**REPUBLIC OF NAMIBIA**

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

**JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2021/00212

In the matter between:

| | |
|---|---|
| **GABRIEL UAHENGO** | **APPLICANT** |
| **And** | |
| **SEAL PRODUCTS (PTY) LTD** | **1ST RESPONDENT** |
| **ZACHARIAS PETRUS CILLIERS** | **2ND RESPONDENT** |
| **JOSIA PETRUS SWART** | **3RD RESPONDENT** |
| **MINISTER OF FISHERIES AND MARINE RESOURCES** | **4TH RESPONDENT** |
| **NATIONAL YOUTH COUNCIL** | **5TH RESPONDENT** |

**Neutral Citation***:* *Uahengo v Seal Products (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2021/00212) [2021] NAHCMD 351 (30 July 2021).

**CORAM:** MILLER AJ
**Heard:** **24 June 2021**
**Delivered:** **30 July 2021**

**ORDER**

1. The application is hereby dismissed with costs of one instructing and one instructed counsel.

2. The matter is removed from the roll and is regarded as finalised.

**JUDGMENT**

MILLER AJ

[1] The applicant filed an urgent application on 28 May 2021 which was heard on 24 June 2021. The application is opposed by the second and third respondents. The second and third respondents do not contest the urgency of application. The parties were ordered on 11 June 2021 to file their heads of argument on 16 June 2021 and 21 June 2021 respectively. The parties will be referred to as they are in this application.

*Background*

[2] The applicant seeks to compel the second and third respondents to sell their shares in the first respondent to the applicant against payment in terms of the payment plan set out in annexure X attached to the notice of motion.

[3] The application was necessitated by the fact that whereas the second and third respondents insist on selling the whole shareholding in the first respondent to a third party, the applicant refuses to sell his shares to the third party. The applicant is prepared to buy the shares of the second and third respondents at the price set by the respondents, however the second and third respondents refuse to sell their shares to the applicant, on the terms offered by him.

[4] The applicant seeks relief in terms of section 260 of the Companies Act, 2004 (Act 28 of 2004) on the basis that the second and third respondents conduct

amounts to conducting the affairs of the first respondent in a manner unreasonably prejudicial, unjust and inequitable to him.

*Relief sought*

[5] In his notice of motion, the applicant prays the following orders:

1. An order in terms whereof the applicant's non-compliance with the Rule 73(3) of the rules of this Honourable Court, in so far as it pertains to forms and service is condoned, and this application is heard as one of urgency.

2. That an order be granted in terms of section 260(1) read with section 260 (3) of the Companies Act, 28 of 2004 and in the following terms:

    2.1. That the second and third respondents be ordered to sell their shares in the first respondent to the applicant for purchase consideration in the amount of N$ 4 950 000.00 and N$ 2 200 000.00 respectively and payment to be effected in accordance with the provisions of the schedule annexed hereto marked "X".

    2.2. That the second and third respondents shall, within five days of this order, in writing notify the applicant of their resignation as directors of the first respondent and surrender their respective original share certificates to the applicant.

    2.3. The Deputy Sheriff for the district of Windhoek, is authorized to sign all documentation incidental to the transfer of the second and third respondents respective shares in the first respondent to the applicant, in the event that the second and/or third respondents refuse to sign the necessary transfer documents, after having been called upon to do so on 3 days written notice.

3. An order in terms whereof the respondents are ordered and directed to pay the costs of this application, in the event they oppose this application.

4. Further or alternative relief that this Honourable Court may deem fit.

*Arguments by the parties*

*The applicant*

[6] The founding affidavit was deposed to by Mr Gabriel Uahengo, the applicant in this urgent application. Mr Uahengo is a director and 45% shareholder in the first respondent Mr Uahengo states that during February 2021, Mr Cilliers informed him verbally, that there is a local group that would like to buy Seal Products for N$ 15 million and he further informed him that Mr Swart wants to sell his 22% shares in Seal Products for N$ 2.2 million. Mr Uahengo further states that upon taking into account of the Chinese groups offer of N$ 15 million, Mr Cilliers pegged the price of his shares at N$ 4.95 million, this being 33% of N$ 15 000.00. Since it came to light that Mr Swart wants N$ 2, 2 million for his shares, Mr Uahengo informed Mr Cilliers that he would buy both of them out, each at their asking price. On 19 February 2021, Mr Swart formally sent Mr Uahengo his offer to purchase his shares which amounted to N$ 2 730 000. On or about 25 March 2021, Mr Uahengo informed Mr Swart that he accepts his offer to purchase his shares, at his asking price and will be responsible for N$ 91 579.50, being 45% of ostensibly, a company debt to him. Mr Uahengo further states that in that same response, he proposed a payment plan to him, given the current economic climate and their decision to sell their shares.

