REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

***EX TEMPORE* JUDGMENT**

In the matter between: Case no: A 35/2013

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY APPLICANT

and

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES RESPONDENT

***In re*:**

In the *ex parte* application of:

In re: Declaration of rights in case no: 244/2007 (Hendrik Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority & another) pursuant to Supreme Court judgment in case no: SCR1/2008 (Hendrik Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority & 2 others)

Neutral citation: *Namibia Financial Institutions Supervisory Authority v Christian t/a Hope Financial Services* (A 35/2013) [2014] NAHCMD 54 (28 January 2014)

Coram: GEIER J

Heard: **27 January 2014**

Delivered: **28 January 2014**

Released: **19 February 2014**

Flynote: Practice - Applications and motions - Ex parte applications – application for leave to oppose - in terms of Rule 6(4)(b) – authority to bring application challenged –

Practice - Applications and motions - Motion proceedings - Institution by legal person – such applicant bearing onus to prove authority to institute proceedings where authority conferred by resolution on person to act on behalf of an applicant legal persona which purports to authorise the relevant proceedings, if properly and substantially challenged by a respondent - such applicant, in reply, cannot merely remain content with the text of a resolution (or for that matter an extract of minutes of a meeting whereat the alleged resolution was taken). In that case an applicant is required to present concrete evidence that the resolution (or for that matter the relevant extract of a minute) indeed is what it purports to be, namely, evidence of a decision properly taken by the applicant at a properly constituted board meeting to authorise the legal proceedings and the person and/or persons that are to act on its behalf.

Applicant failing to prove authority – Application in terms of Rule 6(4)(b) dismissed.

Practice — Practice - Parties - Joinder - Non-joinder of necessary party - Inherent jurisdiction of Court to require joinder of such party in proceedings already instituted - In casu - Respondent - by way of an *ex parte* application – seeking an order declaring certain judgments granted in favour of applicant null and void – such relief directly impact on the rights that the other party has acquired through the judgments which are to be assailed. Before any such judgment is set aside – on whatever ground - the affected party will be entitled to defend any rescission attempted in this regard -

Under the common law the Court has the inherent power to order the joinder of further parties to a case - which has already begun - to ensure that all persons - with the requisite interest in the subject matter of the dispute - and whose rights may be affected - are before the Court – the applicant was such a party – despite dismissing the applicant's application for leave to oppose the ex-parte application, which the respondent had brought on an *in limine* objection – court nevertheless ordering the joinder of that applicant as a respondent to the main application-

Summary: The facts appear from the judgment.

ORDER

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1. The respondent is directed to bear the costs occasioned by the Rule 30 application brought on 28 November 2013.

2. The late filing of the replying affidavit, delivered on 07 November 2013 by the applicant in the Rule 6(4)(b) application is hereby condoned.

3. The respondent in the Rule 6(4)(b) application is directed to pay the costs of opposition to the condonation application.

4. The application for leave to oppose in terms of Rule 6(4)(b) is dismissed.

5. The applicant in that application is to pay the respondent's costs in the Rule 6(4)(b) application, such costs are to be limited to the respondent's actual disbursements, reasonably incurred.

6. Namfisa is hereby joined as a respondent in the ex parte application brought under case no. A 35/2013.

7. Namfisa is to give notice of its intention to oppose case A 35/2013 within 5 days of this order and to file its answering papers thereto within 14 days of the delivery of its notice of intention to oppose, if it so chooses.

8. The respondent is to deliver its replying affidavit thereto within 7 days of the delivery of any answering affidavits.

9. The matter is postponed to 18 March 2014 at 15h30 for a case management hearing.

JUDGMENT

GEIER J:

[1] Four interlocutory applications were initially placed before the court for determination. They were:

a) whether or not an additional affidavit, filed by the respondent on 27 November 2013, should be admitted onto the record of a Rule 6(4) (b) application pending before the court;

b) a Rule 30 application which had been launched in that regard and which was aimed at having such additional affidavit struck out as an irregular step or proceeding;

c) whether or not the court should condone the late filing of the replying affidavit delivered by the applicant in the application for leave to oppose on 7 November 2013;

d) whether or not the applicant should in the main application should be granted leave to oppose the *ex parte* application bought by the respondent during February 2013 under case number A 35/2013 as contemplated in Rule 6(4)(b).

[2] At the hearing of the matter the respondent indicated that he no longer wished to have the additional affidavit delivered on 27 November 2013 admitted onto the record.

