

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00502

In the matter between:

**HIGH POWER HOLDINGS (PTY) LTD
EUGENE LOTTERING
WISEMAN KHUMALO**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

and

**IMPRINT INVESTMENTS (PTY) LTD
PSP LOGISTICS (PTY) LTD
BPLC MANAGEMENT CONSULTANTS
(UK) LIMITED
VEIINASTOCKS HOLDING GROUP
INTERNATIONAL (PTY) LTD
NAMIBIA EQUITY MINING CC
PASCAL INVESTMENT CC
ABUID KATJAITA
ALFRED MBAHA
JACQUELINE PRINCE
JUNFA XIE**

**FIRST RESPONDENT
SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT**

MICK MUTANGA	ELEVENTH RESPONDENT
PANDULENI SHIMUTWIKENI	TWELFTH RESPONDENT
RAUNA HANGHUWO	THIRTEENTH RESPONDENT
STEVEN KARIAZU	FOURTEENTH RESPONDENT
BEN KAUARI	FIFTEENTH RESPONDENT
IYALOO MWANINGANGE	SIXTEENTH RESPONDENT
JUSTUS STANLEY VEII	SEVENTEENTH RESPONDENT
BARRY GERALD STOCKS	EIGHTEENTH RESPONDENT
ERIC NEALE JOY	NINETEENTH RESPONDENT
ABUID KATJAITA	TWENTIETH RESPONDENT
ASAVELA ANDERSON NGCONGO	TWENTY-FIRST RESPONDENT
CHARLES KAUEJAO	TWENTY-SECOND RESPONDENT
BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY	TWENTY-THIRD RESPONDENT
MINISTER OF MINES AND ENERGY	TWENTY-FOURTH RESPONDENT

Neutral citation: *High Power Holdings (Pty) Ltd v Imprint Investments (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2022/00502) [2023] NAHCMD 688 (30 October 2023)

Coram: SCHIMMING-CHASE J

Heard: 27 June 2023

Delivered: 30 October 2023

Flynote: Practice — Particular defences — Defence of *lis alibi pendens* — requirements restated — there must be pending litigation, between the same parties or their privies, based on the same cause of action, and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical.

Summary: In this application, the applicants seek to set aside certain resolutions taken by the board of directors of the first respondent. The essence of the relief sought is that whilst litigation concerning *inter alia* the financial management and the objectives of the first respondent was under way in this

court, and on 24 November 2021, the seventeenth to twentieth respondents convened a meeting of the first respondent scheduled for 23 December 2021. The notice was also shared with the applicants.

Despite protest by the applicants that convening a board meeting at that stage, would prejudicially interfere with the litigation instituted by the applicants against the respondents, the board meeting went ahead in the absence of the applicants. At the aforesaid meeting, it was *inter alia* resolved to remove the first applicant as shareholder of the first respondent, and to remove the second applicant and third applicants as directors of the first respondent.

In the action proceedings, the applicants sought leave of the court to amend their particulars of claim to have the resolutions made by the first respondent on 23 December 2021 declared null and void and set aside. This court, per Parker AJ (HC-MD-CIV-ACT-OTH-2021/03944), refused the application for leave to amend. Subsequent to an application for leave to appeal to the Supreme Court, which was similarly refused, the applicants petitioned the Chief Justice. Leave to appeal to the Supreme Court was granted on 7 December 2022. On 2 October 2023, the matter was postponed to 27 March 2024 pending the outcome of the Supreme Court appeal. These application proceedings were launched on 26 October 2022.

The respondents raised the dilatory defence of *lis alibi pendens*, contending that essentially the same relief sought in the application for leave to amend which forms the subject matter of the appeal, is sought in these proceedings; hence the launching of this application was premature.

Held that, the requirements for the plea of *lis pendens* are that there must be pending litigation, between the same parties or their privies, based on the same cause of action, and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical.

