to recover the monies of the Applicants. He contends that by raising the point in *limine* concerning *locus standi*, the Respondents are being "frivolous and vexatious".

[19] Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondent argued in reply that the 8<sup>th</sup> and 9<sup>th</sup> Applicants appeared to have derived their *locus standi* from a cession of rights and that this was not stated in their particulars of claim. They failed to comply with Rule 18(6) of the Rules of the High Court which provides as follows:

*"(6) A party who in his or her pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleadings".*

In counsel's submission, Applicants 8 and 9 could not then state to have derived their *locus standi* from some cession or contract and so the Court should regard the submission to that effect as an afterthought, because it is not based on anything that is stated in the pleadings. Counsel further referred the Court to Section 37A of the Pension Fund Act, 1956 which specifically prohibits any cession of any rights in a Pension Fund. Counsel further argued, correctly, that section 14 of the Pensions Fund Act, 1956 has nothing to do with a cession of any rights or cession of contract. It deals with amalgamations or transfers and it is totally irrelevant for the purpose of 8<sup>th</sup> and 9<sup>th</sup> Applicants' *locus standi*.

[20] Counsel for the 5<sup>th</sup> Respondent adopted the argument advanced by

Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondent in so far as she referred to section 37A of the Pensions Fund Act. Counsel for the 7<sup>th</sup> Respondent further associated himself with the arguments in reply advanced by Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 5<sup>th</sup> Respondents.

[21] In determining the point in *limine* concerning the *locus standi* of the 8<sup>th</sup> and 9<sup>th</sup> Applicants I am guided by the general principles of law regarding *locus standi*. In order for the litigant to have *locus standi* he must have a legal interest at stake which must be direct or personal. The interest of the 8<sup>th</sup> and 9<sup>th</sup> Applicants are based on the facts that they have been appointed to recover pension monies in exchange for a 2,5% commission of the total recovered value.

[22] What constitutes a direct and substantial interest was considered by this Court in *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC) at 7D-E, quoting with approval the dictum of Corbett J (as he then was) in *United Watch and Diamond Company*

(Pty) Ltd and Others, *Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H where it was stated:

"In *Henry Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169)...

'an interest in the right which is subject matter of the litigation and...not merely a financial interest which is only an indirect interest in such a litigation'.

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division....and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court..."

[23] The 8<sup>th</sup> and 9<sup>th</sup> Applicants do not have a direct and substantial interest in the relief claimed. They would only enjoy a mere derivative right derived from

the other Applicants.

[24] The 8<sup>th</sup> and 9<sup>th</sup> Applicants argued further that they have to have derived their *locus standi* from the other Applicants who allegedly ceded the claim to them. I accept the submission by counsel for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents that this appears to be an afterthought as it was not stated in the particulars of claim. Furthermore I do accept the submission by counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents' argument that section 37A(1) of the Pension Funds Act, prohibits cession of any right or benefit provided for in the rules of a registered fund. The section provides as follows:

"(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1963 (Act 23 of 1963), no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand [Namibia Dollar] per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

[25] It therefore find that the so called "cession of right" to the 8<sup>th</sup> and 9<sup>th</sup> Applicants has no basis in law and so it cannot clothe them with *locus standi* to litigate in this matter. It follows inevitably that since they are not parties to the matter the points *in limine* they have raised fall away.

[26] I now wish to consider whether the Court should entertain the application for Summary Judgment by 1<sup>st</sup> to 7<sup>th</sup> Applicants. The Application for Summary Judgment was accompanied by a verifying affidavit deposed to by the 8<sup>th</sup> Applicant. In his verifying affidavit he stated that all relevant files and

documentation relevant to the rules of fund in question were under his possession and control and perused by him and he is apprised of all facts pertaining to this particular case and that he was accordingly authorized to sign the affidavit. It appears from the documents attached on the particulars of claim that the 8<sup>th</sup> Applicant came into possession of certain documents concerning TCL Pension Plan and Goldfields Namibia Provident Fund when he made inquiries concerning benefits to members. The 8<sup>th</sup> applicant was not a member of the Pension Fund or worked in relation to the Pension Fund. Therefore, it could not be said that the 8<sup>th</sup> Plaintiff has personal knowledge of the matters in the files and the documents which came into his possession or control.

[27] It is a requirement of Rule 32 that the affidavit accompanying an application should be deposed to by a plaintiff himself or herself or by any other person who can swear positively to the facts. The 1<sup>st</sup> to 7<sup>th</sup> Applicants did not file any affidavit in terms of rule 32 (2) and they did not comply with the Rules of the High Court.

[28] The 8<sup>th</sup> Applicant who made the verifying affidavit was not in a position to positively verify certain facts upon which the cause of action was based. It therefore follows again that this court is not satisfied that a proper affidavit which is in support of summary judgment has been deposed to by a person who has personal knowledge of the facts on which the plaintiff's cause of action is based and of the amount claimed. I therefore decline to entertain the Application for summary judgment as it is not properly before me. This conclusion disposes of the application. In view of this conclusion, I find it unnecessary to deal with other points in *limine* raised by the Respondents.

[29] I will now consider the issue of costs. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondent prayed for the Court to award costs on the scale of legal practitioner and client and for the Court to order that the action should be stayed until the Applicants have paid the Respondent's costs.

[30] It was stated in *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 at 773 G-H as follows:

"Orders which stay proceedings until the costs on interlocutory or other proceedings between the same parties have been paid are particularly harsh on indigent litigants and in reality, are likely to inhibit to obtain redress of their grievances in a Court of law. Orders of this nature are usually made within a narrow scope of cases."

[31] In the light of the above authority I am of the opinion that the circumstances of this case do not attract the making of an order that the action should be stayed pending the Applicants' payment of the Respondent's costs. I do not think the present case falls within the "scope of cases referred to by Maritz JA in *Christian v Metropolitan Life Namibia Retirement Annuity Fund* supra. That is to say, I am of the opinion that the conduct of the Applicants could not be said to be vexatious or frivolous. Consequently I decline to award costs on the scale between legal practitioner and client against the Applicants.

[32] In the result the following order is made:

1. The Application is struck from the roll -
  - (a) with costs, such costs to include costs consequent upon employment of one instructing counsel and one instructed counsel in favour of the 5<sup>th</sup> Respondent.
  - (b) with costs in favour of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents.
2. The 1<sup>st</sup> to 9<sup>th</sup> Applicant must jointly and severally pay the costs to the Respondent the one paying the other to be absolved.

**SHIVUTE, J**

Appearance for the parties:

For applicants:

In Person

For respondents:

Ms Potgieter

Government Attorney

Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup>  
Respondents

Mr Visser

Koep & Partners

Counsel for the 4<sup>th</sup> Respondent

Mr Smuts SC and Ms Engelbrecht

Counsel for the 5<sup>th</sup> Respondent

Instructed by: HD Bossau & Co

Mr Titus

Counsel for the 7<sup>th</sup> Respondent  
Koep & Partners