[7] Mr Uahengo in his affidavit further stated that the court that on or about 26 March 2021, he sent Mr Cilliers a proposed payment plan, just as he did with Mr Swart for the purchase of his shares. In response to his proposed payment plan, Mr Cilliers expressed concerns with his age, stating that four years is a long time to wait for his money and on that basis Mr Uahengo revised his proposal to shorten the time. On 30 March 2021, Mr Swart sent an e-mail to Mr Uahengo stating that he went through his proposal for the purchase of his shares and that the terms and conditions are not acceptable to him. He further stated that he and Mr Cilliers will discuss the proposal further, but that they are looking to sell their shares to a third party. Mr Uahengo provides that Mr Cilliers and Mr Swart never had any intention to enter into a *bona fide* discussion with him regarding the sale of their shares and that they have no intention to sell their respective shares to him but to the local Chinese group.

[8] Mr Uahengo states that Mr Swart and Mr Cilliers scheduled a meeting for 6 April 2021 at Mr Swart's office in Swakopmund, which Mr Uahengo did not attend as he was under the impression that the meeting was for Mr Cilliers and Mr Swart to discuss his offers to each of them to purchase their respective shares. On 7 April 2021, Mr Uahengo received the minutes of the meeting held on 6 April 2021, and Mr Uahengo was surprised to see that it was recorded that he was absent without an apology. He further noted that Mr Cilliers and Mr Swart "resolved" at the meeting of 6 April 2021 that Seal Products must be sold to a third party. On that same day (7 April 2021), Mr Uahengo replied to the e-mail pointing out that his absence was recorded as "without apology" and that this was incorrect since he was not aware that he was required to be part of the meeting. Mr Uahengo further informed them to correct the minutes of the meeting as they failed to record that he made offers to purchase their respective shares and that they failed to record that he does not wish to sell his shares. He further noted that he disagrees that Seal Products be sold.

[9] Mr Uahengo states that another meeting was scheduled for 27 April 2021 in Henties Bay, he attended but was under the impression that they would discuss his offers to purchase their respective shares. At this meeting, a formal offer from African Wood Safari Lodge CC, was presented. The offer sought to purchase the entire business factory of Seal Products for an amount of N$ 13 000 000. This offer is notably down from the previous notification of N$ 15 000 000, as communicated by Mr Cilliers and as benchmarked by him for his asking price of N$ 4.95 million in lieu of his 33% shares.

[10] Ms Uno Katjipuka, counsel for the applicant submits that the second and third respondents conduct falls squarely within the parameters of section 260 and therefore amounts to conducting the affairs of the first respondent in a manner that is unreasonably prejudicial, unjust and inequitable towards the applicant. Ms Katjipuka further submits that the second and third respondents engaged in secret negotiations with a third party for the sale of the entire shareholding of the first respondent and entered into sham negotiations with the applicant to appear as having complied with requirements of the Act.

[11] Ms Katjipuka states that the second and third respondent refused to act in accordance with the Cabinet directive and the MOU signed with NYC, by failing to sign the necessary paperwork for the formation of the Joint Venture Company, which would ensure that the first respondent maintains its designation under governmental objectives.

[12] Counsel for the applicant submits that the applicant does not have to inform the second and third respondents, how, when and where he will raise the funds for the purchasing of the shares as long as the payment plan is binding on the applicant (by order of court) he has to comply herewith.

*The second and third respondents*

[13] Mr Zacharias Petrus Cilliers, the second respondent and Mr Josia Petrus Swart deposed to the answering affidavits. Mr Cilliers is a director and 33% shareholder in the first respondent. Mr Swart is a director and 22% shareholder in the first respondent. Mr Cilliers states that that he was responsible for the day-to-day operations of the company.

