REPORTABLE

CASE NO.: SA 35/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

EXECUTIVE PROPERTIES CC	**FIRST APPELLANT**
FIRST NATIONAL BANK OF NAMIBIA	**SECOND APPELLANT**

and

OSHAKATI TOWER (PTY) LTD	**FIRST RESPONDENT**
GEORGE NAMUNDJEBO	**SECOND RESPONDENT**
REGISTRAR OF DEEDS	**THIRD RESPONDENT**

Coram:	Maritz, JA, Mainga, JA *et* Strydom, AJA
Heard on:	19/03/2012
Delivered on:	13/08/2012

APPEAL JUDGMENT

STRYDOM AJA:

[1] By notice of motion the respondent, Oshakati Tower (Pty) Ltd (*Oshakati Tower*) claimed as against the first and second appellants, respectively cited in the Court *a quo* as first and third respondents, as well as one George Namundjebo, cited as second respondent, the relief set out hereunder. The Registrar of Deeds, as fourth respondent, was only cited for the interest he may have in the relief sought, namely-

> "1. Declaring the agreement between applicant and first respondent in terms whereof the latter purchased the following property from applicant invalid and of no force and effect, i.e.
>
> Erf No 1314 Oshakati (Extension 4)
> In the town of Oshakati
> Registration division 'A', Oshana Region.
>
> 2. Directing and ordering the fourth respondent to cancel the entry in the Deeds Register indicating that the aforesaid property belongs to first respondent.
>
> 3. Directing and ordering the fourth respondent to register the aforesaid property in the name of applicant in the Deeds Register.
>
> 4. Directing fourth respondent to cancel the first mortgage bond registered in favour of third respondent against the aforesaid property.
>
> 5. Ordering second respondent to pay the costs of the application save insofar as any of the other respondents may oppose it, in which event ordering the respondents so opposing it to pay the costs of the application together with second respondent jointly and severally.
>
> 6. Further and/or alternative relief."

[2] Executive Properties (*Executive*), First National Bank of Namibia (*FNB*) and George Namundjebo(*Namundjebo*), filed notices to oppose the application. In regard

to Executive and FNB answering affidavits were filed. However, although Namundjebo gave instructions to a legal practitioner, and a statement was drafted on his behalf, he never signed the statement. The statement nevertheless found its way into the record and formed the basis for an application to refer the matter for *viva voce* evidence, which was brought by Executive, supported by FNB. This application was dismissed by the Court *a quo* and the matter was decided on the affidavits filed by the parties.

[3] Oshakati Tower was successful and an order was issued by the learned Judge *a quo* substantially in the form set out in the notice of motion.

[4] Both Executive and FNB gave notices of appeal in which they attacked the Court's refusal to refer the matter for evidence and the Court's finding, on the merits, in favour of Oshakati Tower. However both appellants did not timeously comply with Supreme Court Rule 8(3) and did not inform the Registrar of the Court that they had entered into security for the costs of appeal of Oshakati Tower as a result whereof their appeals lapsed. (See Rule 8(3) read with Rule 5(5) and *Ondjava Construction CC v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) at par [5]). This necessitated both parties to apply for condonation and to ask this Court to re-instate their appeals. I shall deal with this issue at a later stage.

[5] Mr. Udo Manfred Stritter deposed to the founding affidavit on behalf of Oshakati Tower in the proceedings *a quo*.He, together with Namundjebo, one HE List,

CL List and S Thieme constituted the Board of Directors of Oshakati Tower. The only asset of the companyconsisted of a build-up property situated in Oshakati Township which is the subject matter of the litigation in this case.

[6] During January 2005 it came to the knowledge of the deponent that a third party claimed to be the owner of the said property. Further investigation brought to light that the property was transferred to Executive during December 2004. A Deed of Sale further showed that the property was sold to one Shamil Dirk, or his nominee, by Namundjebo, purporting to represent Oshakati Tower and claiming that he was duly authorized to conclude the sale. The purchase price was N$4.2 million which was paid over to Namundjebo who in turn pocketed the money and did not payOshakati Tower. Mr. Stritter denied that any resolution was taken by the Board of Directors to sell the property. He stated that if such a document was produced to the conveyancerit was false and it was furthermore untrue that Namundjebo was authorized to sell the property. Mr. Stritter further stated that Mr. Shamil Dirk is the only member of Executive in whose name the property was transferred.

[7] It was a condition of the sale thatthe purchaser would be able to acquire a loan to finance the purchase. This brought FNB into the picture. It advanced a loan to Executive in an amount of N$4.752 million against the registration of a first mortgage bond over the property in its favour.

