

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2018/00337

In the matter between:

PIETER WILLEM VAN ZYL (Snr)	1ST APPLICANT
JACOBA VAN ZYL	2ND APPLICANT
PIETER WILLEM VAN ZYL (Jnr)	3RD APPLICANT
MARITTE VAN ZYL TRUST	4TH APPLICANT
PK FAMILY TRUST	5TH APPLICANT
PMW FAMILY TRUST	6TH APPLICANT

and

NAMIBIAN AFFIRMATIVE MANAGEMENT AND BUSINESS (PTY) LTD	1ST RESPONDENT
RUDOLF DAUSAB	2ND RESPONDENT
SALOMON HEINRICH BOOIS	3RD RESPONDENT
SIMON OTTO JACOBS	4TH RESPONDENT
MINISTER OF ENVIRONMENT AND TOURISM	5TH RESPONDENT
DAUSAB FAMILY TRUST	6TH RESPONDENT
SALOMON FAMILY TRUST	7TH RESPONDENT

JACOBS FAMILY TRUST	8 TH RESPONDENT
FREDERICK SWARTBOOI	9 TH RESPONDENT
ANNA ISAAK	10 TH RESPONDENT
LUKAS KATUANENE	11 TH RESPONDENT
JULIANA APRIL	12 TH RESPONDENT
ANDRIES PIENAAR	13 TH RESPONDENT
MATHEUS MATINGA	14 TH RESPONDENT
WITBOOI TRADITIONAL AUTHORITY TRUST	15 TH RESPONDENT
WITBOOI TRADITIONAL COUNCIL	16 TH RESPONDENT
JOHANNA SOFIA WITBOOI	17 TH RESPONDENT
HENDRIK WITBOOI FAMILY TRUST	18 TH RESPONDENT
ROOI FAMILY TRUST	19 TH RESPONDENT
GRANT KNIGHT	20 TH RESPONDENT
KNIGHT FAMILY TRUST	21 ST RESPONDENT
/KHOWESE DEVELOPMENT TRUST	22 ND RESPONDENT
SALOMON JOSEPHAT WITBOOI	23 RD RESPONDENT
PENIUS EDUARDT TOPNAAR	24 TH RESPONDENT
SHOMANY KEISTER	25 TH RESPONDENT
FREDERIK SWARTBOOI	26 TH RESPONDENT
SALMON DAVID ISAACKS	27 TH RESPONDENT
FLORIS FERNANZO FLEERMUYS	28 TH RESPONDENT
MEMORY IMGRIT BIWA	29 TH RESPONDENT

Neutral Citation: *Van Zyl (Snr) v Namibia Affirmative Management and Business (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2018/00337) [2018] NAHCMD 350 (5 November 2018)

CORAM: MASUKU J

Heard: 5 and 19 October 2018

Delivered: 5 November 2018

Flynote: Civil Procedure – urgent application – requirements to be met; *locus standi* to bring an application in terms of s. 260 of the Companies Act, 2004 – temporary interdict – requirements to be met by applicant therefor. Company Law – application of s. 260 and requirements to be met by an applicant therefor.

Summary: The applicants are members of a company called NAMAB which was involved in the business of tourism and lodge development. It had a number of directors. As time went on, there were problems with some of the directors who began doing acts that sabotaged the core business of the company, including booking tours in competition with the company. Some funds placed in the hands of the said directors were not properly accounted for, thus causing disruptions in the running of the business. Attempts to resolve these amicably failed. The applicants then approached the court seeking an order interdicting the members who were alleged to run the company business in an untoward manner from continuing with their roles pending the convening of a meeting where a new board of directors would be appointed.

Held – that a case for urgency, particularly commercial urgency had been made by the applicant, In regard, all the requisites of rule 74(3) and (4) had been met by the applicants.

Held further – even if a matter is urgent, the court will still expect its officers to attend the matter with the requisite degree of meticulousness. Papers filed before the court should not be slovenly or sub-standard.

Held – that the applicants had the *locus standi* to bring the application they did in terms of s.260. Section 260, it was held, applied in different situations *viz*

where a member contends that the company's acts or omissions of the company are unreasonably prejudicial, unjust or inequitable or where a member complains that the business of the company is being run in a manner that is unreasonably unjust, prejudicial or inequitable. The court found that the applicants had brought their application in terms of the latter.

Held further – that the standard applied by the court in invoking the provisions is where it 'appears' to the court that the prejudicial conduct is being perpetrated, meaning that the standard is lower and need not be proof beyond reasonable doubt. In this regard a *prima facie* but not a conclusive case need not be made by an applicant.

Held – the allegations made by the applicants were such that it appeared to the court that a case for the invocation of the provisions of s. 260 had been made. The provisions of s. 274 as argued by the respondents, were inapplicable.

Held further that - the respondents' contention that the shareholders' agreement governing the parties' relationship was invalid because it had not been signed by some parties, could not hold as the parties had acted in terms thereof and the respondents were thus estopped from arguing that the agreement is invalid.

Held that – no case had been made by the applicants for the granting of a *mandamus* against the Minister for the reason that he had not been properly notified in terms of the relevant agreement of the change in the company's agreement that was required.

The court found that a case had been made under s.260 and accordingly granted the applicants the relief they sought. The opposing respondents were ordered to pay the costs.

ORDER

1. The applicants' non-compliance with the forms and service provided for in the rules of this court is condoned and the matter is heard as one of urgency in terms of the provisions of Rule 73(3) of this Court's Rules.