[14] Mr Cilliers outlines that the first respondent does not have a right allocation for the 2021 season, as the applicant neglected to apply in time for the renewal of the company's seal harvesting rights and as a result of his negligence, the rights expired, and the company has not received any annual quotas since January 2021. The new harvesting rights were issued in 2020 for 7 years, which necessarily means that the company will not receive any seal harvesting quotas until at least 2027.

[15] Mr Cilliers states in his affidavit that Mr Uahengo says that he and Mr Swart offered their shares to him for sale, which offers he refused by countering with wholly unreasonable proposals scheduled over several years, despite the fact that the company has a third-party cash buyer. Mr Cilliers further states that Mr Uahengo asked for a court order compelling them to accept his deplorable payment terms, knowing that he does not have the money to pay them, on his own version a fair and reasonable price when compared to his own valuation of the company, rather than agreeing to also sell his shares. Mr Clliers points out in his answering affidavit that

Mr Uahengo wants the court to compel Mr Swart and him to extend credit to Mr Uahengo for the payment of the purchase price of their shares and Mr Cilliers states that the terms of credit which Mr Uahengo wants to impose on them is not fair, reasonable, just or equitable.

[16] Mr Swart outlines that the company has no seal harvesting rights and thus no quota, the company simply cannot generate any income and the entire seal factory has been mothballed since the end of November 2020. During February 2021 Mr Swart states that he was approached by Mr Hou Xuecheng who expressed an interest in purchasing the Company. Mr Xuecheng has an interest in the seal factory in Luderitz, thus understands the company's business, already has a sustainable supply of seals and has an established market for seal products.

[17] Mr Swart further outlines that the applicant's true reason for bringing this application is that he is dissatisfied with the fact that he and Mr Cilliers do not want to sell their shareholding to him on comprehensively unreasonable terms. He goes further to state that acting in the best interest of the company, and for the reason that the applicant himself caused the first respondent to be without any harvesting rights until 2027, they want to dispose or their shareholding to a cash buyer, but the applicant is obstructive and instead instituted this wholly unsustainable application.

[18] Mr Ramon Maasdorp, counsel for the second and third respondents argued that the second and third respondents own 55% of the shares in the first respondent. The two respondents herein have an offer to purchase their shares for cash and before they accepted the cash offer, they offered their shares to the applicant, who is 45% shareholder in the first respondent. Mr Maasdorp states that the applicant cannot meet, or refuses to meet, the terms of the offer as in his counteroffer, which the respondents reject, the applicant does not quibble with the price for the shares but cannot, or does not want to, offer immediate payment. Instead, the applicant demands that the respondents sell their shares to him on credit. The applicant wants to settle the purchase price over three years in respect of Mr Cilliers and four years in respect of Mr Swart. Mr Maasdorp argues that the applicant cannot or refuses to offer any guarantees of payment, despite being challenged, the applicant has not presented any evidence of his ability to pat the purchase price.

[19] Mr Maasdorp outlines that the court has to answer the two primary questions upon considering the above stated facts:

1. The first primary question is whether the conduct of Messrs Cilliers (who is 81 years old and needs the money from the sale of shares to live off) and Swart in refusing to extend wholly unsecured credit to the applicant, and instead choosing to sell to a *bona fide* and secured cash buyer, is conduct that is unreasonably prejudicial, unjust, or inequitable to the interest of the company or the applicant. If the answer to this question is "no" the application ought to be dismissed. If the answer is "yes", the inquiry turns to the second question.

2. The second primary question is whether the order proposed by the applicant is an appropriate order that is just and equitable in the circumstances and will bring an end to the matters complained of. If the answer is "no", it is respectfully submitted the court should dismiss the application.

[20] Mr Maasdorp states that without seal harvesting rights, the first respondent could not generate any income as its factory stood idle since November 2020. Despite not being operational, the company still had expenses. In November 2020 the company's non-operational expenses were about N$ 65 000 per month.