[3] The first issue was thus disposed of.

[4] This stance also consequentially disposed of the related Rule 30 application, save for the issue of costs.

[5] Mr Philander who appeared on behalf of the applicant submitted in this regard that the procedure, which the respondent had utilized in the filing of the additional affidavit, was defective and that this had necessitated the bringing of the Rule 30 application. Costs should thus be awarded to his client.

[6] The respondent on the other hand took the view that he had no other avenue open to him, once faced with a replying affidavit but to file a further affidavit. He should thus be absolved from having to pay the costs of the Rule 30 application.

[7] That may be so - it is however uncontroverted that no application for leave to file that particular affidavit accompanied the filing thereof, which was simply delivered at the time, and the respondent had only subsequently indicated that he would seek the requisite leave at the hearing of the matter, orally.

[8] It is clear that the procedure employed by the respondent in this regard was irregular. If the additional affidavit would have been tendered under cover of an application properly setting out the basis on which the indulgence would be sought, allowing the other party to consider such grounds, in order to evaluate whether or not to oppose such application, it would have been another matter.

[9] It is also clear that, if the additional affidavit would have been admitted onto the record, the other side should have to be given an opportunity to reply thereto, if necessary, and if desired. The application from the bar could thus have brought about the postponement of the matter.

[10] In any event it is as a general rule normally so that the party withdrawing notices or proceedings is saddled with the wasted costs resulting from such aborted process.

[11] I do however not agree with Mr Philander that the irregular step, triggering the Rule 30 application, was vexatious.

[12] It is for these reasons that I award the cost of the Rule 30 application to the applicant in the Rule 30 proceedings.

[13] In such circumstances the condonation application, for the late filing of the replying affidavit, as well as the main application for leave to oppose, still require determination.

AD CONDONATION

[14] The applicant in the main application for leave to oppose had to file its replying affidavits on or before 6 November 2013. It served the affidavit on the following morning - that is on 7 November 2013 - on the respondent, at 09h20 hours, and filed same at court at 10h46.

[15] On the next day - 8 November 2013 - an application for the condonation of the late filing of this affidavit was brought.

[16] This application was opposed.

[17] In support of the application the applicant contented that due to heavy work commitments and also a staff issue, the applicant's legal practitioner could only attend to the attestation of the reply around 16h20 on 6 November, which was then delivered to him about 17h00, and thus, the affidavit could only be served on the following morning. The applicant also addressed its prospects of success.

[18] Importantly the applicant also alleges that the non-compliance in this instance was negligible and that the respondent was not prejudiced at all as a result.

[19] The respondent vehemently opposed the granting of condonation. He took a number of points such as the lack of authority, that the founding affidavit was not improperly commissioned before the Government Attorney, that the application was not set down on not less than five days' notice, as per the applicable practice directive, and that there was a total disregard of the rules of court by the applicant's legal practitioner of record.

[20] The matter can- and should be decided summarily.

[21] The delay was indeed minimal and thus negligible. The non-compliance was not significant. Nor can it be said that the applicant's legal practitioner was grossly negligent. He should of course have known better, particularly in the circumstances of the past history of litigation between the parties, where no mercy was asked for and none given.

[22] The main application for leave to oppose is also not frivolous in the circumstances of the matter or without prospects of success. Good cause for the relief sought there has been shown.

[23] The opposition to this application, in these circumstances, was however totally unwarranted in my view.

[24] As far as the question of costs is concerned I will thus adopt the approach that of my brother Mtambanengwe J applied *Transnamib v Essjay Ventures Limited* [1] where he states:

'Lastly in the *Stolly's Motors* case supra[2] at 809 De Villiers JP dealt with the question of unnecessary opposition to an application for the uplifting of a bar where the delay, like in the present case, was for one day only, and concluded that 'the proper course for the respondent to take was to submit the matter to the judgment of the Court and not to oppose it further. . . '. The learned Judge President ordered, as he had done for similar reasons, in *Gool v Policansky* supra[3], respondent to pay the costs of opposition to the application. I adopt the same approach in this matter because I do not think that the respondent should have set down the main action in the manner he did or that he should have opposed this application at all.'[4]

[25] In the result the application for condonation is granted and the respondent is to bear the costs of opposition to this application.