2. The Second, Third and Fourth Respondents be and are hereby interdicted and restrained from:
 - (a) making applications to the Fifth Respondent for obtaining permits on behalf of the Namibian Affirmative Management And Business (Pty) Ltd (NAMAB);

 - (b) acting or purporting to act on behalf of NAMAB or exercising any right or obligation of NAMAB;

 - (c) making use of NAMAB's facilities, including, but not limited to, NAMAB's camp and facilities inside the latter's concession area in the Namib Naukluft Park; and

 - (d) from engaging in any conduct whatsoever that interferes with the rights, obligations, operations, management and governance of NAMAB.

3. The orders set out in prayers 1 and 2 above are ordered to operate pending the appointment of a board of directors of NAMAB as envisaged by clause 6.3 of the Shareholders' Agreement of NAMAB concluded in 2009 and the finalisation of any arbitration or legal proceedings that may arise from such appointment of the board of directors.

4. The PWM Trust and the Witbooi Traditional Authority Trust are directed to appoint a board of directors of NAMAB within a period of ninety (90) days of this order – and that should any dispute arise between the shareholders of NAMAB in respect of such appointment of a board of directors, steps be taken to initiate arbitration proceedings under the Shareholders' Agreement, or to institute any legal proceedings in order to resolve such disputes within thirty (30) days of such appointments.
5. The Second, Third and Fourth Respondents are ordered to pay the costs of this application consequent upon the employment of instructing and two instructed counsel.
6. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Shorn of all the frills, and stripped to the bare bones, the major question falling for determination by this court in this matter, is whether the applicants have made a sufficient case for the invocation by this court, of the relief provided by the provisions of s. 260 of the Companies Act.¹

The parties

[2] There are a number of applicants and respondents in this matter. I will, for that reason, avoid having to mention and describe each party in full in this judgment. I will describe the parties in generic terms for ease of reference and to avoid burdening this judgment with the accurate and full description of each of the parties.

¹ Act No. 28 of 2004.

[3] The first three applicants are natural persons who are trustees of the PMW Family Trust, the 6th applicant in this application. The 6th applicant is a shareholder in an entity described as the Namibian Affirmative Business and Management (Pty) Ltd, (NAMAB'), which is cited in this application, as the 1st respondent. The first three applicants are cited in their respective capacities as trustees of the PMW Trust, which is a shareholder in the 1st respondent and also in their personal capacities as shareholders of the 1st respondent.

[4] The 4th applicant is a natural person who is a trustee of an entity called the PK Family Trust. The said Trust is a shareholder in the 1st respondent and the 4th applicant is cited in her capacity as a Trustee of the said Trust. Furthermore, the 4th applicant is married to the 1st applicant. The 5th and 6th applicants are family trusts which were established *inter vivos* and whose respective addresses are situate at 430 Bamboes Street, Henties Bay. The 1st and the 2nd applicants are the trustees of the 5th applicant, whereas the 1st and 4th applicants are trustees of the 6th applicant.

[5] The 1st respondent is the common denominator in this matter. Most of the parties stand in some relationship to the 1st applicant, which is, for short, referred to henceforth, as 'NAMAB'. It is a private company with limited liability duly incorporated in terms of the Company Laws of this Republic. Its place of business is situate at 61 Bismarck Street, Windhoek. I will not, for purposes of this judgment, trace the ancestry of NAMAB.

[6] It suffices to mention though that NAMAB has 200 issued ordinary shares which are divided among 9 shareholders, being the 5th and 6th applicants, 6th, 7th, 8th, 15th, 18th, 19th, 21st, in different shareholdings that need not be mentioned for purposes of this judgment. The rest of the respondents, save the Minister, who is cited in his official capacity as such, are generally speaking trustees of the various trusts and have been cited in their aforesaid capacities. It is not necessary to identify the various trusts that the natural respondents represent. I will, however, deal, at the appropriate stage, if it will be necessary, with the position of the 2nd respondent, who seems to be at the centre of the controversy that has engulfed NAMAB.

Relief sought

[7] The applicants sought an order in terms of which the court would grant an interim rule *nisi* and in terms of which the court was requested to interdict and restrain the 2nd, 3rd and 4th respondents from purporting to act on behalf of NAMAB in obtaining permits, exercising any right or obligation of NAMAB or making use of facilities of NAMAB and from engaging in any conduct that interferes with the rights, obligations, operations, management and governance of NAMAB. This order was to be issued pending the holding of meeting for the appointment of a board of directors of NAMAB as recorded in a document, described as a shareholders agreement.

[8] After the initial hearing of the matter on 5 October 2018, the court issued an order by the consent of the parties enabling them to file their respective sets of papers and the matter was then postponed for hearing to 19 October 2018. It should be mentioned that the court did not issue an order in the interim to have immediate effect as had initially been prayed for by the applicants in their notice of motion.

[9] The parties complied with the timelines imposed by the court for the filing of the relevant sets of affidavits. In this regard, it is important to mention that in effect, only the 2nd, 5th and 6th respondents opposed the relief sought by the applicants. I will, in due course, traverse the grounds of opposition they raised in their respective sets of answering affidavits.

NAMAB

[10] As intimated earlier, NAMAB is a private limited liability company. In or about March 2009, the shareholders of the NAMAB concluded an agreement called the Shareholders Agreement. Among other things, the said agreement stated the objects of NAMAB to be to carry on tourism and lodge development on the allotted concession land and trading in related products. It further provided that there shall be nine directors of NAMAB.

[11] The applicants allege that presently, NAMAB does not have the requisite number of directors and that the appointment of some of the present directors, including the 2nd respondent, is questionable and may be void. The applicants allege that the 2nd, 3rd and 4th respondents are wrongly interfering in the proper running of NAMAB's business, particularly its tourism business in terms of which it advertises its business internationally and conducts tours and sets up a campsite within the concession area. This camp accommodates 30 guests at a time.

