

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

**RULING ON SPECIAL PLEAS OF NON-COMPLIANCE WITH THE COMPANIES ACT
AND LACK OF AUTHORITY**

Case No.: HC-MD-CIV-ACT-CON-2021/00463

In the matter between:

NATIVE BRICKS NAMIBIA (PTY) LTD
DR PATRICE URAYENEZA

1st PLAINTIFF
2nd PLAINTIFF

and

ARCHIE MBAKILE
ZIBO MBAKILE
KHAYALAMI PROPERTIES CC

1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT

Neutral citation: *Native Bricks Namibia (Pty) Ltd v Mbakile* (HC-MD-CIV-ACT-CON-2021/00463) [2023] NAHCMD 457 (31 July 2023)

Coram: SIBEYA J
Heard: 25 July 2023
Delivered: 31 July 2023

Flynote: Civil Procedure – Special pleas – Section 274 of the Companies Act 28 of 2004 and lack of authority to initiate proceedings on behalf of the company – Consequences of not leading evidence in support of a special plea, especially in the absence of common cause facts agreed upon by the parties – The provisions of s 274 of the Act are not invoked in instances where the first plaintiff lodging the action on its own behalf.

Summary: Before court, are two special pleas raised by the defendants, for alleged non-compliance with s 274 of the Companies Act 28 of 2004 ('the Act') and lack of authority to institute proceedings. The defendants contend that the second plaintiff served no notice contemplated in s 274 of the Act on the first plaintiff before instituting these proceedings and further instituted these proceedings on behalf of the first plaintiff without authority to do so. The special pleas are opposed.

The plaintiffs instituted action proceedings against the defendants by issuing summons out of this court. The plaintiffs' claims comprise of a total of eleven, out of which nine claims are sought in favour of the first plaintiff while the remaining two claims are sought by the second plaintiff in his personal capacity. The defendants defended the matter and subsequently filed their plea to the plaintiffs' particulars of claim where they pleaded to the allegations contained therein. After the matter progressed to pre-trial stage the defendants' erstwhile legal practitioner withdrew from the matter and the new legal practitioner for the defendants applied for leave to amend the defendants' plea in order to include a special plea of non-compliance with s 274 of the Act and further that the second plaintiff instituted these proceedings on behalf of the first plaintiff without authority to do so.

The leave to amend was opposed but, however, granted by the court in a ruling delivered on 13 April 2023. The court is now faced with the task of determining the propriety of the special pleas raised.

Held: that it was incumbent on the defendants to lead evidence in order to substantiate their special plea as it is difficult to determine propriety of the said special plea based on the pleadings only. The said difficulty is exacerbated by the fact that there is no statement of agreed facts filed by the parties in terms of rule 63, neither are there common cause facts set out by the parties for the court's consideration in the determination of the special pleas.

Held that: the literal grammatical meaning of the words employed in s 274 of the Act, lays bare the fact that it applies to instances where a company suffered damages or loss, or was deprived of any benefit as a result of a wrong or breach by any director or officer of that company and the company has not instituted proceedings to recover the said damage or loss.

Held further that: any member of the company may initiate proceedings on behalf of the company against the director or officer even if the company has condoned or ratified the wrong. Before such member initiates the proceedings, he or she must comply with the peremptory requirements, namely, that he or she must first serve a written notice on the company calling on the company to institute those proceedings within one month from the date of service of the notice, and further providing that if the company fails to do so, an application will be made to court to appoint a curator for the company to institute and conduct the said proceedings on behalf of the company.

Held: that it is clear as day that the provisions of s 274 provide for instances where proceedings are initiated by a member of the company acting on behalf of the company. Section 274 would have applied to this matter if the second plaintiff or any other member initiated proceedings against the director or officer or past director or officer on behalf of the company. The present proceedings reveal that the company is the first plaintiff and it initiated the proceedings on its own behalf. The first plaintiff instituted proceedings on its own behalf in order to recover the alleged damages suffered, loss and benefits deprived by the defendants.

Held that: had the second plaintiff been cited as a member acting on behalf of the first plaintiff, this would have triggered the invocation of s 274. As stated above, this latter position is foreign to the facts before court.

The special pleas are dismissed with costs.

ORDER

1. The defendants' special pleas of non-compliance with s 274 of the Companies Act 28 of 2004 and lack of authority to institute proceedings on behalf of the company, are dismissed.
 2. The defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiffs' costs for opposing the special pleas.
 3. The parties must file a joint status report on or before 7 August 2023.
 4. The matter is postponed to 10 August 2023 for a status hearing to determine the further conduct of the matter.
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RULING

SIBEYA J:

Introduction

[1] Before court, are two special pleas raised by the defendants, for alleged non-compliance with s 274 of the Companies Act 28 of 2004 ('the Act') and lack of authority to institute proceedings. The defendants contend that the second plaintiff served no notice contemplated in s 274 of the Act on the first plaintiff before instituting these

proceedings and further instituted these proceedings on behalf of the first plaintiff without authority to do so. The special pleas are opposed.