[8] Mr. Shamil Dirk deposed to an affidavit on behalf of Executive. He stated that he *bona fide* believed that Namundjebo was duly authorized to represent OshakatiTower. Since the property was transferred to Executive, it had expended an amount of N$724763,08 to effect improvements to the property. Mr. Dirk squarely raised the issue of estoppel on the basis that, if Oshakati Tower was at all times aware that Namundjebo was endeavouring to sell the property and it stood by, knowing that he was not authorized to do so,the company would be estopped from raising his lack of authority.

[9] On behalf of FNB it was stated that the purchase price for the property was indeed paid to Namundjebo. If, at the time, FNB was aware of the allegation that he did not have authority to sell the property, FNB would not have advanced the money or agreed to take the property as security for the loan. It was further alleged that before re-transfer of the property could take place, and whatever the outcome of the application,Oshakati Tower will have to pay to FNB the outstanding amount on the bond in order to be able to effect cancellation thereof.A plea of estoppel was also raised by FNB on the same grounds as raised by Executive.

[10] The pleas of estoppel raised by Executive and FNB were based in anticipation of an affidavit by Namundjebo in which he intended to allege that Mr. Stritterhad been aware of the fact that he was attempting to sell the property.

[11] In reply Mr. Stritter denied that he was aware of the fact that Namundjebo was going to sell the property. In a supplementary affidavit Mr. Stritter referred to his founding affidavit in which he stated that the property sold was the only asset of the companyand submitted that such sale was prohibited by the provisions of sec. 228 of the Companies Act, Act No 61 of 1973, unless prior approval thereto was given by shareholders in a general meeting or later ratified by shareholders in such meeting. At the time the shareholders of the company were:

CL List: 1 share

HE List: 1 share

E Namundjebo: 1 share

G Namundjebo: 1 share

S Thieme: 1 share

WUM Properties Ltd: 1997 shares.

[12] Mr. Stritter further stated that he was also a director of WUM Properties and, as such, would have represented WUM Properties at any meeting of shareholders of Oshakati Tower.He stated that no such meeting to approve or ratify the sale of the property took place and further averred that sec. 228 was a complete answer to a plea of estoppel.

[13] Because of the supplementary affidavit filed on behalf of Oshakati Tower further affidavits were filed by FNB and Executive which dealt with the allegations set

out in the supplementary affidavit. The deponent on behalf of FNB submitted that in order to establish whether a general meeting of shareholders took place, or whether shareholders informally consented to the disposal of the property, it would be necessary to apply to have that issue referred to oral evidence in terms of High Court Rule 6(5)(g).

[14] An affidavit was also filed by attorney BJ van der Merwe who stated that, on the instructions of Namundjebo, he had drafted an affidavit with annexures which he sent to Mrs. Aggenbach as Namundjebo wanted her to represent him. This affidavit with annexures was handed to Namundjebo and was, to his knowledge, not signed by him. Mr. van der Merwe submitted that in order to have a fair trial Executive should be permitted to hear the evidence of Namundjebo and Mr. Stritter.

[15] In reply Mr. Stritter reiterated his denial that he was aware of the sale of the property and said that he only became aware thereof during January 2005.

[16] This then constitutes the evidence on the main appeal but, as indicated earlier herein, there was also a substantive application (the referral application) to refer certain issues for *viva voce* evidence. This application was dismissed by the Court *a quo* and Executive and FNB also appealed against this dismissal. If the latter appeal is successful it follows that the matter will have to go back to the High Court to hear the evidenceand then to consider the main application afresh.

[17] Argument in the referral application was heard on 24 November 2008 and judgment was promptly given on 28 November 2008. That happened before argument was heard on the main application. This application was launched by Executive and was supported by FNB. The relief claimed by Executive in its Notice of Motion was as follows:

> "1. Condoning the first respondent's late filing of this additional affidavit.
>
> 2. That the matter be referred to oral evidence, based solely on the information currently contained in the record and affidavits filed alternatively that the matter be referred to oral evidence, based on the documents in the affidavit of Mr. Erasmus, annexed hereto.
>
> 3. That the wasted costs be in the cause."

[18] The founding affidavit supporting the application was made by Mr. Erasmus, the legal practitioner of Executive. He gave notice of a point*in limine* which were to be argued by counsel. Mr. Erasmus stated that he was approached by Namundjebo to represent him after the previous legal practitioner had issued summons against Namundjebo for outstanding fees. He accepted the brief. In the file handed to him he found various letters and documents which were previously sent to the legal practitioner of Oshakati Tower and to which no reply was received. Mr. Erasmus attached these documents which he alleged were supporting the case of his client. One of these documents was in the form of a settlement and, so it was alleged, clearly stipulated an agreement between Namundjebo and Mr. Stritter of WUM

Properties Ltd. It was alleged that in terms thereof Namundjebo took over the shares of WUM Properties and that the sale of those shares were for credit.