[12] In this connection, it is further alleged that NAMAB set up an office for its business in Henties Bay where bookings and permits were applied for. The office was run by Ms. Kota Van Zyl in her capacity as the administrator and NAMAB's business went fairly smoothly. Ms. Van Zyl would prepare the list of tourists for each trip and hand same over to the 2nd respondent who had the responsibility of taking the list to the 5th respondent's Ministry, together with the concession fees payable which the 2nd respondent would pay over to the Ministry.

[13] It is alleged that the 2nd respondent did not, after some time, properly account for the monies paid to the Ministry in relation to the concession fees and it became difficult to do reconciliations for NAMAB's financial records because of him not accounting properly. Early at the beginning of the year, it is further alleged, the 2nd respondent surreptitiously registered NAMAB for VAT. This sent alarm bells ringing culminating in Ms. Van Zyl reporting a criminal matter to the police which matter remains under investigation.

[14] Matters, however, came to a head when in May 2018, the 2nd respondent together with the 3rd and 4th respondents convened a meeting of the directors of the company. This meeting, the applicants allege, was called in contravention of the applicable time limits and at which meeting certain key decisions were taken, which included the appointment of a legal practitioner, Mr. Borris Bruno Isaacks as the chairperson of the board of the company's directors.

[15] Furthermore, a decision was taken to close the office in Henties Bay and to open a new office in Walvis Bay. All permits were to be done through the new office. In this regard and all bookings in relation to the company, were to be done via the new office. A further decision taken, was to pay all NAMAB's funds into the trust account of Isaacks and Associates and that a new bank account for the company be opened. The applicants claim that these were illegal and were meant to benefit the aforesaid respondents to the detriment of the company. It is further alleged that the 2nd respondent is the one who orchestrated this move in order to frustrate the investigations into his dealings with regard to the company's finances amongst other things.

[16] The applicants' state that a further shareholders' meeting was held on 29 June 2018 and which the three respondents did not attend. Decisions were taken at that meeting, including the suspension of the triumvirate as directors. Pursuant to this meeting, a letter was written² to the three.

[17] In particular, the letter notified the respondents of the decision taken at a shareholders' general meeting of the 1st, 2nd and the 15th respondent to remove the 2nd respondent as a director of NAMAB with immediate effect and that he refrains from making any contact or representation to NAMAB's clients, tour operators and the Government; breaking down of any infrastructure of NAMAB; conducting tours with his 'guests' and harming the interests of NAMAB in any other way. The letter had a clear warning that if the 2nd respondent persisted with any of the conduct referred to, an urgent application would be brought to restrict him accordingly. In a spirited response, the three respondents, via a letter from their legal representatives, stuck to their guns, so to speak.³

[18] On 8 and 18 August, 2018, Ms. Van Zyl states, a pre-booked and arranged tour for guests was undertaken within the concession area. To their dismay, they found that the 2nd respondent had booked other tours on the

² PW 21 at p. 216 of the record.

³ PW25 at p. 223 of the record.

same dates and the campsite was occupied by the 2nd respondent's guests. The money received from the 2nd respondent's tours was not remitted to the company, Ms. Van Zyl further states.

[19] It would appear that this resulted in a meeting was convened on 23 August 2018 involving all the parties, and the Ministry to try and resolve this impasse. The said respondents did not attend this meeting and did not tender an apology therefor. The Ministry thus postponed the meeting to 10 September 2018 but the three still did not attend nor tender any apology therefor. The Ministry, in view of the disharmony, decided not to issue any further permits to NAMAB and they also stated that they were not willing to conduct any meeting in the absence of the triumvirate, thus leaving the applicants in the lurch. The applicants state that their only means to address the situation, was to approach this court for appropriate relief, which they did.

[20] There are many other allegations that are contained in the applicants' affidavits that I have not captured in the judgment regarding this impasse and the acts attributed to the three respondents in particular. I should mention that generally speaking, the relevant respondents deny these allegations and adopt the position that the court should dismiss this application with costs. The Minister, also opposed the application and I will, at the appropriate juncture, deal with his position in this matter.

Points of law *in limine*

Urgency

[21] Mr. Diedricks, for the three respondents took the point that the applicants failed to comply with the mandatory requirements of the provisions of rule 73(3) of the rules of this court that deal with urgent applications. He contended in this regard, that the applicants failed to state the circumstances that render the matter urgent and why they claim they cannot be afforded substantial redress in due course.

[22] In this regard, the court was referred to the judgment of *Nghiimbwasha and Another v Minister of Justice*,⁴ where this court dealt with the responsibility of an applicant in a matter alleged to be urgent. Mr. Diedriecks, in particular, argued that the applicants merely paid lip service to the requirements referred to above, which are peremptory in nature.

[23] I do not agree. I have read the affidavit filed by the applicants and I am satisfied that the necessary averments, although not necessarily captured in very distinct but rather staggered terms, have been made. One would immediately realise that the issue of urgency was to some extent, intertwined with that relating to an interim interdict. This is not surprising because the latter part of rule 73(3) has a bearing on the granting of an interim interdict, which the applicant also applies for in the matter, namely whether there is alternative relief that can be granted in due course.

[24] The applicants, in their affidavits, stated the nature of what they consider illegal and detrimental actions of the said respondents and how the company stands to be affected by losing money and its reputation being sullied as a result of it being unable to cater for pre-booked clients who may have travelled from overseas. This is not to mention also the suits that the NAMAB might ultimately have to face for breach of its obligations, resulting from the respondents' improper and detrimental conduct. It must be mentioned that in urgent applications, the court decides the issues on the basis of the allegations made by the applicants and they are, in this case compelling. I am of the view that a case of commercial urgency has been clearly made out by the applicants in this matter.⁵

[25] In *Bergman v Commercial Bank of Namibia*,⁶ Levy J stated correctly in my view, that in dealing with urgent applications, the court exercises a judicial discretion and may, in that regard, refuse to grant urgent relief where the party in question has created the urgency through *mala fides* or through culpable

⁴ (A 38/2015) [2015] NAHCMD 67 (20 March 2015).