The parties and their representation

[2] The first plaintiff is Native Bricks Namibia (Pty) Ltd, a company with limited liability, duly registered in terms of the laws of Namibia with its registered address situated at Rem Swakop River Plots, Five Rand Camp, Okahandja.

[3] The second plaintiff is Dr Patrice Urayeneza, a major male Engineer with full legal capacity, practicing as such at no. 39 Daan Bekker Street, Windhoek and the major shareholder in the first plaintiff, with 55 percent shares.

[4] The first defendant is Mr Archie Mbakile, a major male person with full legal capacity, residing in Okahandja, and who is employed by third defendant and is a shareholder in the first plaintiff with 22.5 percent shares. He is married to second defendant.

[5] The second defendant is Ms Zibo Mbakile a major female person with full legal capacity, residing in Okahandja, and is a shareholder in the first plaintiff with 22.5 percent shares. She is married to first defendant.

[6] The third defendant is Khayalami Properties CC, a close corporation, duly registered in accordance with the relevant laws of the Republic of Namibia, with its registered address situated at Unit 59, Osona Village, Okahandja.

[7] The first and second defendants are both members of the third defendant where they jointly hold 70 percent membership interest.

[8] The plaintiffs are represented by Mr Mhata while the defendants are represented by Ms Cloete.

Background

[9] The plaintiffs instituted action proceedings against the defendants by issuing summons on 11 February 2021. The plaintiffs' claims comprise of a total of eleven claims out of which nine claims are sought in favour of the first plaintiff, while the remaining two claims are sought by the second plaintiff in his personal capacity.

[10] The defendants filed their notices to defend the matter and subsequently filed their plea to the plaintiffs' particulars of claim where they pleaded to the allegations contained therein. The matter progressed to the pre-trial stage. It was at that stage that the defendants' erstwhile legal practitioner withdrew from representing them. The current legal practitioner for the defendants applied for leave to amend the defendants' plea in order to include a special plea of non-compliance with s 274 of the Act and further that the second plaintiff instituted these proceedings on behalf of the first plaintiff without authority to do so.

[11] The application for leave to amend was opposed by the plaintiffs. The defendants' application was however granted in a ruling delivered on 13 April 2023.

[12] The defendants opted to argue the special pleas on the pleadings filed without leading evidence. The court is presently seized with the determination of the propriety of the special pleas raised.

The defendants' case

[13] As stated above, the defendants contend that the plaintiffs lacked authority to institute action proceedings in this matter and that the second plaintiff failed to comply with s 274 of the Act when he so launched the action proceedings.

[14] Ms Cloete argued that the second plaintiff instituted these proceedings on behalf of the first plaintiff without serving a written notice on the first plaintiff calling on it to

institute these proceedings as required by s 274. She argued further that it is a peremptory requirement which must be complied with when one institutes proceedings on behalf of a company. Failure to comply with s 274 is fatal to the plaintiffs' case, so she argued.

[15] Ms Cloete further argued that the plaintiffs had not established that the Board of the first plaintiff resolved to institute these proceedings, nor is there evidence that the second plaintiff has authority to take the decision to institute these proceedings. Ms Cloete relied on the *Mall (Cape) (Pty) Ltd v Merino Ko-operasie BPK*¹ for her contention on the authority to act for a juristic person and that the lack thereof is fatal to the plaintiff's case. She called for the special pleas to be upheld with costs.

The plaintiffs' case

[16] The plaintiffs, on the other hand, contend, in their replication to the defendants' special pleas, that the provisions of s 274 do not apply to this matter. The plaintiffs state that the first plaintiff instituted legal proceedings on its own behalf making s 274 inapplicable. The plaintiffs further contend that the second plaintiff, being a director and a major shareholder of the first plaintiff with 55 percent shareholding, has authority to make a resolution on behalf of the first plaintiff and to act on behalf of the first plaintiff.

[17] The plaintiffs further contend that the first plaintiff presently has one director being the second plaintiff, as the directorship of the first and second defendants is in question and yet to be determined by court. The first and second defendants are, therefore, according to the plaintiffs, purported directors of the first plaintiff.

[18] Mr Mhata argued that s 274 finds no application to this matter as the first plaintiff instituted legal proceedings on its own behalf. On the issue of the alleged lack of authority by the second plaintiff to act for the first plaintiff, Mr Mhata argued that the defendants opted to have the special pleas adjudicated upon on the pleadings filed without leading evidence. He argued that the second plaintiff states that he is duly

¹ *Mall (Cape) (Pty) Ltd v Merino Ko-operasie BPK* 1957 (2) SA 347 (C).

authorised to institute and appear for the first plaintiff. He invited the court to dismiss the special pleas with costs.

