REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: SINCO FISHING (PTY) LTD & OTHERS vs HEINASTE INVESTMENT NAMIBIA (PTY) LTD & OTHERS	**Case No:** HC-MD-CIV-MOT-GEN-2020/00588
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE GEIER	**Date reserved:** 01 AUGUST 2021
	Delivered on: 20 AUGUST 2021
Neutral citation: *Sinco Fishing (Pty) Ltd v Heinaste Investment Namibia (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2020/00588) [2021] NAHCMD 377 (20 August 2021)	

IT IS ORDERED THAT:

a) The special plea of non-joinder in respect of the PG and Tunacor is upheld with costs, such costs to include the costs of two instructed- and one instructing counsel.

b) Rule 32(11) of the Rules of Court is not to apply.

c) The case is postponed to 8 September 2021 at 08h30 for a Status hearing.

Following below are the reasons for the above order:

Re Joinder

[1] It is the dispute between the parties relating to the non-joinder of the Prosecutor-

General ('PG') and Tunacor Fisheries Limited ('Tunacor') that requires the *in limine* determination by the Court in this instance.

[2] This dispute arises in circumstances where, ex facie the notice of motion, the applicants – the minority shareholders in the first respondent - seek declaratory relief relating to the composition of the first respondents board of directors together with certain alternative relief, also in terms of section 260 of the Companies Act No 28 of 2004. It so appears that the relief sought essentially relates to the constitution of the first respondent's board of directors.

[3] The applicants' opposition to the joinder of outside third parties, ie. the PG and Tunacor, parties, that have no role to play in the realms of the first respondent's internal corporate governance, thus, at first glance, seems to have veracity.

[4] Important for the resolution of the matter is however the background against which the relief that the first and second respondents seek has to be viewed and where it is firstly to be kept in mind that the first respondent's principal asset was the motor fishing vessel Heinaste ("MFV Heinaste") which was purchased by the first respondent from Heinaste Investments Limited, a company registered in Cyprus, for USD 23,314,889.00 [1] and where, secondly, it is important to note that the "MFV Heinaste" was attached by the Prosecutor General under the Prevention of Organised Crime Act 29 of 2004 (POCA), then released by agreement with the PG and then sold on to Tunacor.

[5] What is of further relevance according to counsel for the respondents is the applicants' case, which was summed up as follows :

a) 'In September 2020, Arnason and Julliousson (the directors sought to be suspended) called a general shareholders meeting to discuss the attachment.[2]

b) The directors presented a memorandum for the sale of the "MFV Heinaste" "*with the co-operation of the Prosecutor General.*"[3]

c) The applicants disputed - at the meeting - that the first respondent's Board was "*properly*

[1] Record p 385 (A copy of the Memorandum of Agreement: annexure "A-1") [7] Record p 396 (a copy of the CM 29 attached hereto as annexure "A-2").

[2] Rec p 21 para 61.

[3] Rec p 21 para 62; Rec 242 "MG20".

constituted as a result of which the meeting could not be properly called."

d) Significantly, the applicants state in their founding affidavit that the "key partnership asset, the "MFV Heinaste", was *purportedly been sold*, and *the terms of the attachment of the asset and its proceeds are being purportedly determined by persons* who are in law not the true *Board of the company*. Thus, the unlawful conduct described continues to be compounded by further unlawful conduct."[4]

e) The "MFV Heinaste" was then sold to Tunacor. But the applicants complain that the "MFV Heinaste" has been "*significantly undervalued*."[5] '

[6] It was thus submitted that it was plain that the applicants' dispute the validity of the agreement for the sale of the "MFV Heinaste" to Tunacor and that also the validity of the arrangement entered between the PG and the directors sought to be "*suspended*" by Court order was under attack, and that this was the real purpose for which the main application was brought.

[7] It was pointed out that it was apparent from the terms of the notice of motion, that the applicants were seeking relief which would have a significant impact on the agreement of sale of the "MFV Heinaste" between the first respondent and Tunacor. Similarly the sought relief would also have an impact on the agreement between the PG and the first respondent which had been concluded to secure the release of the "MFV Heinaste" from attachment in terms of POCA.