[19] A further document referred to was an unsigned statement by Namundjebo which was drafted on the former instructions by his erstwhile legal practitioner, Mr. van der Merwe. In this document it was stated that all the directors and shareholders were aware of the fact that he, Namundjebo, was endeavouring to sell the property. They only instituted this application when it became clear that he was not going to pay his debt to Ohlthaver and List.

[20] On the strength of these documents Mr. Erasmus submitted that a case was made out for the referral of the matter to *viva voce* evidence to determine the status of the agreement between Namundjebo and Mr. Stritter and to determine whether all directors and shareholders were aware that he was selling the property of Oshakati Tower.

[21] In reply Mr. Stritter denied that there was enough material put before the Court to refer the matter for oral evidence and stated that the application was merely a strategy by Executive to attempt to put a coherent defence before the Court. The deponent commented on the various documents attached to the affidavit of Mr. Erasmus and in regard to the unsigned statement by Namundjebo he alleged that no explanation was given why the statement was not signed and intimated that at the hearing, application would be made to strike out the offending portion of the

paragraph in Erasmus' affidavit, as well as the statement itself, on the basis that it constituted inadmissible hearsay.

[22] Mr. Stritter admitted the agreement between himself and Namundjebo for the sale of WUMProperties' shares in Oshakati Tower but said that it was a condition that the purchase price of N$3259269,82 be paid by Namundjebo by 24 February 2006. Namundjebo failed to come up with payment of the shares and the agreement lapsed for failure to fulfill the condition. Mr Stritter further denied that any shareholder consented to the sale of the property at any time or that they knew about it, nor was the sale subsequently ratified. To this extent the deponent attached affidavits by Mr. Thieme and Mr. List who confirmed what was stated by him. Mr. Thieme and Mr. List were, at the time, nominees of WUM Properties holding one share each.

[23] The point *in lime,* of which notice was given by Mr. Erasmus in his affidavit, concerned the *locus standi* of Oshakati Tower to rely on the provisions of sec. 228 of the Companies Act, 1973. It was submitted that only the shareholders of the company could rely on that provision. I agree with Mr. Frank that in dealings with a company the company acts through its directors and not shareholders. There is no indication that the articles of the company prohibited the directors to sell the asset of the company so that, as far as the company was concerned, their action was *intra vires* their powers although *ultra vires* the provisions of sec. 228. (See*Farren v Sun Service SA Photo Trip Management (Pty) Ltd,* 2004 (2) SA 146 (CPD). A reading of the cases on this issue shows that the company may rely on the provisions of this section in

regard to claims against the company or the provisions of the section could be raised as a defence against a claim by a company. (See generally *Levy and Others v Zalrut Investments (Pty) Ltd,* 1986 (4) SA 479 (WLD); *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd and Others,* 1996 (3) SA 134 (NPD) and *Farren v Sun Service SA Photo Trip Management (Pty) Ltd, supra.*)

[24] The point *in limine* must therefore be dismissed.

[25] Mr. Frank, assisted by Mr. Corbett, in turn submitted that FNB's interest in the proceedings was limited to its mortgage bond and that it wasnot open to it to rely on defences which were raised by Executive in regard to the claim by OshakatiTower. This argument was based on the eventuality that the Court might refuse the application for condonation by Executive. As set out later in this judgmentI have come to the conclusion that the application for condonation by Executive should be allowed and consequently the argument of Mr. Frank will have little or no effect on the issues to be decided.

[26] With reference to the oft quoted case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,* 1949 (3)SA 1155 (TPD), Mr. Heathcote, assisted by Mr. Maasdorp for the appellants, submitted that the categories set out therein when a Court will refer a matter for evidence or trial, and more particularly the categories set out under sub-paras (a) and (d) on page 1163 of the case, combined with Article 12 of the Constitution, apply to the present instance. Counsel submitted that knowledge by

the directors and shareholders is material to the outcome of the case. If they all knew about the sale of the property, as was alleged by Namundjebo in his unsigned statement, yet sat back and only complained once Namundjebo neglected to pay what he allegedly owed them, Oshakati Tower's application would have been defeated. Counsel submitted that the learned Judge *a quo,* in dismissing the application, did not apply the correct test.

[27] Counsel furthermore pointed out that there was also the issue whether, subsequent to the institution of these proceedings, there was a settlement of the dispute between Mr. Stritter and Namundjebo as allegedly evidenced by the written documentattached to the affidavit of Mr. Erasmus. He submitted that if this document was indeed a settlement of the present dispute it would also non-suit the application by Oshakati Tower.