⁵ *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd*, 1982 (3) SA 582.

⁶ 2001 NR 48 (HC) at 49J-50A.

remissness or inaction. The learned Judge further reasoned that the urgency procedure may not be invoked where the relief sought is final in nature or where the respondent has been afforded little or no insufficient time to properly and fully canvass and present their case. I am of the considered view that those considerations do not apply in the instant matter. The point taken relating to urgency is accordingly bad and must be dismissed.

[26] I should caution that it is, in many instances, unwise to pursue the point relating to urgency where the matter was called and the court, after considering the matter, calls upon the parties to file their respective sets of affidavits. I say this because where the court is of the view or is correctly persuaded that the matter is not urgent, it will normally refuse to enrol the matter at all, thus obviating the need for the parties to file any papers whatsoever. Unless the issue of urgency is expressly reserved for hearing at a later date after the filing of the full set of papers, it must be understood that the court views the matter as one of urgency, hence the call on the parties to file a full set of papers, which is not inconsistent with enrolling the matter.

Applicants' locus standi in judicio

[27] Mr. Diedricks had yet another arrow in his quiver. He reasoned that the applicants have no right to obtain the relief they seek for the reason that they have approached the court in terms of the provisions of s.260 of the Companies' Act. It was his contention that the proper section under which the applicants could have properly brought the application, was s.274. It becomes necessary, in the circumstances, to briefly advert to these provisions.

[28] Section 260, under which the application is brought, has the following rendering:

'(1) Any member of a company who complains that any particular act or omission of a company is unreasonably prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unreasonably prejudicial, unjust or

inequitable to him or her or to some part of the company, may, subject to subsection (2), make an application to the Court for an order under this section.

(2) Where the act complained of relates to –

- (a) any alteration of the memorandum of the company under section 62;
- (b) any variation of rights in respect of shares of a company under section 108;
- (c) a conversion of a private company into a public company or of a public company into a private company under section 24,

an application to the Court under subsection (1) must be made within 30 days after the date of passing of the relevant special resolution required in connection with the particular act concerned.

(3) If on any application it appears to the Court that the particular act or omission is unreasonably prejudicial, unjust or inequitable, or that the company's affairs are being conducted in a manner which is unreasonably prejudicial, unjust or inequitable and if the Court considers it just and equitable, the Court may, with a view to bringing an end to the matters complained of, make an appropriate order, whether for regulating the future conduct of the company's affairs or for the purpose of the shares of any member of the company by other members of the company.

(4) ****

(5) ****.'

[29] Mr. Diedericks, as I understood him, argued that the reason why the applicants cannot obtain relief under this provision is because the conduct complained of and which the court may make an appropriate order in respect of, must be of the company itself and not some other person, whether a director or shareholder of the company. In the instant case, the argument developed, the conduct complained of is that of some of the directors and not of the company and for that reason, the applicants are barking the wrong tree as it were.

[30] Mr. Totemeyer's argument was a different kettle of fish altogether. He submitted that the respondents' argument was flawed for the reason that it wrongly considered that there is only one type of conduct under the said provision, in terms of which the court may be asked to intervene by issuing an appropriate order in the interests of the company and that it is where it appears to the court that prejudicial, unjust or inequitable conduct is being perpetrated by the company against a member.

[31] He argued that the case of a member complaining about any act or omission of the company that is unreasonably prejudicial, unjust or inequitable is only but one case. The other, he submitted, is where it appears to the court that the affairs of the company are being conducted in a manner that is unreasonably prejudicial, unjust or inequitable manner. It is in the latter category, he submitted, that the applicants' case resorts.

[32] I am in full agreement with Mr. Totemeyer's submission. On a proper reading of the provisions of s.260 (1), it is clear that the Lawgiver envisaged two different situations in which the court may intervene at the instance of an aggrieved party. First, it is where it is alleged by a member of the company and appears to the court that there is some act or omission of the company that is unreasonably unjust, prejudicial or inequitable. In that case, the member may approach the court for appropriate relief.

[33] The second scenario envisaged by the provisions, is where a member of the company complains that the affairs of the company are being conducted in a manner that is unreasonably prejudicial, unjust or inequitable to him, her or other members of the company. In that case, the member may then bring the application for the court's intervention with an appropriate order under the section.

[34] That there are two different scenarios envisioned, is clear from the use of the word 'or' which appears after the first scenario, namely acts of omissions of the company that are unreasonably prejudicial, unjust or

inequitable. It is a situation of one or the other. That this conclusion is correct, may also be gleaned from the provisions of ss. (3), where the Lawgiver again deals with both scenarios stated in ss. (1) above.

[35] I am accordingly of the considered view that the applicants appear to be on firm ground in relation to the application, as their case, is that they, being members of the company, complain that there is certain unreasonably prejudicial, unjust or inequitable conduct being perpetrated by the respondents. This, in my view, renders them competent to bring the application. Whether the application will ultimately succeed, is a different enquiry altogether.

[36] In this case, the jurisdictional facts necessary are present, namely, that they are members of the company and secondly, they complain about unreasonably prejudicial, unjust or inequitable conduct on the part of the named respondents. For that reason, I am of the view that there is no need to consider the circumstances in which the provisions of s.274 may be invoked. I come to that conclusion because in my considered view, relevant allegations have been made bringing the matter within the purview of the section in question. The respondent's argument must, for the foregoing reasons, be rejected, resulting in a finding that the applicants have a right to bring the application as they did, in terms of s. 260.