Further held that, should the Supreme Court uphold the appeal, the same cause of action and relief sought to be obtained in these application proceedings will

become a live issue in the action currently pending between the parties, which has been stayed pending finalisation of the appeal. To make a determination on that same issue whilst an appeal is pending would effectively usurp the Supreme Court's function of determining the issue before it.

Accordingly the plea of *lis pendens* is upheld with costs and these proceedings are similarly stayed pending finalisation of the Supreme Court appeal.

ORDER

1. The respondents' point in limine of *lis pendens* is upheld.
2. The applicants must pay the respondents' costs in this application, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to **29 April 2024** at **15h30** for a Status hearing.
4. The parties are directed to file a status report outlining the further conduct of the review application on or before **24 April 2024**.

JUDGMENT

SCHIMMING-CHASE J:

[1] Serving before court is a matter involving corporate infighting between the applicants on the one hand and the respondents on the other, as it regards the functioning, leadership in and ownership of the first respondent. As a result of the skirmishes between the parties, the respondents are alleged to have made certain resolutions, which resolutions the applicants now seek to impugn in these motion proceedings.

[2] The first applicant is High Power Holdings (Pty) Ltd ('High Power'), a company with limited liability, registered in terms of the company laws of the Republic of South Africa, with address located at 7, 29 Bantry Road, Bryanston, Johannesburg, Republic of South Africa.

[3] The second applicant is Dr Eugene Lottering, a South African national and businessman. He is a director of High Power and Chair of the Board of Directors of the first respondent. He also represents High Power's interests in the first respondent. Dr Lottering deposed to the founding affidavit in these proceedings.

[4] The third applicant is Wiseman Khumalo, a South African national with his business address located at Seekoeiwater AH, Emalahleni in the Republic of South Africa. Mr Khumalo also represents High Power's interests in the first respondent. I refer to the parties by their names, and collectively as 'the applicants' where applicable in this judgment.

[5] The first respondent is Imprint Investment (Pty) Ltd ('Imprint'), a duly registered company with limited liability registered and incorporated in terms of the company laws of the Republic of Namibia.

[6] The second respondent is PSP Logistics (Pty) Ltd, a company with limited liability, registered and incorporated in terms of the company laws of the Republic of South Africa, with its address located at 1st Floor, Illovo Muse, 198 Oxford Road, Illovo, Republic of South Africa.

[7] The third respondent is BPLC Management Consultants (UK) Limited, a company with limited liability incorporated in terms of the company laws of the United Kingdom, with its address located at 41, Cornmarket Street, Oxford, OX1 3HA, United Kingdom.

[8] The fourth respondent is VeiinaStocks Holding Group International (Pty) Ltd, a duly registered Namibian company with limited liability, incorporated in terms of the company laws of the Republic of Namibia.

[9] The fifth respondent is Namibia Equity Mining CC, a close corporation, registered in terms of the close corporation laws of the Republic of Namibia.

[10] The sixth respondent is Pascal Investment CC, a close corporation, registered in terms of the close corporation laws of the Republic of Namibia.

[11] The seventh to sixteenth respondents are shareholders of Imprint.

[12] The seventeenth to twenty second respondents are directors of Imprint as of 30 August 2022.

[13] The twenty-third respondent is the Business and Intellectual Property Authority, a statutory body established in terms of s 3 of the Business and Intellectual Property Authority Act 8 of 2016.

[14] The twenty-fourth respondent is the Minister of Mines and Energy, duly appointed as such in terms of article 32(3)(i)(bb) of the Namibian Constitution, representing the Government of the Republic of Namibia.

[15] By way of short background to the proceedings before court, High Power and the second, third and fourth respondents agreed during May 2020 to utilise Imprint as a vehicle to conduct exclusive prospecting operations in the Otjozondjupa and Omaheke regions. To this end, Imprint is the holder of two exclusive prospecting licenses issued by the 24th respondent.

[16] It is alleged in the founding papers that High Power made a substantial capital contribution/investment into Imprint. At its inception, Imprint's Board of Directors comprised Dr Lottering, Mr Khumalo, and 17th to 19th respondents.

