

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 6/2013
Case heard: 18-01-2013
Date delivered: 27-03-2013

In the matter between:

NAFCOC NORTHERN CAPE	1st Applicant
NAFCOC INVESTMENTS HOLDING COMPANY LIMITED	2nd Applicant

And

ROSEMARY ELFREDA MODISE N.O	1ST Respondent
MABOTSA DANIEL ALEX MABOTSA N.O	2nd Respondent
NAFCOC NORTHERN CAPE INVESTMENT TRUST	3rd Respondent
MASTER OF THE HIGH COURT, NORTH GAUTENG	
HIGH COURT (PRETORIA)	4th Respondent
HOSKIN CONSOLIDATED INVESTMENTS	
TREASURY LTD	5th Respondent

CORAM: C.C WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. This application was brought on an urgent basis on Friday, 18 January 2013 for the following relief:

- “2. *Directing that the first and Second Respondents who are the remaining trustees of the Third Respondent in office are not competent or entitled to pass a resolution that propose to sell or acquire share on behalf of the Trust, including the HCIT deal.*

 - 2.1 *Alternatively to prayer 2 above, and only in the event that the remaining Trustees in office had already met and adopted or passed a resolution for the sale of the trust shares to the Fifth Respondent,*

 - 2.1.1 *Directing that the purported adoption or passing of a resolution by the First and second respondents for the sale of trust shares to the Fifth Respondent is hereby declared null and void.*
 - 2.2 *Further alternatively to payer 2 above, and only in the event that the Fifth Respondent had already bought the Trust shares at the time of hearing of this application,*

 - 2.2.1 *Directing that the purported purchase of the Trust shares by the Fifth Respondent shall not be implemented.*
3. *Directing that the order in terms of prayer 2 above be an interim order, pending the outcome of a declaratory relief to be brought by the Applicants in respect of the interpretation of clause 7 of the Deed of Trust, read with clause 6.2 thereof.*
4. *Directing that the Applicants shall bring the application for a declaratory relief in terms of prayer 3 above within 25 (twenty five) working days from the date of this Court order.*
5. *Directing that in the event that the Applicants fail to bring the declaratory relief within 25 (twenty five) working days as contemplated at prayer 4 above, the interim order shall automatically lapse.*
6. *Directing that the First and Second respondents, or any other Respondent, pay the costs of this application, jointly and severally, the one paying the other to be absolved, in the event of any opposition by them.”*

2. After hearing argument for both sides, I due to the urgent nature of the matter, made an order herein on Monday, 21 January 2013 in which the application was dismissed and that the deponent to the founding affidavit and the second applicant pay the costs of the application jointly and severally, the one paying the other to be absolved. I reserved my reasons for the order which now follow.
3. The first applicant in NAFCOC, Northern Cape, a voluntary association and a beneficiary of the third respondent, NAFCOC Northern Cape Investment Trust ("the Trust").
4. The second applicant is NAFCOC Investments Holding Company Ltd ("NAFHOLD"), the founder of the Trust.
5. The first and second respondents are trustees of the trust and are cited in their capacity as such.
6. The first and second respondents opposed the application on the following grounds:
 - 6.1 The application, although in form for interim relief, is in fact final in effect and fails to comply with the requirements for a final interdict; and
 - 6.2 The applicants lack the requisite *locus standi* to bring the application.

7. Before dealing with the issues raised by the respondents it is necessary to give a brief background of the events leading to the application.
8. The Trust is the owner of preference shares in Tsogo Investment Holdings Limited (“TIH”). During the course of 2012 the fifth respondent, Hoskin Consolidated Investments Treasury Limited (“HCIT”) offered to purchase the Trust’s shares in TIH for a purchase price of about R20 million. At the time the Trust had three trustees, the first and second respondents and a certain Mr Kabelo Makaudi. The offer to purchase, or the HCIT deal, as it is referred to in the papers, appears to have completely polarised the trustees who seem to have already had a rather strained relationship.
9. On 12 November 2012 Makaudi, purporting to act on behalf of the Trust, launched an urgent application together with NAFHOLD against the first and second respondents, wherein the applicants sought *inter alia* an interim interdict in the form of a *rule nisi*, preventing the first and second respondents from dealing with the Trust’s financial affairs and management of its income. The *rule nisi* was granted on 13 November 2012 in the absence of the two respondents. The respondents opposed that application and on 11 December 2012 the *rule nisi* was discharged with costs.