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[1] 1996 NR 188 (HC)
[2] *Stolly's Motors Ltd v Orient Candle Company Ltd* 1949 (4) SA 805 (C)
[3] *Gool v Policansky* 1939 CPD
[4] at 196 D to H

THE APPLICATION IN TERMS OF RULE 6(4)(b)

[26] The respondent, by way of an *ex parte* application, is seeking certain declaratory relief which *inter alia* is aimed at setting aside certain judgments, granted in past litigation, in applicant's favour, against the respondent.

[27] Inexplicably, given this background, the respondent has however elected to launch and continue the main application on an *ex parte* basis, without citing NAMFISA as a respondent, and despite openly declaring, at the first hearing of this matter, on 22 February 2013, that NAMFISA had an interest in these proceedings.

[28] The following exchange is reflected on record - and I quote:

'Mr van Vuuren I appear on behalf of NAMFISA in this matter. My Lord on instructions of LorentzAngula Incorporated. My Lord, the Notice to Oppose was served this morning only. My Lord I beg to hand up the original together with the Power of Attorney of this matter My Lord.
Court: Yes any objection that the Notice to Oppose be handed up.
Mr Christian: I have no objection.
Court: Thank you please hand it up Mr van Vuuren.
Mr van Vuuren: Thank you My Lord.
Court: Mr Christian of course it appears from your *ex parte* application that it was served on NAMFISA?
Mr Christian: Yes.
Court: So?
Mr Christian: As an interested party.
Court: That partly related to them yes as an interested party and you will also agree that the declaration of rights which you seek under cases A244/2007 and I 2232/2007 all had NAMFISA as the Respondent.
Mr Christiaan: Yes.
Court: And I think that is why you probably caused your ex parte Application to be served on them.
Mr Christiaan: Yes.
Court: So that I suppose would explain the appearance here this morning because they received the notice.
Mr Christiaan: Yes.'

[29] It so emerges that the respondent not only served his *ex parte* application at the time on the applicant but that he also acknowledged that the applicant had an interest in the matter - after all - the respondent's application was aimed at setting aside certain judgments granted in favour of applicant and to have them declared void.

[30] It does not take much to realize that the applicant is a party who has a substantial and direct interest in the *ex parte* proceedings launched by respondent and whose rights may be affected by the relief sought by the respondent therein.

[31] The respondent has however opposed this Application for Leave to Oppose and has raised five points *in limine* in this regard.

[32] *Inter alia* - he has raised - and continuously has done so - an objection based on the applicant's lack of authority. The challenge was initially worded thus:

'*In limine* lack of authorization:

4.

According to the deponent, Mr Phillip Shiimi, he is a major male person and the Chief Executive Office of NAMFISA. …

5.

According to the deponent, Mr Phillip Shiimi, he is duly authorized to depose to these affidavit on behalf of NAMFISA, to launch the application on behalf of NAMFISA and to oppose the main application. …

6.

The deponent filed as proof of authority purported resolution of NAMFISA dated 19 February 2010, filed with this Court on 27th February 2010, which reads as follows:

'Resolution

Certified extract from the minutes of Namibia Financial Institutions Supervisory Authority Board Meeting held at Windhoek, on the 19th of February 2010.

The board resolved :

THAT, and in so far as it may necessary in light of the provisions of Namibia Financial Institutions Supervisory Authority Act 3 of 2001, the Chief Executive Officer ("CEO")or any person appointed as Acting Chief Executive Officer of Namibia Financial Institutions Supervisory Authority ("NAMFISA"},or his/her substitute (designated in writing by the incumbent of the position of the CEO including the Acting CEO), is hereby authorized to grant and sign a Special Power of Attorney to sue and defend, and to act on behalf of

NAMFISA, in connection with any and all legal actions and/or applications to be instituted or defended/opposed by NAMFISA, and is authorized to sign all documents on behalf of NAMFISA to enable NAMFISA to institute, defend and/or oppose any action or any application, and to finalise such action and/or application, including in respect of any appeal that may be prosecuted by or against NAMFISA".

7.

It is clear that the crisp question for determination is whether the purported resolution authorizes Mr Phillip Shiimi CEO to institute the leave to oppose application and to oppose the main application.'

[33] The Respondent then goes on to make an interpretation argument, which I will omit to quote. He then goes on to state:

'A careful reading of the resolution the phrase *"… to institute, defend and/or oppose any action or any application …"* is not a delegation of the function of the board to decide whether to institute, defend/oppose any action or any application but may nearly authorize Mr Phillip Shiimi to grant and sign a Special Power of Attorney or all documents in order to enable NAMFISA to institute, defend/oppose any action or any application and to sign all documents on behalf of NAMFISA after a decision has been taken by NAMFISA in the usual and/or normal manner to institute, defend/oppose any action or any application. The usual manner of taking decisions is by way of a meeting and a meeting must be properly convened on notice to all board members and that the matter should be considered by at least a quorum of the board members.