[28] Mr. Frank, in turn,submitted that Namundjebo, who was at the time represented by a legal practitioner, knew what serious allegations were made against him but nevertheless decided not to answer these allegations onaffidavit must thereby be regarded as not to dispute those allegations. If every shareholder knew about his negotiations to sell the property and had consented thereto there was no reason for him to forge a resolution of a Board meeting which was purportedly held in Windhoek on 8 December 2004. This is also proved by his reluctance to sign an affidavit setting out those facts.

[29] Counsel furthermore argued that even ifNamundjebo was negotiating on behalf of the company it did not mean that he was authorized to enter into any agreement. In terms of sec 228 of the Companies Act it was still required for the shareholders to ratify the specific transaction. Counsel therefore submitted that there was no basis for the application of category (a) set out in the *Room Hire* case and that reliance thereon was futile.

[30] As far as category (d), set out in the *Room Hire* case, was concerned, counsel referred the Court to various cases and the test for reference to oral evidence laid down therein and submitted that in the present instance there was no grounds to doubt the correctness of the allegations on behalf ofOshakati Tower. (See *Moosa Bros & Sons (Pty) Ltd v Rajah,* 1975 (4) SA 87 (D&CLD) at 92G to 93H.) Counsel further submitted that as far as FNB was concerned the representations made to them were minimal and unless they could show that Oshakati Tower represented to them that the power of attorney to transfer the property was genuine, or that they tacitly endorsed it, they could not succeed. They in any event did not make any of the allegations necessary to substantiate such a defence.

[31] In regard to the settlement agreement Mr. Frank submitted that neither FNB nor Oshakati Tower were parties thereto so that even if evidence was permitted in that regard it would not affect the position of FNB. Counsel further submitted that to effect a transfer of shares it was necessary that the seller cede to the purchaser the rights sold and that the purchaser paid the purchase price. (See LAWSA: 1st Reissue:

Vol. 4 part 1 para. 226.) Counsel submitted that there was no evidence to gainsay the allegation by Mr. Stritter that the agreement was conditional upon payment by Namundjebo of the purchase price on 24 February 2006, and that two years after the date of payment there was still no documentary evidence to substantiate a credit sale.

[32] Although,at the time of the hearing of the application, counsel for Oshakati Tower submitted that the unsigned statement by Namundjebo should be struck out the learned judge did not do so but decided that he should regard it as a document containing allegations which were not substantiatedby other cogent evidence and, as there was no such evidence substantiating the statement, it could not create a dispute of fact. In regard to the agreement between Mr. Stritter and Namundjebo the Court found that there was no scope to interpret the document as a credit sale or a settlement agreement between the parties.The Court consequently dismissed the application.

[33] In the *Room Hire* case the Court stated that one of the clearest ways in which a dispute of fact arises is “(a) when the respondent denies all the material allegations made by the various deponents on the applicant’s behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed”. Mr. Heathcote submitted that it was particularly this excerpt from the case which applied to the present matter.

[34] In instances where application is made to refer evidence on affidavit to evidence *viva voce* the general rule laid down by the South African Appeal Court in the case of *Hilleke v Levy* 1946 AD 214 is as follows:

> "In *Prinsloo v Shaw* (1938 AD 570) it was said that it is not disputed that the general rule of our practice is that, where the material facts are in dispute, a final interdict will not be granted merely on the affidavits. In *Mahomed v Melk*(1930, T.P.D. 615), which was an application for sequestration, it was held that even where, on the affidavits, there was a balance of probabilities in favour of the creditor's version, the Court must be satisfied that a *viva voce* examination and cross-examination will not disturb this balance of probabilities before making an order for sequestration on affidavits.(p 219.)"

[35] More recently the test was restated in the case of *Kalil v Decotex (Pty) Ltd and Another,* 1988 (1) SA 943 (AD) at 979 H – I as follows:

> "Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."

[36] In the matter of *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others,* 2008 (2) SA 184 (SCA) at 204, Cloete, JA, also dealt with

the principles applicable where an application was launched to refer the matter to evidence *viva voce,* and stated as follows:

> "[55] No affidavits were filed by valuers employed by, or officials in the employ of or who had been in the employ of, the respondents who had personal knowledge of what had transpired when the properties were valued and the purchase prices determined. There was no indication that such persons were available to the respondents, or would give evidence in support of the allegations of fraud if subpoenaed.
>
> [56] Where a respondent makes averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit that contains allegations which *prima facie* establish that defence, the respondent should in my view, subject to what follows, be entitled to invoke Land Claims Court Rule 33(8) or Uniform Rule of Court 6(5)(g). Such a case differs from the situation discussed in *Peterson v Cuthbert & Co Ltd* and the *Room Hire* case, alluded to in that part of the *Plascon-Evans* decision quoted in para [24] above which refers to those two cases. There, the respondent puts in issue the facts relied upon by the applicant for the relief sought by the latter. In the situation presently being considered the respondent may not dispute the facts alleged by the applicant, but do seek an opportunity to prove allegations which would constitute a defence to the applicant's claim. In the former case the respondent in effect says: given the opportunity, I propose showing that the applicant will not be able to establish the facts which it must establish in order to obtain the relief it seeks; and in the latter the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence.(It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent, because *ex hypothesi* the respondent is unable to produce evidence in affidavit form in support of its version.) It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement

> deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent."