*Urgency*

[21] What is clear from Rule 73 is that the court has a discretion whether to hear an application as one of urgency or not. The fact that the parties agree, is a relevant factor, but not a binding one. This Court in the matter of *Shetu Trading CC v The Chair of the Tender Board for Namibia and Others* said:[1]

'It admits of no doubt that it falls within the discretion of the judge to condone non-compliance with the rules or not. In exercising that discretion, all or any of the principles enunciated in *Mweb* may find application; depending on the facts of the case. In turn, the

[1] *Shetu Trading CC v The Chair of the Tender Board for Namibia and Others a Case No* CASE NO.:
A 352/2010 delivered on 23 June 2011.

principles explained in *Mweb* are not all-encompassing. Exercising a discretion judicially; "is by no means the same as general intuition" as "a judge who decides merely as he thinks fit without reference to existing legal rules, is to be feared more than dogs and snakes … the discretion may not be exercised according to the "whim of the judge's own brain".'

[22] I am satisfied that the applicant in this matter has persuaded the Court that this matter was of such urgency and that its non-compliance with the Rules must be condoned and heard as one of urgency, despite the fact that it was set down for hearing 22 days after it was issued and served. It is for the reasons set out in this judgment that I condoned the applicant non-compliance with the Rules of Court, relating to service and time periods and ordered that the matter be heard as one of urgency in terms of Rule 73 of this courts Rules. Primarily I take note of the fact that another court, when the matter was first enrolled, granted a postponement to enable the parties to file heads of argument.

*Application of the law to the facts*

[23] In paragraph 14 of the applicants founding affidavit, he states that due to a miscommunication and misunderstanding, Seal Products failed to apply for the extension of its fishing right that was due to expire in 2019. He further states that Seal Products only applied for the extension of right to harvest seals at a later stage after the application window was closed. The second and third respondents disputes this statement by the applicant and provides that the applicant caused the first respondent to be without harvesting rights due to not submitting the company's application timely.

[24] In paragraph 22 of the of applicants founding affidavit, he outlined that whilst they, earnestly engaged with the National Youth Council (NYC) as a partner in the JV to be informed, Mr Cilliers and Mr Swart suddenly reneged on their undertaking and decided that Seal Products must be sold. The respondents once again dispute this statement made by the applicant and state that they did not reneged on anything and that the company made no money and that this was as a result of the applicants doing. It is clear from the exchange of affidavits that there is a dispute of facts between the parties.

[25] Insofar as there are factual disputes raised in the papers, I will follow the trite test as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2], which has been applied in Namibia in various cases and is commonly referred to as the Plascon - Evans rule. One of these cases is *Standic BV v Petroholland (Pty) Ltd*[3], where the court cited with approval the following formulation by Harms JA in *Kgori Capital Ltd v The Director of Public Prosecutions*[4] in which the rule was explained as follows;

'Motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. Where in motion proceedings disputes of fact arise on affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be difficult if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[26] Same is illustrated in *Mostert v Minister of Justice*[5]*,* where Strydom AJA indicated that the court could not reject the respondent's version, at 21G-I:

'These allegations are denied by the Permanent Secretary and she explained in detail how it came about that the [applicant] was transferred from Gobabis to Oshakati. In my opinion a genuine dispute of fact was raised by the denial of the Permanent Secretary and, as the dispute was not referred to evidence…the Court is bound to accept the version of the respondent and facts admitted by the respondent. . .'

[27] The deep-rooted and entrenched principle in motion proceedings is that a party will stand or fall by its papers, which means that the affidavits, which are both the pleadings and the evidence, must make out a case for the relief sought by the

---

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623; applied in Namibia in *Bahlsen v Nederloff and Another* 2006(2) NR 416 (HC); *Grobbelaar and Another v Council of the Municipality of Walvis Bay* 1997 NR 259 (HC).

[3] *Standic BV v Petroholland (Pty) Ltd* (I 2508/2012) [2019] NAHCMD 274 (02 August 2019).

[4] *Kgori Capital Ltd v DPP* Crim App No. CLCGB-033-19 (delivered 26 July 2019), para 16.

[5] *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I.

respective parties.[6] Therefore, it is imperative that when the applicant makes an election to proceed by way of application that he or she must only do so if he or she does not, reasonably foresee genuine disputes of fact arising on the affidavits.