12.

It is further respectfully submitted that no proof has been provided that the formalities required for a resolution to that effect has been complied with and that the resolution has been properly recorded.

14.

In the premises I deny that Mr Phillip Shiimi has the necessary authority to launch the leave to oppose application and to oppose the *ex parte* application on behalf of NAMFISA and that, for this reason alone, the leave to oppose application should be dismissed with punitive costs which costs, which costs must be paid by Mr Phillip Shiimi and the unauthorized legal practitioners.'

[34] Namfisa's response was as follows:

13.

'The content thereof is denied as if specifically traversed and thereafter specifically denied. I am duly authorized to depose to the necessary affidavits in this matter, to launch any proceedings necessary to oppose the ex parte application of the respondent - including the current application - and to oppose the respondent's ex parte application and to do all matters incidental thereto to give fact to such authorization. I refer the court to annexure "PS22".'

"PS 22"

'CERTIFIED RESOLUTION

CERTIFIED EXTRACT OF THE RESOLUTION BY THE BOARD OF THE NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY TAKEN AT WINDHOEK, ON THE 8™ OF OCTOBER 2013.

The Board resolved:

THAT, the Ex Parte application dated 15 February 2013 of Hendrik Christian be opposed and that the Chief Executive Officer or his incumbent (including, for the avoidance of doubt, the incumbent Chief Executive Officer and any successor to that position (whether in an acting, temporary or permanent position) and any deputy to him or her) is hereby authorized to oppose this Ex Parte Application, as well as any future legal proceedings in any forum involving Mr. Hendrik Christian.

THAT, to the extent necessary and further to its resolution of 19 February 2010, any and all steps taken by the Chief Executive Officer or any person appointed as Acting Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority ("NAMFISA"), or his/her substitute (designated in writing by the incumbent of the position of the CEO (including the Acting CEO)), in opposing the aforementioned Ex Parte Application is hereby ratified.

THAT, and in so far as it may be necessary in light of the provisions of the Namibia Financial Institutions Supervisory Authority Act 3 of 2001, the Chief Executive Officer CEO') or any person appointed as Acting Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority ("NAMFISA"), or his/her substitute (designated in writing by the incumbent of the position of the CEO (including the Acting CEO)), is hereby authorized to grant and sign a Special Power of Attorney, in connection Mith the Hendrik Christian litigation and/or applications to be instituted or defended/opposed by NAMFISA, and is authorized to sign all documents on behalf of NAMFISA to enable NAMFISA to institute, defend and/or oppose any action or any application, and to finalise such action and/or

application, including in respect of any appeal that may be prosecuted by or against NAMFISA.

CERTIFIED A TRUE EXTRACT OF THE RESOLUTION

Signed and Certified at Windhoek this 8th.day of October 2013.

CHAIRPERSON

BOARD SECRETARY'

14.

'In any even no factual matter is advanced by the Respondent regarding the alleged absence of authority. The referred to Annexure PS 22 is a certified extract from the resolution taken by the Board of Applicant on 8 October 2013."

[35] In his written Heads of Argument filed on 13 January 2013 already the Respondent reinforced his challenge as follows. And I quote.

"It is established law that a legal person can only initiate applications through its duly authorized officials. If the official lacks authority, the Application should be dismissed with costs. I refer to *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351D - H. (See also *Transcash SWD (Pty) Ltd v Smith* 1994 (2) SA 295 (C).)

[23] As was correctly submitted by Mr Coleman the applicant which is a legal persona bears the ous to prove that the application is duly authorized and that the individuals who make the application is/are duly authorized to make such application and/or to depose to the relevant affidavits on behalf of the applicant. I refer to the judgment in Mall (Cape) (supra) at 350 - 351 as well as the dictum of Corbett J (as he then was) in *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) at 252C - F E and the authorities there referred to.

Naholo v National Union of Namibian Workers 2006 (2) NR 659 (HC) at 669 C to E.