10. On 14 December 2012 NAFCOC, Northern Cape, purportedly represented by Mr Tshepo Smith and NAFHOLD launched an urgent application against *inter alia* the three trustees, seeking to prevent the trustees from holding meetings or taking decisions as trustees of the Trust pending an application for the removal of the three trustees, alternatively an order that first and second respondents comply with their duties as contemplated in clause 18 of the Deed of Trust. On 20 December 2012 the application was postponed to 15 February 2013 for argument.
11. On 27 December 2012 Makaudi tendered his resignation as trustee of the Trust “*with immediate effect notwithstanding the provisions of clause 12.9 of the Deed of Trust.*” The letter of resignation was delivered to the first respondent as chairperson and trustee of the Trust.
12. On 28 December 2012 and on the instructions of the first and second respondents, the Trust’s attorneys informed Makaudi in writing that in terms of the Trust Deed he would cease to be a trustee only thirty days after giving notice of this intention to resign and accordingly remained a trustee and was obliged to comply with his duties as such until 26 January 2013.
13. On the same day (28 December 2013) the first respondent convened a meeting of the trustees to take place on 8 January 2013. The items on the agenda were *inter alia* the

consideration of the HCIT deal and whether it should be accepted by the Trust. Makaudi did not attend the meeting. The first and second respondents, of the view that they were entitled thereto as the majority of trustees in office, resolved at that meeting to accept the HCIT offer.

14. The applicants are of the view that since the Trust Deed (clause 7) provides for a minimum of three trustees to be in office and Makaudi had resigned on 27 December 2012, the two remaining trustees were not competent to pass a resolution to sell the TIH shares on behalf of the Trust, hence this application.
15. The first issue to be decided is whether the relief sought is of an interim nature or whether it is final in effect, as argued by Mr Currie for the respondents. If the relief sought is final in substance the requisites for a final interdict have to be present.
16. In this regard applicants were well aware of the fact that the HCIT offer was to expire at 17h00 on Monday, 21 January 2013. This was also one of the main reasons for the application to be heard on a “*semi-urgent*” basis on 18 January 2013, during the court recess. The relief sought i.e. preventing the implementation of the resolution passed by the first and second respondents pending the finalisation of an application for declaratory relief to be instituted within 25 days, would have the result of the offer lapsing before the finalisation of the future

application, thus effectively preventing the HCIT deal. The relief sought would thus be final in effect.

17. Another factor which militates against this application being for interim relief is that the intended future application is not determinant of the principal dispute between the parties. In fact the interpretation of clause 7 read with clause 6.2 of the Trust Deed is not in dispute at all. Clause 7 of the Trust Deed states the following:

“7. MINIMUM AND MAXIMUM NUMBER OF TRUSTEES

Notwithstanding anything to the contrary in this deed there shall at all times be at least three and not more than nine trustees in office; provided that, pending the appointment of trustees in terms of 6.2 and notwithstanding 10.1, the trustee/s remaining in office (or if no trustee remains in office, the trustee/s whose term of office has expired in terms of 6 so that the minimum requirement under this 7 is no longer met) shall form a quorum for the purposes of trustees meetings and shall be empowered to act in the preservation and necessary formal administration of the trust assets until a sufficient number of trustees have been appointed in terms of 6.2 and (if required in terms of the Act) letters of authority have been issued in respect of such trustees by the Master in terms of the Act.”

And Clause 6.2 thereof that;

- “6.2 Each of the trustees, other than the initial trustees, shall (subject to 1.2 and 7) be appointed from time to time after the signature date in*

terms of a resolution of the executive committee for a period of three years from the date of such resolution.:

18. Both sides are in agreement that in terms of clause 7 there must be a minimum of three trustees in office. The dispute between the parties is therefore not about the interpretation of clause 7 but whether there were in fact three trustees in office when the resolution to accept the HCIT offer was passed on 8 January 2013, a dispute which I was informed by Mr Mkhabela for the applicants, I need not decide upon in this application. The anticipated application for declaratory relief as to the interpretation of clause 7 read with clause 6.2 would not dispose of the main dispute between the parties and in the absence of a future application which would actually finally determine the dispute between the parties, the *interim interdict* is of a final nature and such an order cannot be made based on a *prima facie* case. See *Botha v Maree en 'n Ander 1964(1)SA 168(O)*.
19. In my view Mr Currie is correct that in these circumstances a clear right must be shown by the applicants on a balance of probabilities.
20. The right which the applicants rely upon is the right that the Trust be administered in accordance with the Trust Deed.

