



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: A 228/2012

In the matter between:

WESTCOAST FISHING PROPERTIES

APPLICANT

and

GENDEV FISH PROCESORS LIMITED

1ST RESPONDENT

R HEATHCOTE SC

2ND RESPONDENT

Neutral citation: *Westcoast Fishing Properties v Gendev Fish Processors Limited*
(A 228/2012) [2013] NAHCMD 185 (28 June 2013)

Coram: GEIER J

Heard: 28 June 2013

Reasons: 03 July 2013

Flynote & Summary: Practice – compliance with Practice Directive 37 – citation of foreign case law – parties failing to comply with Practice Directive – court analysing rationale for Practice Directive and importance for complying therewith – court concluding that Practice Directive was ultimately put in place as a safeguard and to ensure the achievement of the proper adjudication of all cases in accordance with applicable Namibian legal authorities – as this premise was not given in the

present instance – court refusing to hear matter – matter accordingly removed from the roll to enable counsel to comply with Practice Directive in question -

ORDER

1. The matter is removed from the roll due to the parties' non-compliance with Practice Directive 37.
2. The costs of today are to stand over.

REASONS

GEIER J:

[1] The Consolidated Practice Directives issued by the Judge President of the High Court of Namibia on 2 March 2009 require where counsel in his or her heads of argument relies on foreign authority in support of a proposition of law that:

‘(a) such counsel must certify that he or she is unable, after diligent search, to find Namibian authority on the proposition of law under consideration; and

(b) whether or not Namibian authority is available on the point, counsel must certify that he or she has satisfied himself or herself that there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the Court of the proposition of law that the foreign authority is said to establish.’¹

[2] The fundamental rationale for the Practice Directive is clear. Although South Africa and Namibia, at date of Independence, shared, what can generally be

¹See Practice Directive 37

described as a common legal system, with a largely similar body of statutory and common law - (as recognised in the Constitution and in respect of which transitional provisions where required) ² - and where, since Namibia's Independence, the legal systems of Namibia and South Africa have started to diverge – as - in each country – the respective Parliaments continued to legislate – and where the courts continued to hand down judgments, in a legal environment that thus continued to change accordingly - it became important to take into account the developing differences, so that the general body of jurisprudence of this court would be developed in accordance and with reference to the particular- and often different legal developments which had - and were occurring in each respective country.

[3] When I therefore noticed, during my preparation for the hearing, from the Heads of Argument, filed in this case, that counsel, for both parties, had relied exclusively on South African authority, I felt that this matter was not ripe for hearing.

[4] The court thus raised the issue of the parties' non-compliance with Practice Directive 37 with counsel at the hearing of this matter. Both counsel – being foreign counsel - confessed that they were not aware of the requirements set by the Practice Directive, although both parties had also engaged the services of Namibian legal practitioners, albeit on a correspondent basis only. Inexplicably the locally based practitioners had obviously failed to bring this requirement to counsels' attention.

[5] I should add that Mr Fitzgerald SC, who appeared with Mr Traverso, on behalf of the first respondent, informed the court that they had spent time, the previous day, studying and acquainting themselves with the applicable Namibian case law, which fact Mr Fitzgerald demonstrated with reference to the *Shikunga* matter³.

[6] I nevertheless indicated to counsel that I was not prepared to hear the matter in the circumstances particularly as there were indeed a number of applicable

²See Article 140 of the Namibian Constitution

³*S v Shikunga and Another* 1997 NR 156 (SC)

Namibian authorities available on the various issues raised by the parties in their heads of argument.⁴

[7] While I made it clear to counsel that I might have condoned a lesser degree of non-compliance in different circumstances, I was not prepared to do so in a case where not a single Namibian authority had been referred to in the heads of argument by both the parties.

[8] I also tried to emphasise the importance of compliance with the Practice Directive in question as it is clearly incumbent on this court to base its decisions on the applicable Namibian authorities.

[9] Although a court is probably never totally absolved from conducting its own research of the applicable case law pertaining to a matter serving before it, the question of research is surely not the predominant task of any court. On the other hand a court will obviously also be entitled to place reliance on counsel's heads of argument, which are intended to assist the court in arriving at a proper decision in each case before it with reference to the applicable authorities and the facts.

[9] In addition it must be taken into account that it has in any event also been stated in numerous decisions of this court that South African case law, subject to Article 140(1), is not binding on this court and merely constitutes persuasive authority – which a Namibian Court is free to adopt in all fitting cases⁵.

[10] Ultimately therefore it must be concluded that the Practice Directive was put in place as a safeguard, and to ensure the achievement of the proper adjudication of all cases, in this jurisdiction, in accordance with the applicable Namibian authorities.

⁴Some of these issues where for example : the effect of a non-admitted legal practitioner in civil proceedings, the effect of an irregularity in criminal proceedings, the effect of fraud or mistake on a contract ...

⁵See for instance : *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) at [9], *S v Malumo and 112 Others* 2011 (1) NR 169 (HC) at [55], *Goseb and Others v Minister of Regional and Local Government and Housing and Others* 2011 (1) NR 224 (HC) at [16], *Gabriel v Minister of Safety and Security* 2010 (2) NR 648 (HC) at [10], *Shikongo v Trustco Group International Ltd and Others* 2009 (1) NR 363 (HC) at [4], *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC) at [30] etc

[11] This premise was not given in this instance.

[12] Accordingly I ordered that the matter be removed from the roll to enable counsel to comply with the requirements set by the Practice Directives of this court.

[13] I also indicated to counsel that, prima facie, I considered it fair and equitable in such circumstances that each party pay its own wasted costs occasioned by the postponement of this matter. Counsel where however agreed that they preferred such costs to stand over for later determination.

H GEIER
Judge

APPEARANCES

APPLICANT:

T P Krüger SC

(with him Mr G L van der Westhuizen)

Instructed by Fisher, Quarmby & Pfeifer,
Windhoek.

RESPONDENTS:

M J Fitzgerald SC

(with him N Traverso)

Instructed by Engling, Stritter & Partners,
Windhoek