[8] Counsel for first and second respondents then posed the following rhetorical question in respect of the PG against this backdrop:

'How can it ever be contended, we rhetorically but respectfully ask? that the PG does not have a substantial interest in the outcome of the relief sought when the circumstances are these; firstly, the PG enters into an agreement with persons whom she clearly perceives to be representatives of the first respondent; secondly, the agreement concerns an arrangement in respect of the vessel in terms of the provisions of POCA ; thirdly , the applicants then , and only after the agreement with the PG is implemented, come along and ask for relief which - if granted - will mean that the representatives of the first respondent – or at least those who the PG thought were representatives of the first respondent - never had authority to enter into the POCA agreement with the PG; fourthly , the reason -so the applicants say- why they had no authority to

[4] Rec p 23 para 86.

[5] Rec p 24 para 75.

enter into the agreement with the PG is because they were not directors at all. What then would be the predictable outcome of the non- joinder plea? Of course it should succeed, we respectfully submit.'

[9] The counter-argument mustered on behalf of the applicants pointed out that no factual basis was placed before the court to the effect that Tunacor was a necessary party to this lis – and - after summing up the respondents' argument - it was submitted that :

'Apparent from the respondents' heads of argument is that, at best, Tunacor has an interest in the *outcome* of these proceedings – that is, the potential invalidity of the sale agreement. It has no direct interest in the corporate governance of the Company, being neither a shareholder nor director.

Crucially, the mere fact that a party may have an interest in the *outcome* of the litigation does not warrant a plea of non-joinder.[6]

Furthermore, the invalidity of the sale agreement does not flow inevitably from the relief sought in these proceedings. It would remain open to the revised board to ratify the sale agreement.[7]

The respondents have therefore failed to demonstrate a direct and substantial interest on the part of Tunacor which would necessitate its joinder.'

[10] A similar argument was mustered in respect of the PG :

'In short, the respondents raise the same argument as they did in respect of Tunacor – that is, if, pursuant to this application being granted, the Company's board were held to have been differently constituted, the agreement between the Company and the PG (regarding the proceeds of the sale of the vessel) would be rendered invalid.[8]

The fact that the PG may have an interest in the *outcome* of these proceedings does not entitle it, without more, to be joined to these proceedings. In any event, it would remain open to the revised board to ratify the agreement with the PG (meaning that any interest that it may have in the

[6] *Judicial Service Commission and Another v Cape Bar Council and Another* (*supra*) at [12].

[7] In *Judicial Service Commission* (*supra*) the JSC argued that the first declaratory order sought (ie that the proceedings of the JSC on 12 April 2011 were inconsistent with the Constitution and thus invalid) had a direct bearing on the interests and rights of Judge Henney because, if granted, it would inevitably lead to the setting-aside of his appointment. This, the JSC argued, rendered Henney a necessary party to the proceedings. In finding otherwise, the Court took cognisance of the fact that the mere fact that an administrative decision was unlawful does not visit all its consequences with automatic invalidity, and thus that unless and until an administrative decision is challenged and set aside by a competent court, the substantive validity of its consequences must be accepted as a fact.

[8] Respondents Heads of Argument, p 8, paras 16 and 18; p 10, para 20 and p 11, para 21.

outcome of these proceedings is speculative at best).
Furthermore, none of the evidence or arguments presented by the respondents suggest that the exercise of the powers and duties of the PG would be affected by the order sought in these proceedings.[9]
The respondents have therefore failed to demonstrate a direct and substantial interest on the part of the PG'.

[11] If one considers these submissions it must be said that Counsel for the applicants are of course correct when they submit that *' … it would remain open to the revised board to ratify both the agreements with the PG and Tunacor, (meaning that any interest these parties may have in the outcome of these proceedings is speculative at best)* …'.