[17] On 18 October 2021, the applicants instituted an action in this court under case number HC-MD-CIV-ACT-OTH/03944 seeking the following relief:

(a) an order declaring the meetings held by Imprint between December 2020 and October 2021 unlawful, null and void of any legal consequences, and further setting aside the business conducted during the aforementioned meetings; and

(b) an order excusing Dr Lottering and Mr Khumalo from any possible claim emanating from the business conducted pursuant to Imprint's 'impugned' resolutions taken between December 202 and October 2021 (on dates unknown to High Power, Dr Lottering or Mr Khumalo), as contemplated in s 256(2) of the Companies Act 28 of 2008.

[18] In the applicants' particulars of claim the first and other respondents were requested to stay the implementation of the 'impugned' resolutions pending finalisation of the action. This was not done.

[19] On or about 24 November 2021, the 17th to 20th respondents convened another meeting of the board of directors of Imprint to be held on 23 December 2021. An agenda formed part of the notice convening the meeting, which included, *inter alia*, a special point relating to a special resolution to be taken on Dr Lottering and Mr Khumalo on their status as directors of Imprint. The applicants protested this meeting and requested that the meeting not proceed pending the finalisation of the action. It was also indicated that Messrs Lottering and Khumalo would not attend on behalf of High Power.

[20] The meeting of the board of directors of Imprint proceeded on 23 December 2021. The meeting, amongst others, resolved to: (a) remove High Power as Imprint's shareholder, (b) remove Dr Lottering as a director and chairperson of its board of directors, and (c) remove the Mr Khumalo as a director of its board of directors.

[21] On 8 February 2022, the applicants applied for interim relief seeking to stay the implementation of Imprint's decision taken at the Board meetings which gave rise to institution of the action mentioned above. It appears that on 25 February 2022, the applicants sought to amend the notice of motion in the application *pendente lite*, seeking a stay of the effect of Imprint's resolutions made on 23 December 2021. The applicants also delivered a notice of intention to amend their particulars of claim, seeking a declaration of invalidity of the resolutions taken by Imprint on 23 December 2021 on the grounds that the decisions were taken unlawfully. In a ruling dated 3 August 2022, the application for leave to amend was refused.

[22] Subsequent to an application for leave to appeal to the Supreme Court, which was similarly refused, the applicants petitioned the Chief Justice. Leave to appeal to the Supreme Court was granted on 7 December 2022. On 2 October 2023, the matter was postponed 27 March 2024 pending the outcome of the Supreme Court appeal.

[23] On 16 June 2023, and after leave to appeal to the Supreme Court was granted, the applicants launched the application proceedings which proceedings are now before me for adjudication.

[24] In these proceedings, the applicants seek an order reviewing and setting aside the resolutions taken by Imprint's board dated 23 December 2021 removing High Power as shareholder of Imprint, removing Dr Lottering as its chairman, and removing Messrs Lottering and Khumalo as directors of Imprint.

[25] In addition the applicants seek an order setting aside any share certificates issued by Imprint as a result of this decision, and setting aside the recognition by the 23rd respondent recognising Imprint's decisions. An order was also sought to set aside the appointment of 21st and 22nd respondents as directors of Imprint consequent to the 'impugned' decision.

[26] It is the case of the applicants that the resolutions taken at the meeting of the directors of the first respondent are invalid, unlawful and fall to be declared as such. Further, it is contended that the discussions giving rise to the purported resolutions were not particularised or foreshadowed in the notice or agenda convening the meeting. The applicants further argue that the first respondent's board of directors cannot 'vote out' persons as shareholders of companies, as same is tantamount to (unlawful) expropriation without compensation. In this regard, it was submitted that if it is accepted that the resolutions are invalid, unlawful, and fall to be declared as such, it is a natural consequence of law that any share certificates or document alike must also be set aside.

[27] The respondents dealt with the merits, raising material breaches by High Power of its obligations in terms of the shareholders' agreement. However a number of preliminary points were raised in the answering papers. The only one I consider at this stage, is the dilatory defence of *lis pendens*.

