REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON SPECIAL PLEA

CASE NO. I 3616 /2014

In the matter between:

ARANDIS LUBRICATION SERVICES CC **PLAINTIFF**

And

ERONGO INDUSTRIAL SUPPLY SERVICES CC **DEFENDANT**

Neutral citation: *Arandis Lubrication Services CC v Erongo Industrial Supply Services CC (I 3616-2014) [2016] NAHCMD 253 (7 September 2016)*

CORAM: MASUKU J:

Heard: 25 July 2016

Delivered: 7 September 2016

FLYNOTE: COMPANY LAW- Amendment of founding statement of Close corporation- Legal requirements- Civil Procedure- *locus standi* of close corporation where proceedings are instituted at the instance of one member to the exclusion of other members.

SUMMARY: The plaintiff sued the defendant for payment of certain monies allegedly due as a result of an alleged breach of contract. In response, the defendant, in part brought a special plea in which it alleged that the plaintiff did not have the standing to bring the proceedings because the said proceedings were not properly authorised, in that one of its members instituted legal proceedings against it, without authorization of the other two members.

Held that - the expression *locus standi in judicio* in our law is not used in one sense only. On the one hand it can mean an 'interest to sue' and on the other it may refer to the capacity of a litigant to sue.
Held further that - being a legal *persona*, a corporation cannot do anything, 'except by human agency'. It is only through such agency, i.e. if the natural person acts under its authority, that it can sue.
Held that – the provisions of section 15 of the Close corporation's Act dealing with amendments of a founding statement are peremptory in nature and failure to comply with them is fatal and results in any purported change or amendment of the statement not in conformity with the letter of law ineffectual.
In conclusion the court held that plaintiff was not properly before court in that the other two members did not authorize the other to bring legal proceedings against the defendant. The defendant's special plea was therefore upheld and the said member was ordered to pay costs of these proceedings, namely the costs of one instructing and one instructed Counsel.

ORDER

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1. The defendant's special plea is hereby upheld.
2. The plaintiff's member Mr. Niclaus Tsaneb is ordered to pay the costs of these proceedings, namely the costs of one instructing and one instructed Counsel.
3. The matter is removed from the roll.

RULING

MASUKU J:,

Issue for determination

[1] The question for determination is whether the plaintiff is properly authorized to bring the current proceedings. The reason for this question will become apparent as this ruling unfolds.

Introduction

[2] The plaintiff is a Close Corporation bearing registration number CC 2009/4172 and duly registered in terms of the close corporation Laws of this Republic, having and its principal place of business currently situated at No. 233 Milkwood, Arandis, within the Republic of Namibia.

[3] The defendant is Erongo Industrial Supply Services CC, a close corporation also duly incorporated in terms of the corporation laws of Namibia and has its offices in Swakopmund.

[4] According to the pleadings, during the period of November 2011 to May 2012, the plaintiff, duly represented by Mr. Niclaus Tsaneb (Mr. Tsaneb), and the defendant, duly represented by Mr. John Steenkamp, entered into an oral joint venture agreement, in terms of which both parties would supply certain services to Rossing Uranium Mine (Pty) Ltd (‘Rossing’) for an amount of N$ 1 372 167.00. It is further averred that the

parties agreed that they would share in the profits of the work done on a 50/50 basis upon completion of same in May 2013.

[5] Notwithstanding the above mentioned agreement, it is further alleged, the defendant claimed for work done in April 2012 and received an amount of N$ 1 052 167.00 from Rossing, but failed to pay the plaintiff its 50% share of the said monies despite numerous demands by the latter.

The claim and defence

[6] The plaintiff thus sued the defendant for the payment of an amount of N$ 526 083.50 being its 50 % share of the proceeds of the oral joint venture agreement, allegedly incurred as a result of the defendant's breach of the aforesaid oral agreement in question.

[7] In its defence, and by way of a special plea, the defendant averred that the plaintiff of which the said Mr. Steenkamp holds a 7% members interest, did not authorize Mr. Tsaneb's to institute legal proceedings on its behalf and as such its' claim against the defendant was brought Mr. Tsaneb on his own frolic. On the merits, the defendant denies that it is liable to the plaintiff in the amount claimed or at all. It further denies that it breached the joint venture agreement in the manner alleged or at all. The defendant, for its part, also filed a claim in reconvention and which it is unnecessary to refer to at this juncture.

The evidence

[8] The defendant led evidence in support of its special plea and called Mr. John Andrew Steenkamp and Mr. John English as its witnesses. Mr. Steenkamp (DW1), in his witness statement read into the record under oath, confirmed that he is the sole member of the defendant and also holds a 7% members interest in the plaintiff. He further testified that he got the plaintiff's founding statement (marked as Exhibit 'A') in

August 2015, which reflects three members of the plaintiff as Mr. Niclaus Tsaneb and Mr. John English , who both hold 46.5% members interest and himself, who holds 7%. It was his further evidence that the founding statement was certified as a true copy by the Registrar of Companies on 21st July 2016.