[37] I must, before proceeding further, state, for the sake of completeness, that in my view, the provisions of ss. (2) are inapplicable to the instant case. They apply where the acts complained of relate to alteration of a memorandum of the company, or any variation of the rights relating to shares of a company or the conversion of a company from a public to a private company or vice versa. Clearly, this is not the case in the present matter. Accordingly, the time period within which the application must be made, namely 30 days from the date of passing the relevant special resolution, does not apply in this case. No time limit appears to have been prescribed for the bringing of an application for relief under ss. (1).

Alleged invalidity of the Shareholders' Agreement

[38] Mr. Diedricks further advanced the argument that the shareholders' agreement⁷ on which the application is, to a large extent, predicated was never signed by some of the intended parties thereto. It was his contention that all that was done was to merely have the draft circulated among the parties thereto. For that reason, he contends, it is invalid and may not be relied upon in this case.

[39] The said agreement, it must be stated, regulates the *inter alia*, the appointment of a board of NAMAB's directors and other matters. The 2nd respondent takes issue with the validity of the agreement on the basis of clause 7 of the said agreement, which provides that the effective date of the agreement will be on the signature of all the shareholders on the agreement. He alleges that not all the shareholders signed the agreement and that the last page thereof bearing the signatures of Captain Witbooi and the 3rd respondent, appears to have been inserted as does not seem to be part of the agreement.

[40] I cannot deal with or consider the last averment for the reason that it nothing more than speculative in nature. There is no admissible basis on which the 2nd respondent makes the assertion as he is not an expert in these matters. His allegations, as I say, amount to nothing more than conjecture, with no admissible evidential material to prop up same.

[41] I have considered the argument raised in this matter and without dealing with every allegation made, it would appear, from a reading of all the papers, that the parties to the agreement the respondents' response to the existence of the agreement is rather laconic and is lacking in necessary detail in respect of a direct and factual response to the case made by the applicants. The denial is no satisfactory in my considered view.

⁷ See p. 77 of the record.

[42] To the extent that I may have erred in that regard, it is nevertheless my firm view that all the parties to the said agreement, including those who seek to distance themselves from the validity and binding nature of the agreement clearly and unmistakably conducted themselves in terms of the stipulations in the shareholders' agreement. It appears opportunistic for the 2nd respondent to now claim that the agreement is not valid because it was not signed by some members.

[43] Minutes of the shareholders show irrefragably that the parties considered the agreement binding and conducted themselves in line with its prescriptions.⁸ Not once did the respondents, at the material time, allege the invalidity that should now attach to the said agreement.

[44] In the circumstances, I am of the considered view that the 2nd respondent and his party, are estopped from denying the validity of the agreement in light of the evidence that the parties conduct, including themselves, has previously been and remains governed by the same document they now seek to have invalidated. This argument is nothing but subterfuge or sophistry.

[45] It appears that if the argument of the respondents was to be accepted, it would appear that they are speaking with a forked tongue themselves because they were holding meetings purportedly of the directors of NAMAB. This includes the meeting where at the office was purportedly changed from Henties Bay to Walvis Bay. It is clear that no other document provides for the appointment of directors other than the said shareholders' agreement, which is now being alleged to be invalid, because it was not signed by some members.

[46] The respondents should not be allowed to blow hot and cold in this regard. They appear to be hunting with the hounds but running with the hares at the same time, a position that should not be allowed to be exploited and allowed to constitute refuge for the respondents. It cannot be that the

⁸ See p. 446 of the record and annexure A011 to the 2nd respondent's affidavit.

agreement is valid where and when it suits them but it is invalid where and when it does not so suit them. I accordingly find that the said respondents are estopped from raising the invalidity of the agreement. I accordingly dismiss this point as well.

[47] I digress to mention that even if I may have erred in the conclusion that I have reached on the alleged invalidity of the said agreement, I am not certain that that without more becomes a decisive issue in the relief that is sought by the applicants if the court is satisfied that on the basis of the respondents' actions and behaviour alleged, the relief available in terms of s. 260 is appropriate.

Merits

[48] I now turn to deal with the application on the merits. The first issue that I need to deal with is the allegation by the 2nd respondent that he is acting on behalf of the company in this matter and that the company is opposing the granting of the relief sought. His authority to represent the company was placed in issue by the applicants. Remarkably, the 2nd respondent failed to come good on his word by showing in terms of acceptable evidence that the company is opposing the relief sought.

[49] There is no resolution filed in terms of which the 2nd respondent is properly or at all authorised to act on behalf of the company as he purports to. This is so particularly even after the 2nd respondent was requested by the applicants to provide proof of his bald assertion that he was authorised to act on the company's behalf. In the premises, I take the position that the company NAMAB does not oppose the relief sought and I will keep this uncontroverted position at the back of my mind as I deal with this matter further.

[50] I should, in this regard, also add that the opposition filed by the 2nd, 3rd and 4th respondents' lawyers on behalf of the Witbooi Traditional Authority Trust and the Rooi Family Trust should be disregarded for the reason that queries regarding the proof of authority to represent the said trusts by the

applicant were not properly answered and no document in the nature of proper authority, was forthcoming from them.

[51] What is more disconcerting as well is that the trustees of the Witbooi trust, namely the 9th, 10th, 11th, 12th, 13th and 14th respondents, did not file their respective notices to oppose, despite having been cited and served with the process in this matter. This presents more unanswered questions about the authority of the said legal practitioners to represent the said Trusts. They have failed to discharge the onus thrust upon them, leaving the court with the only irrebuttable conclusion that the opposition filed in respect of the said trusts is unauthorised and therefor ineffectual.

