



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 668/2004

In the matter between:

NAMIBIA DEVELOPMENT CORPORATION

PLAINTIFF

and

AUSSENKEHR FARMS (PTY) LTD

DEFENDANT

Neutral citation: *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd*
(I 668/2004) [2014] NAHCMD 15 (21 January 2014)

Coram: MILLER AJ

Heard: 26 November 2013

Delivered: 21 January 2014

Flynote: Interlocutory application to compel further discovery refused – Application for leave to appeal – leave should not be granted unless it is shown by the applicant that a refusal anticipates or precludes the whole or part of the relief which may be granted at the hearing – Application dismissed.

JUDGMENT

MILLER AJ: [1] On 25 September 2013 I dismissed an application at the instance of the defendant in the main action for an order compelling the plaintiff to make further and additional discovery of certain documents. The defendant alleges that the plaintiff is in possession of further documents which relate to the “winding up” of the plaintiff. The managing director of the plaintiff deposed to an affidavit on behalf of the latter. Mr. de Wet unequivocally denies that any such documents are in the possession of the plaintiff.

[2] I furnished reasons for the dismissal of the applicant in a written judgment delivered on 22 November 2013 (*Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* [I 668/2003] [2013] NAHCMD 354).

[3] The defendant now seeks leave, as it must, to appeal to the Supreme Court of Namibia.

[4] In *Mears v Nederlandsche Zuid-Afrikaansche Hypoteek Bank Ltd* 1908 TS 1147 the following passage appears at p. 1151.

‘...in order to be appealable an interlocutory decision must be one which is irreparable, not in the sense that the effect which it produces cannot be repaired having regard to the resources at the command of the person against whom it is made, but in the sense that (if it remains unreversed) it irreparably anticipates or precludes some of the relief which would or might have been granted at the hearing.’

[5] This reasoning resonates in a substantial number of judgments which were delivered subsequently. I will mention some of them. (*van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) 569 (A); *Abromowitz v Jacquet and Another* 1950 (3) SA 378 (W); *Rood v Broderick Properties (Pty) Ltd* 1962 (2) SA 434 (T).

[6] The underlying principal seems to me to be that a piece meat disposal of the case should not be allowed unless the balance of convenience dictates such a course.

See *South African Chemical Workers Union v African Commerce Development Co. t/a Buffalo Topes* 2000 (3) SA 732 (SCA).

[7] There must in any event, and apart from the requirements stated above be a reasonable prospect of success.

[8] The defendants' present application in my view does not meet the first requirement.

[9] The plaintiff, at this stage of the proceedings is adamant that it does not have in its possession the documents sought to be discovered. To make an order seeking to compel the discovery of such documents is an exercise in futility which will only cause further delay. In this regard I found during the course of my reasons that I am far from certain that I can on the facts before me go behind the affidavit of Mr. de wet and conclude, contrary to what he states that possibly those documents are in his possession. I do not believe that another Court may come to another conclusion.

[10] Should it become apparent during the trial that such documents do exist, the defendant will be able to subpoena the person in whose possession they are in order to produce them.

[11] Similarly should it transpire that, despite Mr. de Wet's assertion on oath, that the plaintiff indeed has such documentation, further discovery can be ordered, with all the consequences that go with that.

[12] For these reasons it is my conclusion that the application for leave to appeal must be dismissed.

[13] I therefore make the following order:

1. The application is dismissed.
2. The defendant is ordered to pay the plaintiff's costs which will include the costs of one instructing and two instructed counsel.

P J MILLER
Judge

APPEARANCES

PLAINTIFF : T FRANK
Instructed by Engling, Stritter & Partners,
Windhoek

DEFENDANT: T BARNARD
Instructed by Diekmann Associates,
Windhoek