"[8] An artificial person can, of course, take decisions only by passing of resolutions in accordance with its regulatory framework such as articles of association, a constitution, rules or regulations. Proof of authority should then be provided in the form of an affidavit deposed to by an official of the artificial person, annexing thereto a copy of a resolution, or an extract of minutes of a meeting of the which the resolution was taken which confers such authority or delegations. See: *National Union of Namibian Workers* supra at 670 D to F; Duntrust (Pty) Ltd, supra, at 149E. Hence, the mere say- so of a deponent (or deponents) does not constitute proof of either authority, in the absence of admissible evidence to authenticate the averment(s). See: Eveleth, supra, at 1227 I".

AJ Jacobs t/a Southern Engineering v The Chairman of the Nampower Tender Board and Another, unreported judgment of Silungwe AJ delivered on 11 March 2008; *National Union of Namibia Workers v Naholo* 2006 (2) NR 659 (HC); *Duntrust (Pty) Ltd v H Sedlacek t/a GM Refrigeration* 2005 NR 147 (HC); *Eveleth v Minister of Home Affairs and Another* 2004 (11) BCLR 1223 (T)'

[36] During oral argument respondent drove home this point in that he again submitted that no evidence had been placed before the court that proper notice of any meeting for 8 October 2013 had been given, or that it the meeting was properly constituted and that the proceedings were minuted, which resulted in the extract of the resolution disclosed as PS 22.

[37] The respondent went outside the papers and even alleged that he doubted that any meeting was held on 8 October 2013 or that it was properly constituted as the secretary had resigned or was not present.

[38] I can of course not take cognizance of those submissions which are not reflected on the papers before me. It nevertheless became clear that the applicant had failed to prove that it had duly resolved to institute the application in terms of Rule 6(4)(b) and to oppose the respondent's *ex parte* application as much as Mr Philander tried to persuade the court that the point of authority by respondent had opportunistically been taken and was without substance as it was not underscored by any evidence.

[39] He was however at least alive to the requirement that his client had attracted an onus in this regard and that it was for the court to decide whether sufficient information had been placed before the court to warrant the conclusion that it was the respondent who was applying and not any other person who was not authorized to do so.[5]

[40] Tötemeyer AJ has indeed conveniently set out the applicable legal position and the approach that should be adopted by the court in this regard in *Naholo v National Union of Namibian Workers* [6], which he did as follows:

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[5] *See also : Otjozondjupa Regional Council v Dr Ndahafa Nghifindaka & Others* Case LC 1/2009 delivered on 22 July 2009 at p10 para [18]
[6] 2006 (2) NR 659 (HC)

[22] It is established law that a legal persona can only initiate applications through its duly authorised officials. If the official lacks authority, the application should be dismissed with costs. I refer to *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351D - H. (See also *Transcash SWD (Pty) Ltd v Smith* 1994 (2) SA 295 (C).)

[23] As was correctly submitted by Mr Coleman, an applicant which is a legal persona bears the onus to prove that the application is duly authorised and that the individual(s) who make the application is/are duly authorised to depose to the relevant affidavits on behalf of the applicant. I refer to the judgment in Mall (Cape) (supra) at 350 - 351 as well as the dictum of Corbett J (as he then was) in *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) at 252C - F E and the authorities there referred to.

[24] During argument Mr Hinda set considerable score by annexure 'AVM1'. His submission was essentially that applicant, having produced this alleged extract from the minutes of a special meeting on 20 January 2006 (as per 'AVM1') - coupled with the allegation under oath by Mr Muheua that he is the vice president of applicant and is duly authorised to bring the application and to depose to the affidavit - had placed sufficient evidence before the Court to prove that the application was indeed duly authorised by the applicant.' …

[25] I am of the view that the aforesaid authorities do not support Mr Hinda's stance. Indeed the principles expressed in a number of the authorities relied on by Mr Hinda support respondent's contention that, if a resolution is produced on behalf of an applicant's legal persona which purports to authorise the relevant proceedings, is properly and substantially challenged by a respondent, an applicant, in reply, cannot merely remain content with the text of the resolution (or for that matter an extract of minutes of a meeting whereat the alleged resolution was taken). In that case an applicant is required to present concrete evidence that the resolution (or for that matter the relevant extract of a minute) indeed is what it purports to be, namely, evidence of a decision properly taken by the applicant to authorise the legal proceedings.

[41] From the facts before me it emerges that also here, the applicant, faced with an express challenge - made in the answering affidavit – as well in the respondent's Heads of Argument - and re-iterated during oral argument - failed to place evidence before the court that it had held a properly constituted Board meeting - on 8 October 2013 - where the resolution - annexed as PS 22 - was properly taken. Such evidence could easily have been placed before the court by way of an affidavit made by an official of NAMFISA, if not by the Chief Executive Officer himself.