[9] It was also Mr. Steenkamp's evidence that he signed off his shares in the plaintiff *vide* a letter named '*for office use'* in November 2009 and had since then not participated in the plaintiff's business. He confirmed this under cross-examination by the plaintiff's legal practitioner (see page 14 of the record of court). This evidence was not contested under cross-examination.

[10] The defendant's other witness, Mr. John English (DW2), testified that to the best of his knowledge, the plaintiff still had three members as cited in paragraph 13 above. He further testified that he has been informed of the action against the defendant by Mr. Steenkamp and that he does not approve of it. Furthermore, it was Mr. English's evidence that he had no knowledge of a purported amended founding statement of the plaintiff. Lastly, Mr. English testified that he had never seen a letter marked as Exhibit 'E' dated 13 November 2010, addressed to him, in which Mr. Tsaneb purported to terminate his (Mr. English's) membership in the plaintiff.

[11] In conclusion, Mr. English (who tendered his evidence in Afrikaans), testified that he had neither been invited to a meeting of the corporation in October 2014, nor on any other date to take a decision to institute the legal action against the defendant. Nor was he aware, he further testified, that Mr. Steenkamp signed off as a member of the plaintiff. That was the evidence of the defendant. The plaintiff led no witnesses to support its case in relation to the special plea.

[12] The plaintiff in response to a request for further trial particulars (record of court at page 23) informed the defendant that Mr. Tsaneb was the only member of the corporation and that the other two members had ceased to be members. It was particularly alleged that Mr. Steenkamp ceased to be a member by virtue of an

amended founding statement, whereas Mr. English did so in terms of clause 11 of the plaintiff's association agreement.

The Application of relevant legal principles: ***Locus standi in judicio***

[13] The expression *locus standi in judicio* in our law is not used in one sense only.[1] On the one hand it can mean an 'interest to sue' and on the other it may refer to the capacity of a litigant to sue. Generally a Close Corporation will always have standing in the former sense, namely to recover damages caused to it by the conduct of another party to the proceedings.[2] In the narrow sense however, 'a capacity to sue' or better known as *legitima persona standi in judicio* as Baxter[3] points out, is an incident of legal personality. Being a legal *persona*, a corporation cannot do anything, 'except by human agency'.[4] It is only through such agency, i.e. if the natural person acts under its authority, that it can sue.[5]

[14] It is in the latter context in the preceding paragraph that the defendant has challenged the plaintiff's '*locus standi'* and authority in their special plea. As such it is on this basis that the matter will be decided.

Section 15 (1) of the Close Corporation Act (the 'Act')[6].

[15] The defendant relies on this section of the Act, which for easy reference I shall quote. Subsection 1 states that:

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[1] *Oshuunda CC v Blaauw and Another*, 2001 NR 330 at page 3.
[2] Ibid.
[3] Administrative Law, p 648.
[4] Meskin "Henochberg *on the Companies Act*, p127.
[5] Ibid.
[6] Act 26 of 1988

‘If any change is made or occurs in respect of any matter of which particulars are stated in a founding statement in accordance with paragraph (b), (d) (other than in relation to a member’s residential address), (e) or (f) of section 12, the corporation shall, subject to section 29 (3) (c) and (d) within 28 days after such change-

(a) lodge with the Registrar for registration in his or her registers an amended founding statement in triplicate, in the prescribed form, signed by every member of the corporation and by any person who will become a member on such registration, and which contains particulars and the date of the change; and

(b) pay the fee prescribed for the registration of an amended founding statement’.

[16] Subsection (2) (a) further provides the following:

‘If any change is made or occurs in respect of any matter of which particulars are stated in the founding statement in accordance with paragraph (a) or (g) of section 12, an amended founding statement shall, in accordance with the requirements of subsection (1) be lodged with the Registrar for registration’.

[17] It is clear in my view, that the above provisions are peremptory in nature and failure to comply with them is fatal and results in any purported change or amendment of the statement not in conformity with the letter of law being ineffectual. That this is the case can be deduced from the nomenclature employed by the law-giver, particularly the use of the word ‘shall’. Ms. Shifotoka’s argument to the effect that such provisions are merely directory fly in the face of the wording and intention of the Legislature as deduced from the words used in the provisions and falls to be dismissed.

[18] I am of the considered view that the failure to lodge the proposed amended statement with the registrar for registration and endorsement resulted in the amended statement not seeing the light of day and the original members retaining their membership and interest in the plaintiff.