Interim interdict

[52] It is now trite that an applicant for an interim interdict, which the applicants claim, should allege and prove the following requisites, namely a *prima facie* case; a reasonable apprehension of harm; the absence of an alternative remedy and that the balance of convenience favours the applicant.⁹

[53] It is important, in this regard, to mention a few principles that attach to the granting of this relief. The first is that if an applicant is able to establish a clear right, as stated above, an apprehension of irreparable harm need not be established.¹⁰ Furthermore, where the applicant's prospects of success are stronger on the merits, the less the need exists for the said applicant to show that the balance of convenience favours him or her.¹¹ It is with the foregoing principles in mind that this application shall be considered.

[54] I should perhaps start with an argument presented by Mr. Diedricks in terms of which he urged the court to refuse the application. It was his submission forcefully made that the court must not be seduced by the label

⁹ *Alpine Caterers Namibia (Pty) Ltd v Owen and Others* 1991 NR 310 (HC), 313F-G.

¹⁰ LAWSA Vol. 11, p422 at para 405.

¹¹ *Ibid* para 422 at para 406.

that the applicant places on the cover of the matter, namely that it is an interim interdict. He argued that in point of fact, the application seeks a final interdict.

[55] I have no doubt that the argument by Mr. Diedricks is palpably without support. I say so for the reason that all the elements of an interim interdict have been alleged and relevant facts in support of same have been stated by the applicants in their papers. There is no intimation whatsoever that the application is for the granting of a final interdict. In this regard, the elements of a final interdict are not alleged as stated in the celebrated case of *Setlogelo v Setlogelo*.¹²

[56] Furthermore, in order to determine the effect of the relief sought, one does not have to go beyond the notice of motion to see that the measures sought by the applicant are temporary in nature and effect and are not geared to have any degree of permanence about them. The object of the application is to bring some stability and direction in the conduct of the company's business until a board of directors is appointed in terms of the relevant instruments.

[57] In this regard, time limits for the carrying out of the necessary processes have been carefully set out in the notice of motion. This should be enough to allay the contending respondents' fears that the court has been sold a dummy by the applicants by pretending to seek an interim order when their purpose and design is to seek and obtain a final order. The court would be astute in ensuring that such a deceptive scheme never sees the light of day.

[58] I will commence with the first requirement, namely, whether the applicants have shown that they have provided proof, which if uncontradicted, and believed at trial, would establish a right. In this regard, the court stands guided by the principles set out in *Webster v Mitchell*.¹³ Simply put, the court

¹² 1914 AD 221.

¹³ 1948 (1) SA 1186 at 1189.

should consider the facts set out by the applicants together with the facts set out by the respondents which the applicant cannot properly dispute and to decide whether, with regard to the inherent probabilities, and the ultimate onus, the applicant should on those facts be granted the relief sought. In this regard, it is only when the facts set out by the respondent throw serious doubt on the applicant's case that the court can hold the applicant should not succeed.

[59] In this connection, the applicants' case is that the shareholders' agreement, which is the constitution of the company, so to speak, is not being adhered to in respects that have led to a degeneration of the company's governance. In this regard, the respondents have called a meeting in which they have coronated themselves as being in charge and have made crucial decisions, which include the closing of the office in Henties Bay. Furthermore, the relevant respondents or some of them have set out to conduct themselves in a manner that undermines the business of the company, which has been successful for a number of years.

[60] In this regard, as stated by the applicants, the 2nd respondent is not properly accounting for the moneys handed to him and has on a number of occasions, organised tours, which clashed, with pre-paid tours organised by the company many months in advance. This, the applicants' state, has as serious reputational risk to the company and its well-being and may result in claims for damages being launched by the persons whose contract with the company has been observed in breach. This conduct, the applicants' state, is unreasonably prejudicial to the company and the applicants as minority shareholders.

[61] I am of the considered opinion that the facts deposed to by the applicants, considered in *tandem* with those alleged by the respondents, shows that the applicants have made out a *prima facie* case. I say so because in relation to the most telling conduct that is alleged to prejudice the company by the applicants, the respondents do not put up facts that can be said to gainsay the facts put up by the applicants. In other cases, what they say

amounts to a mere denial, devoid of factual averments that show where the point of departure is.¹⁴

[62] In particular, the applicants' case that Mr. Dausab has commenced making his own bookings and taking his own guests to the concession area in conflict with the company's bookings, is in my view, not satisfactorily dealt with and in fact is not denied on a proper reading of the respondents' affidavits. There is no gainsaying that this conduct imperils the health of the company's finances and also harms its reputation as a business with run integrity. What is worse is that the allegations that he has not properly accounted in relation to the money given to him is also not satisfactorily dealt with in his affidavit.

[63] Another matter that is alleged with regard to relevant facts placed on record by the applicants relates to the said respondents attempting to form a new Witbooi Trust, which they registered with the Master of the High Court in the course of this year. This is so notwithstanding that the proper Trust has been in existence for almost a decade. The response to these allegations also is unconvincing and points to the matter in this regard having to be decided in the applicants' favour in the interim.

[64] It was also the applicants' case that meetings that have been called to try and resolve this impasse amicably have been thwarted by the respondents' unexplained failure to attend the meeting called by the Ministry. This has clearly resulted in the state of affairs in the company degenerating and the Ministry not issuing licences to the company in the interregnum. This aspect is also not met with a meaty response by the said respondents. Strangely, the permits are however being issued to Mr. Dausab while those of the company remain suspended.

[65] Furthermore, the applicants state that presently, the company is not aware of the funds that have been received by Mr. Dausab that belongs to the company generated from the tours organised by Mr. Dausab. The funds are

¹⁴ *New Era Investments CC v Prosecutor-General*.

not, according to the applicants handed over to the company as should be the case. These allegations are also not properly explained by the respondents, especially Mr. Dausab.

[66] In view of the foregoing, I am of the considered view that the court is entitled in the circumstances to find, as I hereby do, that the applicants have established a *prima facie* right in this matter. Clearly, the assets of the company, being money is not being properly accounted for and that respondents are acting in competition with the company and taking decisions which serve to prejudice the company and the shareholders.

