REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 273/2014

In the matter between:

LAICATTI TRADING CAPITAL INC	**FIRST APPLICANT**
CHRISTOPHER PETER VAN ZYL N.O	**SECOND APPLICANT**
RYNO ENGELBRECHT N.O	**THIRD APPLICANT**
EUGENE JANUARIE N.O	**FOURTH APPLICANT**

(The second to fourth applicants in their respective capacities as joint liquidators of Greencoal Holdings Proprietary Limited (in liquidation), registration number: 2013/120207/07) ("Greencoal Holdings")

And

GREENCOAL (NAMIBIA) (PTY) LTD (REGISTRATION NUMBER: 2010/0314)	**FIRST RESPONDENT**
GERSHON BEN-TOVIM	**SECOND RESPONDENT**

Neutral citation: *Laicatti Trading Capital Inc v Greencoal (Namibia) (Pty) Ltd* (A 273-2014) [2015] NAHCMD 240 (8 October 2015)

Coram: PARKER AJ

Heard: **28 September 2015**

Delivered: **8 October 2015**

Flynote: Practice – Applications and motions – Discovery in motion proceedings – Discovery in terms of rule 28(1), read with rule 70(3), of the rules of court – Court held that in application proceedings rule 28(1), read with rule 70(3), of the rules are enabling provisions and not entitlements; and *a fortiori*, they are subject to the peremptory provisions of rule 66(1)*(b)* of the rules – Additionally, in motion proceedings discovery is very, very rare and only permitted in exceptional circumstances – Court found in instant proceeding that respondents have not complied with rule 66(1)*(b)* and they have not established any exceptional circumstances for the court to permit discovery of a multitude of documents – Consequently, court declined to direct that the respondents discover further documents.

Summary: Practice – Applications and motions – Discovery in motion proceedings – Discovery in terms of rule 28(1), read with rule 70(3), of the rules of court – These rules are subject to the peremptory provisions of rule 66(1)*(b)* of the rules – Respondents sought to introduce a multitude of documents in violation of rule 66(1) *(b)* of the rules – The documents have always been in respondents' possession – Respondents failed to identify, in an affidavit, the particular documents or portions of the documents which the respondents desire to use and rely on – Court found that the approach taken by the respondents is alien to the rules of court and unreasonable and unfair not only to the other parties, but also to the court – Consequently, court declined to direct that respondents discover further documents.

Flynote: Practice – Application and motions – Application for hearing of oral evidence – Generally, court will exercise discretion in favour of hearing oral evidence only where genuine dispute of facts on the papers exists – Courts will not readily refer application for a provisional winding-up order to oral evidence – This will only be ordered in exceptional circumstances – It will not be ordered where material dispute of facts has not been clearly defined – It will also not be ordered where referral will not lead to a just and speedy determination of the matter as contemplated in rule 1(3) of the rules of court.

Summary: Application and motions – Application for hearing of oral evidence – Generally, court will exercise discretion in favour of hearing oral evidence only where genuine dispute of facts on the papers exists – Courts will not readily refer application for a provisional winding-up order to oral evidence – This will only be ordered in exceptional circumstances – It will not be ordered where material dispute of facts has not been clearly defined – It will also not be ordered where referral will not lead to a just and speedy determination of the matter as contemplated in rule 1(3) of the rules of court – Court found that respondents have not clearly defined the material dispute of facts necessitating referral to oral evidence – Court found further that in the circumstances a referral will not lead to a just and speedy determination of the matter as contemplated in rule 1(3) of the rules of court which the court's order of 18 May 2015 sought to achieve – Consequently, court declined to direct that the matter be referred to oral evidence.

ORDER

(a) I decline –

(i) to direct that the respondents discover further documents.

(ii) to direct that the matter be referred to oral evidence.

(b) The set down dates of 2 and 3 November 2015, at 10h00, remains undisturbed.

(c) Costs are in the cause.

RULING

PARKER AJ:

[1] On the papers, it seems to me clear that as between the first applicant and the respondents, the application for the winding up of the first respondent has been ready for hearing since 27 March 2015 when the applicant delivered its replying affidavits. In the course of events the second, third and fourth applicants intervened in the matter.