[12] But it is then this submission that reveals the key to the resolution of this dispute and which discloses that the test - as already laid down as far back as the *Amalgamated Engineering Union* decision[10] and in respect of which the ratio which was formulated by Damseb JP in Kleynhans at [32][11] – was essentially satisfied:

' … Clearly, the ratio in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.[12] *(my underlining)*

[13] While it is also clear that no direct relief is claimed against the PG and Tunacor *ex facie* the notice of motion it cannot be argued away that the rights - which the PG and Tunacor have acquired by virtue of the agreements that they have concluded with the first respondent - and thus also the interests - that they have consequentially acquired - may realistically be prejudicially affected by the judgment the court may make in this instance. It is the said conceded 'speculative possibility' – which is plainly more than a mere 'speculative possibility' - given the context and background to this litigation – and from which it appears that the revised board, in all probability, will not just simply rubberstamp the concluded agreements' - as was argued – particularly if one considers the expressed dissatisfaction with the purchase price achieved for the MFV Heinaste.

[9] *Rosebank Mall* (*supra*) at [26].

[10] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[11] *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC)

[12] Compare *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 168 – 70.

This exposes that what is at play does not simply amount to mere 'internal squabbles'.

[14] Finally it should be said in regard to the fact that no direct relief is claimed *vis a vis* the PG and Tunacor that it occurs frequently that parties are cited in litigation although no direct relief is claimed against them but who are nevertheless cited by virtue of the interest they may have in the proceedings. I believe that the current matter is such a case.

Re waiver

[15] In this regard the applicants allege that they – out of *' an abundance of caution''* - have written to the PG and Tunacor affording them an opportunity to – urgently – indicate *' … whether they would be interested to be joined as respondents and the reasons thereof …*' and *' … should we not hear from you as requested, we are instructed to accept that you have no interest in the matter …;*.

[16] While it is uncontroverted that a party can waive the right to be joined and while particularly the last request would amount, for the lack of a better phrase, to 'clever lawyering', it goes without saying that such an approach cannot pass muster as the PG and Tunacor where clearly not fully appraised of the parameters of the case against which their decision relating to waiver had to be made. Also the requirements, in regard to the full and proper disclosure of all papers, where thus not met by the relied upon letter against which an 'educated decision', to intervene or not, could never have been made. This is particularly also so because of the dangers and risks associated with having regard to extra-judicial notice, put before the Court *ex parte* and as alluded to already by Fagan JA in *Amalgamated Engineering Union.*[13]

[17] Be that as it may.

[18] In any event applicants allege further :

'Tunacor has confirmed telephonically that it does not wish to be joined to the proceedings, which the applicants' attorneys have recorded in writing.[14] Tunacor has thus explicitly waived its right to be joined.

[13] *Amalgamated Engineering Union v Minister of Labour* at 661 H to 663.

[14] See letter dated 28 May 2021.

The PG received the written correspondence but indicated in a letter dated 27 May 2021 that it could not respond by Wednesday, 26 May 2021, as requested by the applicants' attorney of record. The letter was referred to the Attorney-General for consideration. No further written correspondence has been received from the PG in this regard.
The aforementioned correspondence has been jointly placed before the Court during the case management process and by an Affidavit filed in terms of Rule 32 (10).[15]

[19] These argument where exposed to be without merit by the counter-submissions made in this regard and which – because I will uphold them – I will quote verbatim:

'The applicants argue in their heads of argument that they wrote to the Prosecutor General and Tunacor purportedly to "*afford*" them "*an opportunity to indicate…. whether you are interested to be joined as respondents*."[16] None of them responded that they do not wish to be joined.
The Prosecutor General made plain that she referred the applicant's letter "to our legal representative, Government-Attorney, to advise us regarding the application referred to in your letter, as well as the request." The PG's referral of the matter for advice to the Government Attorney is telling. We submit that in absence of an express waiver by the PG, the applicants ought to bring a joinder application.

On applicant's version, Tunacor responded to the applicants' second letter which suggested that it does not want to be joined, that "Ms Karabosweni acknowledged receipt of the letter and advised that a response shall be forthcoming on (date)." This response from Tunacor can never be construed to be a waiver. It does not meet the requisites for a defense of waiver.