Analysis of the law

[19] A special plea does not raise a defence on the merits of the matter but interposes a defence which is not apparent from the pleadings. It is, therefore, a defence raised apart from the merits of the case.

[20] The Supreme Court had occasion to consider special pleas, albeit in a case of lack of *locus standi*, and Frank AJA writing for the court remarked as follows in *Joseph and Others v Joseph*² at paragraph 24:

'The alleged lack of *locus standi* on the part of the plaintiff is raised in a special plea. The special plea contains five subparagraphs which, in essence, contain legal argument and even a reference to case law, to justify with references to sections in the Act why the special plea should be upheld. No new facts or additional facts are raised in the special plea. Special pleas are to be raised where, apart from the merits, there is 'some special defence, not apparent *ex facie*' the particulars of claim. Hence, if it is apparent from the averments in the particulars of claim that the plaintiff lacks *locus standi* this must be raised by way of an exception. The fact that there was no evidence or allegations necessary in addition to what is referred to for the purposes of the special plea is also evident from the fact that the point was argued on the pleadings without the need for any evidence. This was thus a case where the *locus standi* point should have been raised as an exception and not in a special plea.'

[21] Masuku J in *Swanu of Namibia v Katjivirue*³ cited with approval a passage from Herbeinstein & Van Winsen, *The Civil Practice of the High Court of South Africa* where the following was stated:

'Special pleas ... do not appear *ex facie* the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction

² *Joseph and Others v Joseph* 2020 (3) NR 689 (SC) at 695-696 para 24.

³ *Swanu of Namibia v Katjivirue* (HC-MD-CIV-ACT-OTH-2021/03315) [2022] NAHCMD 98 (09 March 2022).

of fresh facts from outside the circumference of the pleading, and these facts have to be established in the usual way.’

[22] Masuku J in *Swanu of Namibia* at para 19 - 20, proceeded to state that in a trial, the usual way of establishing facts is to elicit or establish facts by adducing oral evidence through witnesses. The other is where most of the facts are common cause between the parties, whereby they invoke the provisions of rule 63 and make a written statement of agreed facts. There are, however, instances where special pleas may be determined on the pleadings only.⁴

[23] I have opted to commence with the special plea of lack of authority which, in my considered view, ties well with the above authorities.

[24] The requirement that persons who act for juristic persons must have the necessary authority to act on behalf of such juristic persons is a well-beaten track in our law. Several courts have added their voices to this principle which requires no regurgitation.⁵ The said question must, however, be properly raised and established on the facts in order for the court to determine its propriety.

[25] The second plaintiff is questioned, it being alleged that he lacks the necessary authority to act for the first plaintiff in this matter and further that there is no resolution empowering him to act for the first plaintiff. The second plaintiff contends that, as the director and majority shareholder with 55 percent shareholding in the first plaintiff, he has the authority to make a resolution on behalf of the first plaintiff. He further states that the first and second defendants’ directorship in the first plaintiff is in dispute and yet to be determined by the court.

[26] The issue of lack of authority was raised on the pleadings and it, therefore, stands to be decided on the pleadings, as no evidence was led. What the court is faced

⁴ *Swanu of Namibia v Katjivirue* (supra) para 19- 20. See also: *ADIDAS (South Africa)(Pty) Ltd v Jacobs* (HC-MD-CIV-ACT-CON-2019/02339) [2022] NAHCMD 451 (01 September 2022) para 9.

⁵ *Ondonga Traditional Authority v Elifas and Others* 2017 (3) NR 709 (HC) para 21. *MGM Properties (Pty) Ltd v Bank Windhoek Limited* (HC-MD-CIV-MOT-GEN-2019/00195) [2020] NAHCMD 511 (5 November 2020) para 30.

with is the averment by the defendants that the second plaintiff lacks authority to act for the first plaintiff while the second plaintiff states that he has such authority. In my view, it was incumbent on the defendants to lead evidence in order to substantiate their special plea as it is difficult to determine propriety of the said special plea based on the pleadings only. The said difficulty is exacerbated by the fact that there is no statement of agreed facts filed by the parties in terms of rule 63, neither are there common cause facts set out by the parties for the court's consideration.

[27] On the above basis alone, and considering that no facts were established by the defendants on which the special plea could be determined, the court could refuse to exercise its discretion and uphold the special plea. The special plea could be dismissed on this ground. I, however, proceed to consider the special plea based on the non-compliance with s 274 of the Act.