[2] By agreement between the parties, on 23 July 2015 the court postponed the hearing of the winding up application to 2 and 3 November 2015. In keeping with promotion of the overriding objectives of the rules of court (see rule 1(3)*(c)*) the court ordered that all interlocutory proceedings should be completed and gotten out of the way so that the hearing of the winding up application could proceed on the set down hearing dates. It is for this reason that the two interlocutory matters were set down to be argued on this day 28 September 2015.

[3] The two matters are the following, as are set out concisely in the submission of Mr Steyn, counsel for the first applicant, and with which Mr Corbett SC, counsel for the second, third and fourth applicants make common cause. They are that -

(a) the respondents are entitled as of right under rule 28(1), read with rule 70(3), of the rules of court to make general discovery of documents without the leave of the court; and

(b) the court should at this stage of proceedings refer the matter to oral evidence prior to the hearing of applicants' application for the provisional winding up of the first respondent, which application is set down for hearing on 2 and 3 November 2015.

[4] On the interpretation and application of rule 28(1) of the rules I had this to say in the recent case of *Telecom Namibia Ltd v Communications Regulatory Authority of Namibia* (A 448/2013 [2015] NAHCMD 66 (19 March 2015):

'Rule 28 provides for discovery rules generally and rule 70(3) makes rule 28 applicable to discovery in motion proceedings; but in motion proceedings an applicant must satisfy the court that exceptional circumstances exist. (*Kauaaka and Others v St Phillips Faith Healing Church* 2007 (1) NR 276)) I, accordingly, accept Mr Coleman's submission on the point. In addition to that, the applicant must satisfy the twin requirements prescribed in rule 28(1), namely, that the documents required are documents "*that are relevant* to the matter in question" and "*that are proportionate* to the needs of the case".' (Italicized for emphasis)

[5] It is clear from the interpretation and application of rule 28, read with rule 70(3), of the rules set out in the preceeding paragraph that the respondents are not entitled as of right under those rules to make general discovery. Those rules are enabling provisions; they are not entitlements; and *a fortiori*, they are subject to the peremptory provisions of rule 66(1)*(b)* of the rules.

[6] The problems of the respondents do not end there. In motion proceedings, 'discovery is very, very rare and only permitted' in exceptional circumstances. (*South African Poultry Association v The Ministry of Trade and Industry* (A 94/2014) [2014] NAHCMD 331 (7 November 2014)) In my view, in the instant matter, there cannot be exceptional circumstances existing in the respondents' favour where (a) the respondents decide not to pursue the procedural rules available to them under rule 28 to request discovery of documents referred to in the applicants' founding affidavit; but rather seek to dump a great number of documents on the court and the other parties, and this, after the respondents have already filed their answering papers. The rule of practice, which is well entrenched in the court, is that a respondent must (and I use 'must' in its peremptory connotation) deliver its answering affidavit together with any relevant documents (in terms of rule 66(1)*(b)*). And such respondent must – without any allowance – explain in the affidavit the nature of such documents and their relevance to the issues in dispute. Furthermore, if the documents are so bulky that the respondent is not expected to attach them to the affidavit, the respondent should say so in its affidavit, and then identify, for the benefit of the court and the other parties, the particular documents or portions of such

documents which the respondent desires to use and rely on, and explain the contents of the documents or the portions thereof and their relevance to the issues at hand.

[7] Joffe J put it crisply and clearly thus in *Swissborough Diamond Mines v Government of RSA* 1999 (2) SA 279 (T) at 324F-G:

> 'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed.'

[8] The practice is predicated upon the rule that in motion proceedings the affidavits constitute both the pleadings and the evidence and that a party must make out its case on its papers. See *South African Poultry Association v The Ministry of Trade and Industry*, para 48.

[9] In the instant proceeding, what the respondents seek to do is, with respect, to introduce the documents through the backdoor by way of discovery. The approach that the respondents seek to take is alien to the rules of court. Besides, it is unreasonable and unfair not only to the other parties but also to the court. Apart from all else, what takes away any chance of the court granting any judicial largesse to the respondents is that the documents they wish to introduce have always been in the respondents' possession, as Mr Corbett submitted. In any case, Mr Möller, counsel for the respondents did not point to the court the rule of court which supports the route the respondents seek to traverse.

[10] To conclude; I find that that route, with respect, constitutes an abuse of process of the court. In that regard, the court should invoke its inherent power to protect itself. See *Arrangies v Quick Build* 2014 (1) NR 187 at 195, para 19.