Requirements for waiver has been, the *intentional and unequivocal* renunciation or relinquishment of a known right.[17]

We submit that if a party does not expressly waive a right, and waiver is *to be inferred*, the conduct relied upon must be more consistent - on a reasonable view thereof - with an intention to waive the right in question.[18]

None of the facts stated by the applicants demonstrate *intentional and unequivocal* renunciation of the Prosecutor- General and Tunacor's rights to be joined to these proceedings.

[15] Joing Status Report dated 15 June 2021.

[16] Heads of argument para 10.

[17] *Mutual Life Insurance Co of New York v Ingle* 1910 TPD 540 of 550; *Botha (now Griesel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 792B-D).

[18] *Palmer v Poulter* 1983 (4) SA 11 (T) at page 21A.

In short, the applicants implemented a strategy to put up facts to argue a waiver. There is nothing wrong in law with such a strategy. What the law prohibits is "*unlawful strategies*" not "*strategies*" per se. The applicant's strategy however, either lacked planning or suffered from defective implementation. Ultimately it went horribly wrong. After implementation, no one can say that the unfortunate person who the applicants targeted, knew what Tunacor's rights were, or had authority to waive such rights.

The applicant's strategy suffers from a further fundamental defect. At the heart of the applicant's approach is that it requires this court to determine the fair trial rights - to be joined - of the Tunacor and the PG. Here is the defect, however; The PG and Tunacor are absent. Does Tunacor know that the applicants are busy arguing before a court of law that it -Tunacor - has waived its rights to be joined? The answer is, No. Does Tunacor know that applicants are expecting the court to determine its rights finally and in their absence? The answer is; No. Does this court know what the version of Tunacor is in relation to the allegation that it has waived its rights? The answer is again, No. Does Article 12 of the Constitution allow such a procedure? The answer is surely a resounding, No.'

[20] It so emerges from the reasons given above that I am inclined to uphold the non-joinder special plea raised on behalf of the respondents, particularly also in circumstances where the applicants have failed to prove that the PG and Tunacor had *'intentionally and unequivocally'* waived their rights in this regard.

Costs

[21] The respondents have mounted their plea for the uncapping of costs in terms of Rule 32(11) on the submission that the applicants' opposition to this interlocutory dispute was *'plainly and utterly frivolous'*.

[22] While this may, at best, possibly be said in regard to the belated letters – written out of an alleged *'abundance of caution'* – attempting to conjure up a waiver at the eleventh hour, it cannot be ignored on the other hand that, in terms of Rule 32(9), the applicants where always obliged to endeavour to seek an amicable resolution to this interlocutory dispute. This they did, although, whether the manner in which they went about this was indeed 'amicable', is open to doubt.

[22] In any event, and more importantly so, it can by no stretch of the imagination be

said that the applicants did not have an arguable case on the issue of joinder, particularly as the application in the first instance concerns – what has been labelled - the internal 'squabbles' - and the composition of the first respondent's board of directors in respect of which – and in the normal course – third parties would not, *pe se,* have a direct and substantial interest.

[23] I would thus decline the request for Rule 32(11) not to apply on these grounds.

[24] As the parties have however elected to engage each other with the assistance of senior and junior counsel, as well as instructing counsel, and where the resultant costs seemingly do not play any role – and where the provisions of the rule are essentially aimed at limiting costs in the normal course – I see no reason why the rule should find application in such scenario.

[25] In the result I make the following orders :

a) The special plea of non-joinder in respect of the PG and Tunacor is upheld with costs, such costs to include the costs of two instructed- and one instructing counsel.

b) Rule 32(11) of the Rules of Court is not to apply.

c) The case is postponed to 8 September 2021 for a Status hearing.

Judge's signature:	**Note to the parties:**
	Not applicable.
Counsel:	
Applicant/(Respondent - interlocutory)	**Respondents/(Applicants – interlocutory)**
Adv. J Gauntlett QC SC & Adv. G Solik	Adv. R Heathcote SC & Adv. E Nekwaya

Instructed by	*Instructed by*
AngulaCo Inc.	Sisa Namandje & Co. Inc.