[28] Section 274 of the Act which is under the heading 'Initiation of proceedings on behalf of company by member', provides as follows:

'274 (1) For the purposes of this section, section 275 and 276, "curator" means a person who institutes or otherwise participates in legal proceedings on behalf of a company.

(2) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while a director or officer of that company and the company has not instituted proceedings for the recovery of the damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against that director or officer or past director or officer in the manner provided for by this section notwithstanding that the company has in any way ratified or condoned that wrong, breach of trust or breach of faith or any act or omission relating to the breach or wrong.

(3) The member referred to in subsection (2) must, before initiating any proceedings under subsection (2), serve a written notice on the company calling on the company to institute those proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under subsection (4) will be made.

(4) If the company fails to institute proceedings within the period contemplated in subsection (3), the member may make application to the Court for an order appointing a curator for the company for the purpose of instituting and conducting proceedings on behalf of the company against that director or officer or past director or officer.

(5) On receipt of an application made under subsection (4) the Court may, if it is satisfied –

(a) that the company has not instituted the proceedings;

(b) that there are sufficient grounds for the proceedings; and

(c) that an investigation into the grounds and into the desirability of the institution of those proceedings is justified,

appoint a provisional curator and direct him or her to conduct an investigation and to report to the Court on the return day of the provisional order.

(6) The Court may on the return day discharge the provisional order referred to in subsection (5) or confirm the appointment of the curator for the company and issue directions as to the institution of proceedings in the name of the company and the conduct of the proceedings on behalf of the company by the curator, which it considers necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission is of no force or effect.’

[29] It is apparent from the heading of s 274 that it regulates the initiation of proceedings on behalf of a company by a member of such company. The literal grammatical meaning of the words employed in s 274, in my view, lays bare the fact that it applies to instances where a company suffered damages or loss or was deprived of any benefit as a result of a wrong or breach by any director or officer of that company and the company has not instituted proceedings to recover damage or loss. In that case, any member of the company may initiate proceedings on behalf of the company against the director or officer even if the company has condoned or ratified the wrong. Before such member initiates the proceedings, he or she must comply with the peremptory requirements that he or she must first serve a written notice on the company calling on the company to institute those proceedings within one month from the date of service of the notice, and further providing that if the company fails to do so,

an application will made to court to appoint a curator for the company to institute and conduct the said proceedings on behalf of the company.

[30] It is clear as day that the provisions of s 274 provide for instances where proceedings are initiated by a member of the company acting on behalf of the company. Section 274 would, in my considered view, have applied to this matter if the second plaintiff or any another member initiated proceedings against the director or officer or past director or officer on behalf of the company.

[31] Far from what is regulated by s 274, the present proceedings reveal that the company is the first plaintiff and it initiated the proceedings on its own behalf. The first plaintiff instituted proceedings on its own behalf in order to recover the alleged damages, loss suffered and benefits it was deprived of by the defendants.

[32] I, therefore, agree with the argument by Mr Mhata that the amended particulars of claim cited the first plaintiff as a juristic person that instituted these proceedings whilst acting on its own behalf. The second plaintiff, on the other hand, is cited as a natural person acting on his own behalf and being duly authorised to act for the first plaintiff. The second plaintiff is not cited as a member acting on behalf of the first plaintiff. Had the second plaintiff been cited as a member acting on behalf of the first plaintiff, this would, in my view, have triggered the invocation of s 274. As stated above, this latter position is foreign to the facts before court.

Conclusion

[33] In view of the findings and conclusions reached hereinabove, I am of the considered view that the defendants' reliance on s 274 of the Act in their special plea is misplaced. I further find, for the reasons set out above, that the special plea of lack of authority to institute these proceedings lacks merit. The above findings lead me to one conclusion, namely, that the defendants' special plea falls to dismissed.

Costs

[34] The general rule is that costs follow the event. This case is no different. No reasons were advanced by any of the parties why the said principle should not be adhered to. It follows, therefore, that the plaintiff will be awarded costs.

Order

[35] In the result, it is ordered that:

1. The defendants' special pleas of non-compliance with s 274 of the Companies Act 28 of 2004 and lack of authority to institute proceedings on behalf of the company, are dismissed.
2. The defendants must, jointly and severally, the one paying the other to be absolved, pay the plaintiffs' costs for opposing the special pleas.
3. The parties must file a joint status report on or before 7 August 2023.
4. The matter is postponed to 10 August 2023 for a status hearing to determine the further conduct of the matter.

O S Sibeya

Judge

APPEARANCES

PLAINTIFFS:

N Mhata

Of Nambili Mhata Legal Practitioners,

Windhoek

DEFENDANTS:

L Cloete

Of FB Law Chambers,

Windhoek