[11] Based on these reasons, I find that the respondents have failed to persuade the court to grant them the relief they seek, in invocation of its inherent power.

(b) Referral to oral evidence

[12] The starting point is this. Applications for winding up of companies must be launched by motion proceedings. The Companies Act 28 of 2004 ('the Act') does not provide for trial proceedings. Section 352(2) of the Act is relevant to the instant proceedings; and it reads:

'(2) Where the Court grants an application made under section 351, the Court must, unless there is good reason not to do so -

(a) grant a rule *nisi* calling on the company and all interested persons to show cause on the return day why the company should not be finally wound up; and

(b) direct that the rule be published in the *Gazette* and, if the Court deems it necessary, in a newspaper circulating in Namibia.'

[13] The principle is well settled that courts will not readily refer an application for a provisional winding-up order to oral evidence. This will only be ordered in exceptional circumstances.

[14] An insightful explanation and the reasonability and fairness of the principle are set out in the judgment of the Appellate Division in *Kalil v Decote X (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 979E-F (per Corbett JA):

'Where, on the other hand, the affidavits in an opposed application for a provisional order of winding-up do not reveal a balance of probabilities in favour of the applicant, then clearly no *prima facie* case is established and a provisional order cannot at that stage be granted. The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to

me that in these circumstances the Court should have a discretion to allow the hearing of oral evidence in an appropriate case.'

[15] Having approved *Kalil*, the Supreme Court, per Strydom AJA, held as follows in *Executive Properties v Oshakati Tower* 2013 (1) NR 168, para 39:

'What this court must now decide (and what the court a quo also had to decide at the time of the application) is what the prospects of the viva voce evidence tipping the balance in favour of the applicant who applied to have the matter referred to oral evidence are. In the *Kalil* case, (supra), it was stated that the court would be less inclined to refer a dispute to oral evidence where the balance of probabilities strongly favoured the other party.'

[16] As long ago as 18 May 2015 the court ordered that the first applicants' application for a provisional order of winding up the first respondent should be set down for hearing without delay. In my opinion, referral to oral evidence will not be convenient. There is some urgency in winding-up the first respondent, and the attempt by the respondents to unprocedurally discover two thousand pages of documents, discussed previously, and then to refer the whole matter to oral evidence will certainly not be convenient to the other parties and the Court. Additionally, it will not conduce to the implementation of the court order of 18 May 2015. The purpose of winding up applications is to arrest the state of affairs as soon as possible by granting a provisional order after which the affairs of the company can be investigated and the provisional liquidator can deal further with the matter. And what is more; the issues on which the respondents seek to lead oral evidence are not clearly defined. Indeed, they are not defined at all. There is merely a reference to material disputes of facts in very broadly defined areas. As I see it, what the respondents seek is a trial action to determine whether or not a provisional order should be granted. This approach cannot be allowed. It would be a different case where material dispute of facts is clearly defined. In the instant case, no attempt has been made by the respondents to define the alleged dispute of facts. As I see it, what the respondents seek to refer to oral evidence are all the issues. It need hardly saying that in that event a referral to oral evidence will not lead to a just and speedy

determination of the matter as contemplated in rule 1(3) of the rules, thus, frustrating the 18 May 2015 court order.

[17] I think Mr Steyn's submissions have merit. They are that the court should grant a provisional winding up order on the papers as a rule nisi, calling upon the respondents and other interested parties to show cause, if any, on the return day why the provisional order should not become final. On the return day the court may grant a final order, or dismiss the application or refer it to oral evidence at the instance of either the applicants or the respondents. I think this is a proper course to take in the circumstances. This is not appropriate case where the court should allow oral evidence.

[18] For all the aforegoing reasons,

(a) I decline –

(i) to direct that the respondents discover further documents.

(ii) to direct that the matter be referred to oral evidence.

(b) The set down dates of 2 and 3 November 2015, at 10h00, remain undisturbed.

(c) Costs are in the cause.

C Parker

Acting Judge

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APPEARANCES

FIRST APPLICANT:	H Steyn Instructed by Ellis Shilengudwa Inc., Windhoek
SECOND, THIRD AND FOURTH APPLICANTS:	A W Corbett SC Instructed by Fisher, Quarmby & Pfeifer, Windhoek
FIRST RESPONDENTS:	A Möller Instructed by Du Plessis, De Wet & Co., Windhoek