[67] In this regard, and I revert to s.260 (3) of the Act, the court may make an appropriate order for the future conduct of the company if it 'appears' to it that the company's affairs are being conducted in an unreasonably prejudicial, unjust or inequitable manner. The word appears, is described in the Oxford Advanced Dictionary 8th edition as meaning 'to give impression of being or doing something'. This suggests no conclusiveness, decisiveness or finality but initial impressions, which may, at some stage, once a full view or picture is obtained, change. In legal parlance, one can say it refers to a *prima facie* case that the applicant for relief must make out. This, in my view, suggests that the standard of proof is not to be raised too high, for instance to proof beyond reasonable doubt and this is done in consideration of the interests of the company and its business. (Emphasis added).

[68] Were the standard employed to be raised too high, injustice may well be perpetrated against the company or its members, with those guilty of doing so not being immediately called to account because of the prohibitively high standard required before the court can intervene and save the situation. I am of the considered view that the facts established by the applicants in this matter suffice to place this court in a position where it 'appears' that the conduct complained of is unreasonably prejudicial to the company and the minority shareholders. The *prima facie* right and entitlement to the relief provided in s. 260 is thus in my view established.

Reasonable apprehension of harm

[69] In this regard, I am of the considered view that from what is stated in the foregoing paragraphs, it becomes plain that the company stands to suffer irreparable harm if the conduct by the respondents is not arrested. In this regard, it is clear that the company is placed in an embarrassing position where it is unable to honour its obligations to its clients, some of whom have paid money well in advance. In this regard, its reputation as honourable company is being dragged in the mud. This, as claimed by the applicants, may result in law suits running into millions of dollars may ensure, leaving the company moribund and in financial dire straits, not to mention its reputation which would be left in tatters.

[70] I am of the view that it would be unreasonable and irresponsible in the circumstances for the applicants to wait until the fears apprehended eventuate before the proper steps to arrest the decline and prejudice are taken. From what has been stated, it is apparent that the conduct perpetrated by the respondents is prejudicial to the company and that irreparable damage may well eventuate, leaving the company nothing but an empty shell in the bookshelves of the registry of companies, devoid of any assets and reputation to speak about. Even the other shareholders, who may be harmed by this conduct, would have nothing to get if they sued the applicant at the rate the matters are proceeding.

Absence of an adequate alternative remedy

[71] After considering the papers filed and the arguments advanced, the respondents, it must be said, did not present any meaningful argument, save to state, as earlier intimated, that the order sought was final. In this regard, I am of the view that there is nothing to gainsay the applicants' contention that there is no other adequate remedy that may be prescribed to arrest the situation. I am of the view that in the context and in light of the facts alleged by the applicants as recorded earlier, this is a proper case in which judicial

intervention may be properly invoked for the good of the company and the other shareholders.

[72] I should in this regard point out that when one has regard to the respondents, the large body of them did not oppose the relief sought. Although this should not ordinarily carry weight, in the present circumstances, I cannot turn a blind eye to it for it may be a pointer that the larger body of persons with an interest in the company, perceive that the company's affairs are not being properly run but are prejudicially or unjustly or inequitably compromised. There is no other suitable or less drastic remedy that the respondents suggested would provide a comely elixir in the circumstances.

The balance of convenience

[73] In this leg of the enquiry, it is important to bear in mind what was stated earlier that where the applicant has a strong case on the merits, the need to show that the balance of convenience favours him or her is minimised. It would be clear from what has been stated in this judgment that the balance of convenience in this case decidedly favours the applicants. It is clear that if the order were granted as prayed, it would redound to the benefit of the company and its shareholders as the order designed to restore the company to the proper paths of corporate virtue, where transparency and other corporate governance values reign supreme.

[74] To deny the applicants the relief might amount to sacrificing the life of the company into the hands of a few who, from the factual averments made earlier, are operating to the financial and corporate detriment of the company. If the corrosion that has set in is allowed to fester, the company may well become moribund and become a sorry history of what was seen and geared to be a vehicle for empowerment of some previously disadvantaged Namibians by the authorities' commendable foresight. Their dream would wind up in smoke that is toxic and even out rightly detrimental to any human being's lungs in any event.

The Minister's case

[75] The first thing that must be stated about the Minister is that it was stated on his behalf by Mr. Dausab, his legal representative (not the 2nd respondent), that he does not take sides in the debacle. His affidavit, however, states something completely different as he alleges therein that he represents the 2nd respondent as well. This is very queer indeed and that applicants harped upon it quite understandably because in their view, there appears to be some camaraderie between the Minister and the 2nd respondent.

[76] I will deal with the Minister's position in so far as it appertains to the relief sought against him. The other issues he raises do not appear to be here nor there. The main point raised by the Minister, is that although relief appears to be sought against him, there is no request or application for a permit to be issued by the Minister to an authorised representative of the company. In this regard, the Minister pointed out that he has not had any notification that the 1st applicant is the authorised representative and to whom the permit should be issued in favour of the company.

[77] The applicants' representatives referred the court to certain letters addressed to the Ministry relating to the issuance of permits.¹⁵ These letters, it is correct, were addressed to the Ministry and not to the Minister. As the matter stands, I am of the considered view that the Minister stands on firm ground in that he has not had any application by the company regarding the issuance of permits to an authorised person.

[78] If a letter had been addressed to him requesting the appointment of anybody else duly authorised thereto, to be the recipient of the licence and the Minister refused unreasonably, then, I am of the view that the applicants could have a case for mandamus against the Minister. In this regard, the applicants should, in my view, not confuse the Ministry and the Minister in that he is the one, in terms of clause 15.11.1 of the concession agreement, who

¹⁵ See p.228 (PW26) and p.229 (PW27) of the record addressed to the Ministry by NAMAB.

has to be notified of the company's representative and to whom the Ministry would in turn issue the permits. This, the Minister, correctly states, it seems, has not been done and there is no evidence to gainsay this. I will deal with the issue at the appropriate time.