21. The first and second respondents have contested the *locus standi* of the applicants on the basis that:

21.1 While conceding that the first applicant, as a beneficiary of the Trust, would ordinarily be entitled to enforce the Trust Deed, the authority of the deponent to the founding affidavit Mr Smith, to act on behalf of the first applicant is disputed;

21.2 The second applicant, as the founder of the Trust, in the absence of a provision in the Trust Deed contrary thereto, is functus officio in relation to the affairs of the Trust.

22. Mr Smith purports to have the authority to institute and defend legal proceedings on behalf of the first applicant by virtue of him being the duly elected general secretary of the first applicant. Smith contends that the executive committee of NAFCOC, Northern Cape, as elected during March 2010 in terms of the 2008 NAFCOC Constitution, and whose term was to expire during March 2013, was removed from office at the annual general meeting of NAFCOC, Northern Cape held on 30 November 2012. At this meeting a new executive committee was elected with one Bandile Deke as president and himself as general secretary.

23. The legitimacy of the election of the new executive committee and the elected individuals have been placed in dispute in the pending application referred to in paragraph 10 above as well as in this application. In terms of the 2008 NAFCOC Constitution, which Smith relies upon, the removal of the president and executive committee, before the expiry of their terms of office requires a resolution of the Council of the affiliate (first applicant). In terms of clause 23.3 of the Constitution the president can only be removed from office on a resolution of a two thirds majority of the members present at a meeting of the Council specifically convened for that purpose. Likewise, the election of a president and executive committee are done by the Council of first applicant.
24. Smith does not claim in his founding affidavit, neither in the replying affidavit, that the president or executive committee were removed by the Council of first applicant or that a new leadership was duly elected by the Council. Instead Smith refers to an annual general meeting of the first applicant where *“members”* elected the new leadership. Smith’s only response to the attack on the validity of the meeting and the election is that there was no challenge to the validity of the proceedings of 30 November 2012 by the former president and executive committee until the first applicant launched the previous application. Smith states in his replying affidavit that: *“Mr Morudi’s (the previous president of the applicant’s) decision to question or cast a doubt on our election as the Executive of*

NAFCOC Northern Cape, is an afterthought designed to thwart and create confusion to his Honorable Court about the correct representatives of NAFCOC Northern Cape.” And “the inference must be that until the recent litigation, he had accepted that he was no longer the president of NAFCOC Northern Cape.”

25. Besides the fact that a mere two weeks had elapsed after the annual general meeting of 30 November 2012 and Smith's launching the pending application where the challenge to the validity of the election was made in the opposing papers, it does not follow that the perceived acceptance by Morudi of the election (which Morudi denies), could render invalid proceedings valid. In my view Smith has failed to establish his authority to bring the application on behalf of the first applicant.

26. As far as the second applicant is concerned, it is simply alleged by Smith in his founding affidavit that the second applicant, as a founder and donor of the Trust, supports the application. The Chairman of the second applicant simply confirms this allegation in a confirmatory affidavit. The position seems to be however that once a trust is created, the founder has no further jurisdiction over it and is functus officio unless certain powers have been specifically reserved in the Trust Deed. (See *Honore's South African Law of Trusts* 5th edition, p 418). *In casu* the only right reserved for the founder in the Trust Deed is the requirement that its written permission be obtained before

disposal of the Trust shareholding in NAFHOLD (the founder's) shares. The second applicant therefore has no right generally to enforce the terms of the Trust Deed and consequently lacks the *locus standi* to bring this application.

For the above reasons I ordered that:

The application be dismissed and Mr Tshepo Smith, the deponent to the founding affidavit, be personally held liable with the second applicant (Nafcoc Investments Holding Company Limited) for the costs of the application. I deemed it unfair to saddle the first applicant (Nafcoc, Northern Cape) with the costs of an application brought by an individual with no proper authority to do so.

C.C WILLIAMS
JUDGE

For Applicants:

Adv R.B Mkhabela
Selepe Attorneys

For 1st and 2nd Respondents:

Adv I Currie
Edward Nathan Sonnenbergh Inc
c/o Duncan & Rothman inc