[28] In deciding the issues raised in section 260, the test is an objective one, as raised in the case of *Trans Namib Holdings v Stocks & Stocks Leisure and others*[7]*.*The second and third respondents maintain that they discussed the applicant's payment proposal and they both agreed that they would rather accept a cash offer than to take the risk that the applicant may not be able to pay them over time. As Mr Cilliers also states that he and Mr Swart had to cover the company's expenses when there was not enough money to pay expenses. I fully grasp and understand the respondents' position in this regard as the applicant did not disclose to the respondents how intends to raise the funds to purchase their shares given the dire financial position of the company. It is a given that any person that is in a position, to choose between an upfront cash payment for their shares and a scheduled payment over several years would opt for the cash payment. The second and third respondents also gave the court a brief financial position of the company that led to them making the decision to rather sell their shares to third party that is able to pay for the shares on a cash basis.

[29] The court appreciates the fact that the second and third respondents considered a third party (Mr Xuecheng) who already held an interest in a seal factory, a party that understood the company's business and who already had a sustainable supply of seals and an established market for seal products. Such a third party could be beneficial to the company and potentially get the company out of its dire financial position.

[30] The second and third respondents made it clear that they did make an offer to the applicant with respect to their shares and they also discussed the applicant's counteroffer before they seriously considered the offer made by the third party. The second and third respondent went as far as convening two board meetings to discuss the offer for the cash sale of the company, of which the applicant did not

[6] *Mbanderu Traditional Authority and Another v Kahuure and Others* 2008 (1) NR 55 (SC); *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC).
[7] *Trans Namib Holdings v Stocks & Stocks Leisure and others* SA 106/2020 At par 70.

show up for the first meeting as scheduled. The applicant's reasons for not showing up for the scheduled board meeting is not sufficient to me as the applicant did not make an effort to try and enquire what the agenda of the board meeting was before deciding not to go and to assume that it is held to discuss his offer (and meant only for Mr Cilliers and Mr Swart). I therefore do not agree with the applicant that the second and third respondents conduct falls within the parameters of section 260 and therefore amounts to conducting the affairs of the respondent in a manner that is unreasonably prejudicial, unjust and inequitable towards the applicant.

[31] Counsel for the applicant argues that selling to the applicant ensures that Seal Products continues to operate as Seal Products, whereas selling to either third parties, might spell the end of Seal Products, if Seal Products does not get quota, Xuecheng could simply sell the factory to Africa Wood Safaris or one of his other entities and let Seal Products die – which would have a detrimental effect on the NYC. The court disregards this statement by counsel for the applicant, as this statement is not backed by any proof and is merely based on speculation.

[32] Both parties herein correctly cited the case of *Trans Namib Holdings Ltd v Stocks & Stock Leisure and others*[8] as relevant to this matter. The court is however in agreement with the counsel for the second and third respondent that the conduct of the second and third respondents conduct does not fall within the ambit of section 260. The applicant might have suffered prejudice in that the applicant will not be able to buy the shares of the two respondents. However, the respondents did make the applicant an offer to consider before they considered the offer of the third party for their shares. The court is also of the opinion that the second and third respondents did take both the shareholders as well as the company into consideration upon choosing to opt for the third-party cash transaction.

[33] I am further of the opinion that the facts deposed to by the applicant, considered to those alleged by the respondents, shows that the applicant has not made out a *prima facie* case. I say so because in relation to the conduct that is alleged to prejudice the company by the applicant, the respondents put up facts that can be said to gainsay the facts put up by the applicant.

---

[8] *Trans Namib Holdings Ltd v Stocks & Stock Leisure and others* SA 106/2020.

[34] In the premises, I am of the considered view that on account of the papers filed by the parties and the arguments by Counsel, the applicant has not made a case for the invocation of the provisions of section 260 of the Companies Act.

[35] It is the ordinary rule that costs follow the event, in this regard, I am of the view that the applicant has been unsuccessful against the respondents who opposed this matter with good reason, the court therefore sees no reason why the applicant should not pay the costs of the second and third respondents.

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

1. The application is hereby dismissed with costs of one instructing and one instructed counsel.

2. The matter is removed from the roll and is regarded as finalised.

_____

MILLER K

**Acting Judge**

APPEARANCES:

| | |
|---|---|
| Applicant: | Ms U. Katjipuka |
| Instructed by: | Andreas-Hamunyela Legal Practitioners |
| | |
| Respondents: | Mr R. Maasdorp |
| Instructed by: | Joos Agenbach Attorneys & Notaries |
| | (2nd and 3rd respondents) |