[42] I therefore come to the conclusion that the applicant has failed to discharge its onus in this regard.

[43] The point *in limine* - based on the lack of the necessary authority - on the part of the applicant - in the Rule 6(4)(b) application - is accordingly upheld.

NON - JOINDER

[44] It will by now however have become clear that the relief sought by the respondent – by way of the said *ex parte* application - may directly impact on the rights that NAMFISA has acquired through the judgments which are to be assailed.

[45] Although the respondent strenuously argued that these judgments – ie. those listed in the Notice of Motion - are void - and can thus be ignored with impunity - and that such alleged voidness is also to the effect that NAMFISA can no longer have any interest in such judgments, which may be affected by the sought declaration of rights - I reject such argument outright.

[46] A judgment - even if it is void – stands - until it is set aside!

[47] I will just refer to some of the authorities to underscore that fundamental principle[7], there are more.

[48] Before any judgment is set aside – on whatever ground - the affected party – obviously - will be entitled to defend any rescission attempted in this regard.

[49] The relief sought by the respondent in the ex parte application will obviously affect the interests of NAMFISA, which interests are direct and substantial, and which may be affected by the outcome of any judgment made in this regard.

[50] Under the common law the Court has the inherent power to order the joinder of further parties to a case - which has already begun - to ensure that all persons -

[7] *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A, *Samco Import & Export CC and Another v Magistrate of Eenhana and Others* 2009 (1) NR 290 (HC) p302 para [41], *Namibia Financial Institutions Supervisory Authority v Christian and Another* 2011 (2) NR 537 (HC) at 595 -560 paras [93] to [95]

with the requisite interest in the subject matter of the dispute - and whose rights may be affected - are before the Court.[8]

[51] This principle was also endorsed by this court in *Maletzky v Minister of Justice*[9], where Cheda J, with reference to *Amalgamated Engineering Union v Minister of Labour*[10] stated:

‘ …In that case the court made it clear that where the need for joinder becomes apparent, the court has no discretion and will not allow the matter to proceed without a joinder or the giving of judicial notice of proceedings to the other party. This principle has been authoritatively followed by our courts and has stood the test of time. The court can only exclude the other party if it is satisfied that the said party has waived its right to be joined. In *casu,* third respondent has established the necessity of a joinder. I, therefore, find an immediate difficulty in finding that an issue such as this can be ignored unless the parties themselves have categorically waived their legal rights not be joined.’[11]

[52] It is on the strength of these principles that I will not allow this matter – particularly - in view of its history - to proceed - without the joinder of NAMFISA - as a respondent in the *ex parte* Application A 35/2013.

In the result I make the following orders:

1. The respondent is directed to bear the costs occasioned by the Rule 30 application brought on 28 November 2013.

2. The late filing of the replying affidavit, delivered on 07 November 2013, by the applicant, in the Rule 6(4)(b) application, is hereby condoned.

3. The respondent in the Rule 6(4)(b) application is directed to pay the costs of opposition to the condonation application.

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[8] *SA Steel Equipment Co (Pty) Ltd and Others v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 172H to 173A, *Harding v Basson and Another* 1995 (4) SA 499 (C) at 501C, *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) at 341 E - F

[9] (A 9/2013) [2013] NAHCMD 316 (08 November 2013) at [11] reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2013/316.html

[10] 1949 (3) SA 637 (A) at 659H – 660A

[11] At [11]

4. The application for leave to oppose in terms of Rule 6(4)(b) is dismissed.

5. The applicant in that application is to pay the respondent's costs in the Rule 6(4)(b) application, such costs are to be limited to the respondent's actual disbursements, reasonably incurred.

6. Namfisa is hereby joined as a respondent in the ex parte application brought under case no. A 35/2013.

7. Namfisa is to give notice of its intention to oppose case A 35/2013 within 5 days of this order and to file its answering papers thereto within 14 days of the delivery of its notice of intention to oppose, if it so chooses.

8. The respondent is to deliver its replying affidavit thereto within 7 days of the delivery of any answering affidavits.

9. The matter is postponed to 18 March 2014 at 15h30 for a case management hearing.

H GEIER

Judge

APPEARANCES

APPLICANT:	R Philander LorentzAngula Inc., Windhoek
RESPONDENT:	H Christian In Person