(See further in this regard *Trust Bank van Afrika v Western Bank en Andere,* 1978 (4) 281 (AA) at 294G – 295A; *Wiese v Joubert en Andere,* 1983 (4) SA 182 (OPA) at 201E – H and *Bocimar NV v Kotor Overseas Shipping Ltd,* 1994 (2) 563 (AD) at 587C – G.)

[37] A reference to evidence *viva voce* will generally only be granted where, in the words of Fleming, J, "it is found 'convenient', wherethe issues are 'clearly defined', the dispute is 'comparatively simple' and a 'speedy determination' of the dispute is 'desirable'."(*Standard Bank of South Africa Ltd v Neugarten and Others,* 1987 (3) SA 695 (WLD) at 699F). (See further *Room Hire*-case, *supra,* 1164, 1165 and *Wiese v Joubert, supra,* at 202C-E.)

[38] In granting or dismissing an application to refer affidavit evidence to evidence *viva voce* the Court exercises a discretion and a Court of Appeal will only interfere with the exercise of such discretion if it was not exercised judiciously or if it was exercised on a wrong principle. (See *Cresto Machines v AfdelingSpeuroffisier S.A. Polisie,* 1970 (4) SA 350 (TPD) at 365F-G.)

[39] What this Court must now decide (and what the Court *a quo* also had to decide at the time of the application) is what the prospects are of the *viva voce* evidence tipping the balance in favour of the applicant who applied to have the matter referred to oral evidence. In the *Kalil* case, *supra*, it was stated that the Court would be less inclined to refer a dispute to oral evidence where the balance of probabilities strongly favoured the other party. In the present instance there can be no doubt that, on the affidavits, the balance of probabilities in the main application strongly favours Oshakati Tower and that, without the evidence of Namundjebo, Executive and FNB would find it difficult to overcome, more particularly, the obstacle of sec. 228 of the Companies Act.

[40] Although the purported statement by Namundjebo was not signed by him it seems to me that this Court must accept that he was the source of what was set out therein. Such finding is supported by the affidavits of Mr. van der Merwe, the erstwhile legal representative of Namundjebo, and Mr. Erasmus. That the statement emanated from Namundjebo was also not denied by Oshakati Tower. (I must point out here that the statement by Namundjebo was in answer to the founding affidavit of Mr. Stritter and did not deal with the sec. 228 issue which was only later raised by the applicant.) In the statement it is alleged that during 2004 Namundjebo indicated to Mr. Stritter that he wanted to sell the property of Oshakati Tower in order to pay his debt to Ohlthaver and List. He further stated that they were all unanimously agreed that the property was to be sold and added that, as a result,no Board meeting was necessary for that purpose. Namundjebo further repeated that all the directors and shareholders

were at all relevant times aware of the purpose of the sale and that he was conducting negotiations for and on behalf of Oshakati Tower. In the circumstances he was of the view that it was not necessary to obtain a proper power of attorney and he also did not inform FNB or Mr. van der Merwe about this.

[41] Would this evidence, if given *viva voce*, have the prospect of tipping the scales in favour of Executive and through them FNB? Mr. Frank submitted that various factors militate against Namundjebo being able to establish such defence, but, so it seems to me, the evaluation of such evidence, and whether it has the prospect to tip the scales, is not only a matter of probabilities but also whether such evidence would constitute a valid defence in law and whether, in the particular circumstances, a referral would do justice between the parties.That also goes for all other possible witnesses.The *caveat* set out in the *Minister of Land Affairs and Agriculture*-case, *supra*, that a court should be astute to prevent an abuse of its process by an unscrupulous litigant who is merely out to delay the proceedings or out on a fishing expedition, is relevant. However, I am satisfied that the parties presently before Court, namely Executive and FNB, are not abusing the process of the Court. On the affidavits it is clear that neither party has personal knowledge of what had happened between the shareholders and/or directors of Oshakati Tower and their only access to such information is the possible evidence of Namundjebo. It is no answer, as was submitted by Mr. Frank, that they could have gained knowledge from another shareholder, namely Ms. Namundjebo, as knowledge so gained is still that of the

witness and not of the parties before the Court.Knowledge of another person cannot be ascribed to the parties.

