



# SUMMARY

**CASE NO.: A 140/2007**

**A J JACOBS t/a SOUTHERN ENGINEERING**

**Applicant**

and

**THE CHAIRMAN OF THE  
NAMPOWER TENDER BOARD**

**First Respondent**

**NAMIBIA POWER CORPORATION (PROPRIETARY)  
LIMITED**

**Second Respondent**

*SILUNGWE, AJ*

**PRACTICE** - Motion proceedings – Proof that deponent had authority to depose to affidavits on behalf of respondents – Respondents bearing onus to prove such authority - Respondents failing to prove alleged authority.



**CASE NO.: A 140/2007**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**A J JACOBS t/a SOUTHERN ENGINEERING**

**Applicant**

and

**THE CHAIRMAN OF THE  
NAMPOWER TENDER BOARD**

**First Respondent**

**NAMIBIA POWER CORPORATION (PROPRIETARY)  
LIMITED**

**Second Respondent**

**CORAM: SILUNGWE, AJ**

Heard on: 2008.02.25

Delivered on: 2008.03.11

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**JUDGMENT:**

**SILUNGWE, AJ:** [1] In his notice of motion, the Applicant seeks an order in the following (paraphrased) terms:

1. that the decision taken by the NamPower Tender Board on or about 21 May, 2007 to award the tender (for the supply of 100,000 tons of coal) to a third party (i.e. Walvis Bay Bulk Terminal) be reviewed and set aside;
2. that the decision aforesaid be declared to be in conflict with Articles 12(1) and 18 of the Constitution.

[2] At the outset of these proceedings, Mr Henning, SC, who appeared for the Applicant, raised a point *in limine*, contending that the answering and other affidavits of the Respondents should be struck with costs. In amplification, he argued that Mr Isaac Hiriua Tjombonde (Mr Tjombonde), the deponent of the said affidavits, lacked authority to speak on behalf of decision-makers, namely, NamPower Tender Board and the Second Respondent, as there was no evidence of delegation of authority. He argued that, since the NamPower Tender Board and the Second Respondent are artificial persons, they would normally delegate authority by passing a resolution to that effect, adding that, in this case, there was no evidence of such delegation. He further contended that when an alleged authority is challenged, as in this case, the Respondent must prove the existence of such authority. In support of his argument, Mr Henning cited, *inter alia*, the following cases: *Duntrust (Pty) Ltd v H Sedlacek t/a GM Refrigeration* 2005 NR 147; *National Union of Namibian Workers v Naholo* 2006 (2) NR 659; and *Eveleth v Minister of Home Affairs and Another* 2004 (11) BCLR 1223 (T).

[3] I pose here to make an observation, to *wit*, that on the papers filed in the matter, it is quite clear that Mr Tjombonde is the Chairperson of the NamPower Tender Board, that is, the First Respondent. Besides, he is an employee of the Second Respondent as General Manager of Corporate Services.

[4] As the thrust of the applicant's preliminary point hinges upon "The Respondents' Answering Affidavit" deposed to by Mr Tjombonde, it is fitting to refer to the relevant part thereof which reads:

“1. I am –

1.1 *employed by Namibia Power Corporation (Proprietary) Limited, hereafter referred to as “NamPower” as a General Manager of Corporate Services. In that capacity I have been delegated to act as the Chairperson of the NamPower Tender Board.*

1.2 *authorized in that capacity to depose to this affidavit on behalf of the First Respondent and duly authorized by the Second Respondent to depose to this affidavit on its behalf.*

1.3 ...”

[5] In his counter-argument, Mr De Bourbon, SC, who represented the respondents, contended, *inter alia*, that the respondents had filed their notice to oppose the application; that it was common cause that Mr Tjombonde was the second respondent’s General Manger (of Corporate Services); that there was no need to prove delegation as he was a witness; and that his power to speak on behalf of the Respondents found support in a confirmatory affidavit deposed to by Mr Penda Abisai Kiiyala, the acting Chairperson of the Second Respondent’s Board of Directors. The third paragraph of the said affidavit is couched in these terms:

“3. *I further confirm that the Board of Nampower has authorized Mr Isaac Tjombonde to depose to this affidavit on behalf of the Respondents.*”

[6] Mr De Bourbon’s submission that the Respondents had filed their notice to defend is not in issue; such notice merely serves as a first step towards defending an action in motion proceedings. The second step, of course, entails the filing of affidavits. It is that stage that gave rise to the preliminary point now under consideration. The fact that a deponent is a witness is of no consequence in the absence of admissible evidence to confirm that authority was properly given.

[7] It is not in dispute that the first respondent was sued in a representative capacity and that the NamPower Tender Board as well as the second respondent are artificial persons which can only defend proceedings through their duly authorized officials. Where the alleged authority is challenged by an applicant, as *in casu*, then the onus of proof rests upon the respondent(s) to confirm that such authority was duly given. See: *National Union of Namibian Workers* case, *supra*, at 669D-E. As Patel, J aptly observed in *Eleveth*, *supra*, at 1227C:

*“It is trite law and practice that where one person ... is authorized by another, then the person so authorizing is required to confirm that authority when challenged.”*

[8] An artificial person can, of course, take decisions only by the passing of resolutions in accordance with its regulatory framework such as articles of association, a constitution, rules or regulations. Proof of authority would 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 at which the resolution was taken which confers such authority or delegation. See: *National Union of Namibian Workers*, *supra*, at 670D-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 1227I.

[9] It follows, on the facts of the present case, that although Mr Penda Kiiyala confirmed that the second respondent's Board had authorized Mr Tjombonde to depose to his affidavit on behalf of the respondents, without more, such confirmation was, in the final analysis, an exercise in futility. Both NamPower Tender Board and the second respondent, being artificial persons, could only have clothed Mr Tjombonde with authority by passing a resolution to that effect. There is, however, no evidence to show that a resolution was passed by the second respondent and/or by the NamPower Tender Board to

confer authority upon Mr Tjombonde. As the authority claimed by Mr Tjombonde was put in issue, the Respondents' failure to prove that he had been properly authorized leads me to the conclusion that he did not, in law, have the requisite authority from the respondents to depose to the answering and other affidavits on their behalf and in their defence. What the respondents attempted to do can, at best, be described as an expression of intent to confer authority upon Mr Tjombonde. In the circumstances, Mr Tjombonde can hardly be said to have acted out of his own volition in the matter.

[10] In the light of the conclusions I have come to, the applicant's point *in limine* is destined to succeed.

[11] As to costs, and regard being had to the respondents' attempt to confer authority on Mr Tjombonde, it is appropriate to award costs against the second respondent under whose ownership falls the NamPower Tender Board.

[12] For the reasons given above, I make the following order:

1. the Applicant's point *in limine* is upheld;
2. Mr Tjombonde's answering and other affidavits are struck;
3. the second respondent is ordered to bear the applicant's costs of the date of hearing of the point *in limine* (March 25, 2008), such costs to include the costs of two counsel.

**COUNSEL ON BEHALF OF THE APPLICANT:**

Adv. Henning and Adv Dicks

**Instructed by:**

Dr Weder, Kauta & Hoveka Inc.

**COUNSEL ON BEHALF OF THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS:**

Adv. De Bourbon SC and Adv. Corbett

**Instructed by:**

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