[19] In view of the fact that the said statement was not amended in conformity with the relevant legislation, it follows that the resignation of Mr. Steenkamp was not effectual, regardless of his state of mind suggesting that he had given up his interest in the plaintiff. Furthermore, Mr. English was also not properly removed as he did not know of the purported removal and its consequences. For that reason, since it is clear that both Messrs. Steenkamp and English did not authorize the launching of the proceedings, being members still with interest in the plaintiff in terms of the law, then it becomes clear as noonday that the proceedings in question were not properly authorized and for that reason, the plaintiff does not have the *locus standi* to have instituted the proceedings in the premises.

Analysis of the evidence

[20] As indicated above, the defendant led evidence to support the fact that the plaintiff's amended founding statement was never registered in terms of section 15 (2) of the Close corporation Act. Furthermore, it is contended, that there was no provision in the document made for a date of commencement of change. This court has not been provided with any other document registered with the Registrar of companies by the plaintiff indicating a change in membership. In this instance, the court must accept that the members of the plaintiff are to this date those reflected in the founding statement and mentioned in paragraph 8 above. The letters purporting to change the membership of the plaintiff, not having been registered in terms of the Act carry no legal weight and do not assist the plaintiff at all as already indicated.

[21] Damaseb AJA, dealing with the burden of proof in civil cases, in the case of *M Pupkewitz Mega-Built v Kurz*[7] said the following:

'In general, in finding facts and making inferences in a civil case, the court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt….for, in finding facts or making inferences in a civil case, it seems to me that one may…by balancing probabilities select a conclusion which seems to be the more natural, or

[7] 2008 (2) NR 775 (SC) AT 790A-C

plausible conclusion from amongst several conceivable ones, even though that conclusion be not only the reasonable one.'[8]

[22] In *casu,* the plaintiff's legal practitioner indeed confirmed that an attempt to register the amended founding statement with the Registrar of Companies was only submitted during early January 2016 and that she did not follow it up. Counsel for the plaintiff further informed the court that she considers the documents submitted by the defendant to this effect and that she cannot dispute that there had indeed been a registration or that there have been no amended founding statement as averred by the defendant. This leaves the court with only one plausible version that seems to be the uncontroverted one of the defendant. There seems to be no reason why this version cannot be accepted as true.

[23] The defendant further averred that the association agreement on which the plaintiff relied to terminate Mr. English's members' interest was not signed by all the members as required by section 44 of the Act and it also does not deal with termination of membership of any of the members. For this reason, the plaintiff's reliance on this document is misplaced and cannot come to its assistance.

[24] On a proper analysis of the evidence, I am of the view that Mr. Tsaneb did not have the authority to institute legal proceedings purportedly on behalf of the plaintiff as the concurrence of the other members was not proved nor was it proved that they legally cased to be members of the plaintiff. The purported amended founding statement on which Mr. Tsaneb sought to rely was not duly registered with the Registrar of Companies, as required by section 15 of the Act. Similarly, the association agreement was not signed by all the members and also did not deal with termination of membership of the corporation's members.

[25] It must also be mentioned that faced with such incontrovertible evidence, staring it in its face, the plaintiff failed to put up any evidence that could remotely be said to challenge the evidence mounted by the defendant's witnesses. The defendant's case

[8] Ibid.

has simply been left totally unhinged and there is no basis in the circumstances, in which it can be found for the plaintiff that the proceedings in issue, were properly authorised. This conclusion is wholesome in the circumstances and is simply unassailable.

[26] I should, perhaps before drawing the curtain on this matter, refer to the Supreme Court judgment in *Rally for Democracy v Electoral Commission for Namibia,*[9] where the court expressed itself in the following terms in a related issue:

> 'It is, of course, trite law that "(u) unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. It follows that if legal proceedings are instituted (or opposed) in the name of a juristic person, the proceedings must, as a general rule, be properly authorized'".

Conclusion

[27] Having regard to all the foregoing, I am of the considered opinion that the defendant's special plea, considered in the circumstances of the evidence, should be upheld. I find that Mr. Tsaneb, in his instituting of the proceedings, purportedly on behalf of the plaintiff, did not have the authority to do so. He accordingly acted on his own frolic and such proceedings cannot be said to have been properly authorized. They were not those of the plaintiff according to law. There is accordingly no reason why Mr. Tsaneb should not be mulcted in costs in the circumstances for dragging the plaintiff into a pool of litigation it simply should not have been involved in, regard had to entire conspectus of the case.

[28] In the premises, I issue the following Order:

1. The defendant's special plea is hereby upheld.

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[9] 2013 (3) NR 664 at 688 para [42].

2. The plaintiff's member Mr. Niclaus Tsaneb is ordered to pay the costs of these proceedings, namely the costs of one instructing and one instructed Counsel.
3. The matter is removed from the roll.

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TS Masuku

Judge

APPEARANCES:

PLAINTIFF:	E Shifotoka Conradie & Damaseb
DEFENDANT:	N Bassingthwaighte Instructed by Engling, Stritter & Partners