[42] To satisfy a Court that there are reasonable grounds that the evidence to be led will establish a defence may, in one instance, be easier than in another instance. Where, as is the case here, such evidence depends on the say so of what witnesses know,the evaluation thereof, at this stage, is much more difficult than instances where factual evidence could be placed before the Court. I am satisfied that the evidence to be led, and if accepted, is likely to constitute legal defences and to refuse to refer the matter to evidence may cause an injustice to Executive and FNB.

[43] As previously set out the Court *a quo* regarded the statement of Namundjebo as evidence which, as such, had to be given a certain weight and, because it was hearsay and not corroborated by other cogent evidence, was to be disregarded and was therefore not capable of creating a genuine dispute. Category (a) in the *Room Hire* case, *supra*, on which Mr. Heathcote relied, recognizes that a party may put further evidence before the Court of a witness who was not available at the time the application was launched or who refuses to sign an affidavit but would be willing to testify if subpoenaed. As it is incumbent upon such applicant to put information before the Court which would enable the Court to evaluate the evidence (See the *Bocimar*-case,*supra,* and the *Minister of Land Affairs*-case, *supra*) it is inevitable that such information could be in the form of hearsay, as was submitted by Mr. Heathcote. The purpose for which the statement by Namundjebo was put before the Court *a*

*quo*was not to prove the truth of what was alleged therein but to inform the Court what evidence the possible witness would giveto assist theCourt to evaluate such evidence and, if satisfied that it has the prospect of tipping the scale in favour of the applicant, to exercise its discretion in favour of referring the matter to evidence *viva voce.* In my opinion the Court *a quo* decided the application to refer the matter to oral evidence on a wrong principle and this Court is therefore entitled to decide the issue afresh.

[44] The application for referral to oral evidence has in my opinion the reasonable prospect of raising three different defences. The first is the settlement agreement whereby WUMProperties allegedly sold all its shares to Namundjebo. There is no clear indication in the language used, which established the agreement, that it contains a suspensive condition that unless payment would be made before a specified date that the agreement would lapse. It was submitted that the agreement in regard of payment of the shares is also capable of an interpretation that the sale of the shares was a credit transaction and that evidence was necessary to clear up this issue. Although it was denied by Mr. Stritter that credit was given, the fact of the matter is that the document was not dated and the length of time given before payment was due may be an indication whether this was a settlement subject to a suspensive condition or that credit was given. If credit was given then transfer of those shares could still be claimed by Namundjebo and WUMProperties, no longer being a shareholder of Oshakati Tower, will lack the necessary *locus standi* to bring the application.

[45] The second and third defences depend on the evidence of Namundjebo. The evidence that all the directors and shareholders were aware that he was entering into negotiations to sell the property of Oshakati Tower may constitute the defence of unanimous consent which may overcome the obstacle raised by sec 228 of the Companies Act.

[46] This section states as follows:

> **"Disposal of undertaking or great part of assets of company**
>
> (1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of –
>
> (a) the whole or substantially the whole of the undertaking of the company; or
>
> (b) the whole or the greater part of the assets of the company.
>
> (2) …
>
> (3) No resolution of the company approving any such disposal shall have effect unless it authorizes or ratifies in terms the specific transaction."

[47] Sec. 228 was enacted for the benefit and protection of shareholders. (See *Sugden and Others v Beaconhurst Dairies (Pty) Ltd and Others,* 1963 (2) SA 174 (E) at 179G and the case of *Stand 242 HendrikPotgieter Road Ruimsig* (*Pty) Ltd and Another v Gobel NO and Others,supra,* at p 4 par. 13.) In the *Sugden*case, *supra,* the following was stated by O'Hagen, J, in regard to sec 70*dec* (2) of the previous

Companies Act, Act 46 of 1926 of which sec 228 is an exact counterpart, (at 180H – 181A) namely:

> "There is no reason, in my opinion, why the principles in these decisions should not apply to the facts of the present case. It is true that s 70*dec* (2) prescribes the formality of a general meeting for the approval of the resolution to which the subsection relates; but inasmuch as the subsection was designed for the benefit of shareholders, why should the shareholders not be able to waive compliance with the formalities that are ordinarily attendant upon the convening of a general meeting? In my view, where the only two shareholders and directors express, whether at the same time or not, their approval of a transaction contemplated by s 70*dec* (2), their decision is as valid and effectual as if it had been taken at a general meeting convened with all the formalities prescribed by the Act."

[48] The principle set out in the *Sugden*case was followed in many cases and gave rise to the principle of unanimous consent. (See *Levy and Others, supra,* at p485F; *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd,* 1996 (3) SA 145 (N) at 146C; *Southern Witwatersrand Exploration Co Ltd v BisichiMining plc and Others,* 1998 (4) SA 767 (W) at 774 F – H. It has also been accepted by the South African Appeal Court, see e.g. *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd,* 1975 (1) SA 572 (A) at 581C – 582B; *Alpha Bank Bpk en Andere v Registrateur van Banke en 'n Ander,* 1996 (1) SA 330 (A) at 348G – I.)