[79] It appears also that the Minister takes issue with the non-compliance with the provisions of the Head Concession Agreement, which calls for the matter to be referred to arbitration, failing which it should be referred to the Principal secretary of the Ministry for possible resolution. I am of the view that it is clear that a meeting that had been called by the Ministry was thwarted by the said respondents not honouring same and thus resulting in the meeting being cancelled on two occasions.

[80] I am of the considered view that this failure to hold the meeting, particular regard being had to the circumstances and the deadlock that seems to have been reached, that it would have been irresponsible for the applicants to wait for a meeting that appears to have been deliberately frustrated. In any event, I am of the considered view that there is nothing that prevents a person in the applicant's position from seeking redress from the courts in terms of s.260, where proper grounds for the relief are present and the court is satisfied therewith, as is the case in this matter.

[81] I accordingly am of the view that I should part ways with the Minister on this aspect of the matter, particularly in view of the matters pleaded and the goings-on in the administration of the company that had assumed a worrisome and deleterious trend, justifying an intervention by this court even at this juncture.

[82] I note with consternation that the Minister, in the closing paragraph of his affidavit, prays for the following relief from the court, namely, 'I pray this Honourable Court be pleased to grant us an order in terms of our Notice of Motion.'

[83] There is no notice of motion filed by the Minister, as he has not raised a counter-application. This prayer appears to totally out of place and is

perhaps of the same genus as the portions of the affidavit where he alleged that he deposes to the affidavits on his behalf and also on behalf of the 1st and 2nd defendants, duly authorised.' In addition, the Minister's affidavit was poorly drafted with, numerous, as it would seem, factual inaccuracies, not to mention typographical errors and lack of care on the part of the drafters of his affidavit.

[84] Regardless of how urgent a matter is or is touted to be, it is the duty of legal practitioners to ensure that the quality of the work presented to court, is not in any way compromised. This is particularly so where the affidavits in question relate to a Minister of State. Slovenly work must be avoided at all costs for at the end of the day, the atrocious work presented becomes the express representation and image of the one who presents the papers, with the Minister concerned not far from the mirror unfortunately.

Conclusion

[85] In the premises, I am of the considered view that on account of the papers filed by the parties, the applicants have made a case for the invocation of the provisions of s.260 of the Act. I am also of the considered opinion that a case has not been made for the mandamus against the Minister, for reasons that I have advanced in the judgment. The applicants should, in that regard, notify the Minister appropriately in terms of the relevant clauses of the concession agreement. No case is presently made for the drastic step of issuing a *mandamus* as a proper reading of the Minister's affidavit is not pregnant with any aversion, or so it seems to me, against the applicants.

Costs

[86] It is the ordinary rule that costs should follow the event. In this regard, I am of the considered view that the applicants have been successful against the respondents who opposed this matter. There is, therefore, no reason why the 1st, 2nd and 3rd respondents should not pay the costs of the applicants. As regards the Minister, Mr. Totemeyer left the issue of costs in what he

described as the capable hands of this court, a veneration I will not comment on.

[87] I am of the considered view that the Minister, although he has opposed, was partly successful and partly unsuccessful in the issues he raised. The mainstay of his argument though was the issue of the *mandamus* in respect of which the court has found the applicants had not made a case and that to some extent, their prayer was premature. I will, accordingly order that both the Minister and the applicants bear their respective costs in this matter.

Order

[88] In the premises, I issue the following order:

1. The applicants' non-compliance with the forms and service provided for in the rules of this court is condoned and the matter is heard as one of urgency in terms of the provisions of Rule 73(3) of this Court's Rules.
2. The Second, Third and Fourth Respondents be and are hereby interdicted and restrained from:
 - (a) making applications to the Fifth Respondent for obtaining permits on behalf of the Namibian Affirmative Management And Business (Pty) Ltd (NAMAB);
 - (b) acting or purporting to act on behalf of NAMAB or exercising any right or obligation of NAMAB;
 - (c) making use of NAMAB's facilities, including, but not limited to, NAMAB's camp and facilities inside the latter's concession area in the Namib Naukluft Park; and

- (d) from engaging in any conduct whatsoever that interferes with the rights, obligations, operations, management and governance of NAMAB.
3. The orders set out in prayers 1 and 2 above are ordered to operate pending the appointment of a board of directors of NAMAB as envisaged by clause 6.3 of the Shareholders' Agreement of NAMAB concluded in 2009 and the finalisation of any arbitration or legal proceedings that may arise from such appointment of the board of directors.
 4. The PWM Trust and the Witbooi Traditional Authority Trust are directed to appoint a board of directors of NAMAB within a period of ninety (90) days of this order – and that should any dispute arise between the shareholders of NAMAB in respect of such appointment of a board of directors, steps be taken to initiate arbitration proceedings under the Shareholders' Agreement, or to institute any legal proceedings in order to resolve such disputes within thirty (30) days of such appointments.
 5. The Second, Third and Fourth Respondents are ordered to pay the costs of this application consequent upon the employment of instructing and two instructed counsel.
 6. The matter is removed from the roll and is regarded as finalised.

TS Masuku
Judge

APPEARANCES:

APPLICANTS: R Totemeyer (with him C Van der Westhuizen)
instructed by Dr Weder, Kauta & Hoveka Inc.,
Windhoek

2nd - 4th RESPONDENT: J Diedricks
of Diedricks Inc, Windhoek

5th RESPONDENT: W Dausab
of Government Attorney, Windhoek