[28] Counsel for the respondents argued that the applicants instituted proceedings in this court by way of action on or about 19 October 2021, with the sole purpose of effectively paralysing the operations of the respondents, and thereafter sought to amend their claim. The convening of the meeting and the impugned decisions occurred after the institution of that action. When the respondents learned that the meeting proceeded and that resolutions were taken affecting them, they sought, *inter alia*, an amendment of the action proceedings.

[29] What the applicants sought to amend was that the meeting of 23 December 2021 and all transactions and decisions taken thereat, in essence, be reviewed and set aside. Leave to amend was not granted, and after petitioning the Supreme Court, leave to appeal was granted. Therefore, and at the time of hearing this matter, a determination of the same issues before the Supreme Court was still pending, and in the event the relief is granted – meaning, if the amendment is granted in the action proceedings, such

amendment (which constitutes the main relief of the applicants in these proceedings) would be a live issue between the parties.

[30] The requirements for a defence of *lis pendens* were succinctly set out in *Schuette v Schuette*¹ as follows:

[14] The requirements for the plea of *lis pendens* in terms of the law are these: there must be pending litigations; between the same parties or their privies; based on the same cause of action; and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical.² The plea of *lis pendens* is not absolute. This means that even if it is found that the requirements have been met, the court has a discretion to allow an action to continue should that be considered just and equitable in the circumstances, despite the earlier institution of the same action.

[15] A plea of *lis pendens* is open to a litigant who contends that a dispute between the same parties concerning the same cause of action is pending before the same court or another court with the same jurisdiction. The plea has been aptly explained as being based 'on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised'.³ The party raising the plea of *lis pendens* bears the onus of proving all the requirements.⁴

[31] The party raising the plea of *lis pendens* bears the onus of proving all the requirements.

[32] It is common cause that there is a pending action between the parties, and that the main relief sought in these proceedings was raised as an amendment to the claim in that action. It is true that in these motion proceedings, the 17th to 23rd respondents were cited additionally, and there is relief sought against them, as has been set out above in this judgment.

¹*Schuette v Schuette* (HC-MD-CIV-MOT-GEN-2019/00376) [2020] NAHCMD 426 (18 September 2020).

² LAWSA Vol 3 para 247; *Baker v The Messenger of Court for the District of Walvis Bay* (A 309/2015 [2015] NAHCMD 286 (23 November 2015) para 6.

³ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite and Others* 2013 (6) SA 499 (SCA).

⁴ *Marks & Kantor v Van Diggelen* 1935 TPD 29.

[33] However, and to my mind, the relief sought against the 17th to 23rd respondents necessarily flows from the main relief sought, namely to set aside the 23rd respondent's recognition of the resolutions made by Imprint on 23 December 2021, and to declare the appointment of the 21st and 22nd respondents as directors to be invalid. The 24th respondent was cited in his official capacity mainly for the interest it may have in these proceedings.

[34] It is also clear that as leave to appeal has been granted, that the Supreme Court is to determine whether the application for leave to amend should have been refused or not. Should the applicants succeed on appeal, the relief sought in these motion proceedings becomes a live issue for determination at the trial. It would be ill-advised to effectively usurp the Supreme Court's function to determine the appeal, if this court were, in separate proceedings to determine the merits of the application.

[35] There is clearly a dispute between the same parties concerning the same cause of action, pending before the Supreme Court, and the respondents have proved the elements of the defence raised.

[36] Accordingly, the following order is made:

1. The respondents' point in limine of *lis pendens* is upheld.
2. The applicants must pay the respondents' costs in this application, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.
3. The matter is postponed to **29 April 2024** at **15h30** for a Status hearing.
4. The parties are directed to file a status report outlining the further conduct of the review application on or before **24 April 2024**.

E M SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANTS:

T Muhongo

(with him, S Shimakeleni)
Instructed by
Shakwa Nyambe & Co. Inc.,
Windhoek

1ST TO 17TH RESPONDENTS:

S Rukoro
Instructed by
Williams Legal Practitioners,
Windhoek