[49] Considering the above cases I can think of no reason why the principle set out in these cases should not also apply to sec 228 of our Companies Act. From this it follows that the formality of a general meeting, as required by the section, can be

waived by shareholders who may give their consent to a sale informally. This may even be done separately by the shareholders. (See *Sugden's*-case, *supra.*)There is no allegation by Namundjebo that a formal general meeting was held whereby shareholders registered their consent to the sale of Oshakati Tower's only asset but, as set out above, no formal meeting was necessary and, depending on the evidence to be given, it was open for shareholders to give their consent separately and informally.

[50] The third possible defence is one of estoppel.

[51] In regard to the application of the above provision Mr. Heathcote submitted that, although it was correct that a plea of estoppel could not be raised against the directors of a company who acted contrary to the provisions contained in the section, it did not follow that such a plea could not be raised against the shareholders. Counsel argued that the section is primarily to protect the interests of shareholders and that they could be estopped if they represented that a state of affairs existed which resulted in an innocent party acting thereon to his detriment.

[52] Mr. Frank submitted that even if, what was set out in Namundjebo'saffidavitwas reiterated under oath, it did not follow that he was authorized to conclude the agreement. Counsel added to this that there was no evidence that there was authorization or ratification "in terms the specific transaction" as required by sec. 228.

[53] A reading of the authorities concerning sec. 228 shows that there is a difference of opinion amongst academics and also amongst judges whether, where sec 228 applies, estoppel and the rule in the *Turquand* casecan be applied where directors have acted contrary to the prohibition set out in the section. In an *obiter dictum* in the matter of *Levy and Others v Zalrut Investments (Pty) Ltd,* 1986 (4) SA 479 (WLD), van Zyl, J, was of the opinion that in appropriate circumstances a party could rely on estoppel and that the rule in the *Turquand* case could also be raised where an opposite party raised the defence of non-compliance with the internal rules of the company. However, Cleaver, J, in the matter of *Farren v Sun Service SA Photo Trip Management (Pty) Ltd,* 2004 (2) SA 146 (CPD) was of opinion that, in so far as the application of the rule in *Turquand* negated the provisions of sec. 228, it could not apply. As far as estoppel was concerned the learned Judge stated that a defence of estoppelwould not be permitted if by doing so a result would be achieved which was contrary to the intention of the Legislature. (See*Strydom v Die Land- enLandboubank van Suid-Afrika,* 1972 (1) SA 801 (A).

[54] Moreover, in the matter of *Stand 242 HendrikPotgieter Road Ruimsig (Pty)Ltd and Another v Gobel NO and Others,* 2011 (5) SA 1 (SCA) the South African Supreme Court of Appeal decided that where the purpose of sec. 228 was to protect shareholders, the application of the *Turquand*rule would deprive them of that protection. The Court consequently found that the *Turquand*rule did not apply to sec. 228.

[55] Mr. Heathcote's concession that a defence of estoppel cannot be raised against the directors of a companywas therefore correctly made. This is so because, where shareholders have not consented to the sale of the company's only asset by its directors, allowing the defence of estoppel to be raised against the directors would similarly have negated the protection afforded by sec. 228 to shareholders and would therefore not have been permissible. However, Mr. Heathcote's submission that a plea of estoppel can, in appropriate circumstances, be raised against shareholders of a company has, in my opinion, merit.

[56] To apply the doctrine of estoppel against shareholders who, by their representation, have caused a *bona fide* party to act thereonto his detriment would, in my opinion, not result in estoppel operating to allow a contravention of sec. 228. To allow them in such circumstances to still claim the protection of the section runs counter to the principle that parties should not be allowed to benefit from their own wrongs.

[57] In the *Farren*-case, *supra,* Cleaver, J,did not exclude the possibility of estoppel being raised against the shareholders but it was not necessary for the Court to decide the issue. (p157 par. 18). Also in the *Stand 242*-case the issue was not decided because the argument based on estoppel was not persisted in as it was accepted that no representation was made by the shareholders.

[58] For the reasons set out above I agree with Mr. Heathcote that in appropriate circumstances the doctrine of estoppel can be raised against shareholders who enjoy the benefit of sec 228.

[59] Because of what I have stated earlier in regard to the statement of Namundjebo, this Court must leave the issue whether there was any representation made by the shareholders of Oshakati Tower on which Mr. Dirk orExecutivehas been misled into believing that Namundjebo had been duly authorized to enter into the sales agreement of Oshakati Tower's property to the Court *a quo* to decide after having heard the evidence. As I have pointed out before, the statement by Namundjebo did not address the issue of sec 228 and it is possible that further facts may be forthcoming from the evidence to be heard by the Court *a quo.*

[60] Both parties had to apply for condonation and re-instatement of their appeals as they did not comply with Rule 8(3) of the Supreme Court Rules namely to provide security for the costs of Oshakati Tower. Failure to do so resulted in the lapse of the appeals. Mr. Frank did not oppose the application by FNB but strongly opposed the application byExecutive. In both these instances the legal practitioners of the applicants explained their non-compliance with the Rules of the Court.In the former instance the legal practitioner fully explained the delay caused, which was not inordinate.In the latter instance the problem seems to me also to be that the legal practitioner did not know what the Rules required. In this instance there was also a delay of some months which was not fully explained.

[61] Legal practitioners must take notice that ignorance of what the Rules provide is not an acceptable explanation. If, in this instance, the practitioners had taken the time to read the Rules, it would have been clear what was required of them.

[62] In the matter of *S v van der Westhuizen,* 2009 (2) SACR 350 (SCA) it was stated that a Court dealing with an application for condonation must consider all relevant facts. At p353c-d the following was stated by the learned Judge:

> "Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance are taken into account. These factors are interrelated for example, good prospects of success on appeal may compensate for a bad explanation for the delay."

[63] Although expressed in regard to a criminal matter those principles are also, in my opinion, applicable where an application for condonation concerns a civil matter. In neither of the two applications was there an inordinate delay in the set down of the appeal as a result of the non-compliance. In regard to the application by Executive, Mr. Frank submitted that the delay of some 11months before steps were again taken to prosecute the appeal is a clear indication that the applicant had abandoned the appeal. I do not think that such an inference is justified. The applicant has timeously taken all steps to prosecute the appeal up to the time it was required to comply with Rule 8(3). Although the explanation for the delaywas not adequate, the delay was

not,in my view, attributable to Executive. Furthermore the matter is of great importance to Executiveas it stands to lose the property bought by it for some N$4 million and to be left with a debt to FNB in that amount whilst only having the cold comfort of suing Namundjebo to make good its loss.Lastly,given the conclusion of this Court on the merits, the appeal had very strong prospects of success, to say the least. In these circumstances, I am of the opinion that this Court must condone the appellants' non-compliance of the Rules of this Court.

[64] In the result the following order is made:

1. The appellants' non-compliance with the provisions of Rule 8(3) of the Supreme Court Rrules is condoned and the appeals are re-instated.

2. The appeals succeed with costs, such costs to be inclusive of the costs consequent on the employment of one instructing and two instructed counsel.

3. The Court *a quo's* refusal to refer the matter to *viva voce* evidence,as well as that the Court's finding in favour of the respondent on the merits and costs, are hereby set aside,and the following order is substituted, namely:

"(a) In terms of the provisions of Rule 6(5)(g) of the Rules of the High Court the matter is referred for oral evidence on the following issues:

(i) The status and effect of the written agreement between Mr. Stritter and Namundjebo in terms whereof WUM properties sold all its shares in Oshakati Tower to the latter;

(ii) whether there was unanimous consent, as meant by sec 228 of the Companies Act, 1973, by all shareholders to the particular transaction whereby Namundjebo had sold the only asset of Oshakati Tower to Mr. Dirk and/or Executive Properties CC; and/or

(iii) whether the shareholders, by conduct or otherwise, represented to Mr. Dirk and/or Executive Properties that Namundjebo was duly authorized to sell the property of Oshakati Tower and, by acting thereon, did so to his or its detriment.

(b) The deponents to affidavits in this matter are ordered to appear personally and the parties shall also be entitled to

subpoena any other person to give evidence *viva voce* in connection with the above factual disputes, provided that notice thereof, as well as a short summary of the evidence to be given by such witness, is given to the opposing party or parties at least three days before the witness will testify.

(c) The provisions of Rules 35 and 36 of the High Court Rules in connection with discovery and inspection of documents, shall *mutatis mutandis* apply.

(d) The costs occasioned by the hearing shall be costs in the cause.

(e) The wasted costs occasioned by the respondent's opposition to the application for referral for *viva voce* evidence shall be paid by the respondent and include the costs of one instructed and two instructing counsel."

_____

STRYDOM AJA

I agree.

_____

MARITZ JA

I agree.

_____

MAINGA JA

Counsel on behalf of appellants:	Mr. R. Heathcote
Assisted by:	Mr. R.L. Maasdorp
Instructed by:	Koep& Partners
Counsel on behalf of first respondent:	Mr. T.J. Frank SC
Assisted by:	Mr. A. Corbett
Instructed by:	Engling, Stritter & Partners