

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2097/2014

In the matter between:

**RAIMO NAANDA
IRMA NDATEGA NAANDA**

**FIRST APPLICANT
SECOND APPLICANT**

and

**ALBINUS INDILA EDWARD
BERTHA INODHIMBWANDJE KADHILA
SUAMA NDATAAMBA KAPOLO
HUMAN CAPITAL FISHING COMPANY CC**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Neutral Citation: *Naanda v Edward (I 2097//2014) [2017] NAHCMD 107 (22 March 2017)*

Coram: Prinsloo, AJ

Heard: 2017/03/08

Delivered: 2017/03/22

Flynote: Civil Practice – Application to compel discovery – Rule 28(8) – It is interlocutory in nature – Rule 32(9) and (10) regulates interlocutory matters and applications for directions – The provisions applied in terms of this Rule to interlocutory applications and applications for directives are peremptory in nature and that failure to comply with them is fatal –The purpose of these sub rules is to ensure that in interlocutory proceedings, the parties seek to first amicably resolve the dispute before setting it down for determination by the court –One can surely not say that the applicant sought amicable solution by writing a letter and then wait nine (9) months to launch the application without taking any positive steps in between – The application to compel further discovery is struck from the roll.

ORDER

1. The application to compel further discovery in terms of rule 28(8) is struck from the roll.
2. The first and second applicants are ordered to pay the respondents cost of this application jointly and severally, the one paying the other to be absolved.
3. Matter is postponed for 04/04/2017 at 8:30 for pre-trial on the case management roll of Geier J for allocation of a new trial date.

JUDGMENT

Prinsloo, AJ;

[1] This matter came before me for trial on 06 March 2017. This matter dates back to 03 June 2014 when proceedings were instituted. The matter became defended on 30 July 2014 when a notice of intention to defend was filed.

[2] Since that date, the matter was duly case managed until a date of hearing was set in terms of the pre-trial order dated 23 June 2016.

[3] On 03 March 2017 the plaintiffs (hereinafter referred to as the applicant(s)) filed an application to compel additional discovery in terms of Rule 28(8).

[4] This application was opposed by the Defendants (herein after referred to as the respondent(s)) and once applicant's replying affidavit was filed, a further application was lodged by the respondents to strike out certain allegation, said to be new, from the said replying affidavit.

[5] It was agreed between counsel, Ms Bassingthwaite on behalf of the applicants and Mr Obbes on behalf of the respondents, that both issues will be argued simultaneously.

[6] In the answering affidavit filed on behalf of the respondents a point *in limine* was raised that the applicant failed to comply with the provisions of rule 32 (9) and (10) of the Rules of Court.

Point in limine:

[7] Rule 32 regulates interlocutory matters and applications for directions. Rule 32(9) and (10), read as follows:

'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.

(10) The party bringing any proceeding contemplated in this rule must before, instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information.'

[8] There can be no opposition if I say that the application to compel discovery in terms of rule 28(8) is indeed interlocutory in nature and that rule 32(9) and (10) would apply.

[9] The court was referred the matter of *Mukata v Appollos*¹ where the learned Parker AJ held that the above provisions applied to interlocutory applications and applications for directives and that the said provisions were peremptory in nature and that failure to comply with them was fatal.

[10] The sentiments of Parker AJ was readily accepted by the applicant but it was argued by Ms Bassingthwaite that there was indeed substantive compliance with the said rules even though no report was filed with the Registrar in terms of rule 32(10). The Court was invited to consider the documentation filed in support of the founding affidavit in substantiating the argument.

¹ Case No. I 3396/2014.

[11] It is thus necessary to consider the origin of the application before Court in order to determine if there was compliance with the relevant sub-rules.

[12] This application found its origin in the fact that on 29 April 2016 the applicants filed a notice on the respondents under the heading: **RULE 28(8)(a) DISCOVERY: ADDITIONAL DOCUMENTS TO BE DISCLOSED**. It proceeded to set out the parties to the matter and it called upon the respondents to discover bank account statements of the first three respondents for the period 2012 - 2016 on or before 30 May 2016. The notice was served for purposes of the Pre-Trial Conference dated 02 June 2016 according to the heading thereof.

[13] Respondents were informed by this notice that if they fail to discover the aforementioned documents an application would be made to court for an order compelling them to do so.

[14] The notice served on the respondents was not in the format of Form 11 as per rule 28(8) but in free format as drafted by the legal representative for the applicants.

[15] It is not clear from the case management order if the issue of additional discovery was addressed during case management on 02 June 2016 but it seems doubtful as only Mr Haraseb on behalf of the defendants (respondents) made an appearance.

[16] On 02 June 2016, a letter was addressed to the legal representative for the respondents and the Court will repeat the contents of the said letter as it is important:

'RULE 32(9) &(10): RAIMO NDAPEWA NAANDA & IRMAN NDATEGA NAANDA // ALBINUS INDILA EDWARD & 3 OTHERS

The above matter and our notice in terms of rule 28(8)(a) refers.

Kindly take notice that you have failed to comply with the aforementioned notice, thereby prejudicing our clients in their preparations.

As a result, we therefore intend to invoke our right in terms of rule 28(9), unless you can provide us with an amicable resolution to this matter in compliance with rule 32(9). (Emphasises added)

We await your response hereto.'

[17] It is common cause that both the notice dated 29 April 2016 and the letter dated 02 June 2016 were received by the respondents. Respondents however elected not to respond to either the notice or subsequent correspondence.

[18] Ms Bassingthwaite argued that the Court can condone the non-compliance with the rule for two reasons, i.e. i) there is not prejudice to the parties and ii) the purpose of the rule is to reach an amicable solution between the parties and same would not have been reached even if the rule was followed.

[19] On the latter proposition, I must emphasize right off the bat that the judgments in this jurisdiction have many times over expressed the view that parties cannot decide whether they wish to follow the rule or not, merely because they are of the view that there is no prospects of an amicable solution to be reached. This was made very clear by Masuku J in the matter of *Kondjeni Nkandi Architects v The Namibian Airports Company Limited*² where he remarked as follows:

²(I 3622-2014) [2015] NAHCMD 223 (11 September 2015) paragraph [18]

'My reading of the subrule does not leave it to the parties to agree or disagree to comply with what are clearly mandatory provisions. Parties cannot be allowed to opt out and to choose which rules to comply with and which ones not to comply with. Such an election would be perilous and result in anarchy and a complete breakdown in the orderly conduct of litigation.'

[20] The Court was referred to the matter of *Old Mutual Life Assurance Company of Namibia Ltd v Hasheela*³ where Masuku J said the following on substantial compliance with the rule⁴:

'In the instant case, the purpose of the subrules in question, as stated earlier, is to ensure that in interlocutory proceedings, the parties seek to first amicably resolve the dispute before setting it down for determination by the court. It is clear from what I have said above that that purpose was met and the only deficiency was not placing the evidence of the attempts to amicably resolve the matter before the registrar. I therefore find that there has been substantial compliance with rule 32 (9) and (10) and for that reason, this court is at large to consider the interlocutory application without further ado.'

[21] It is thus clear that if the Court is satisfied that there is substantial compliance with the rule the Court will not let formalism dictate over common sense.

[22] The question for determination is thus whether the documents referred to by the applicant, whether considered individually or collectively, do comply fully or substantially with the requirements of the said sub-rules 32 (9) specifically as it is common cause that no report was filed with the registrar setting out the steps taken to amicably resolve the matter.

³(I 2359-2014) [2015] NAHCMD 152 (26 June 2015)

⁴ Paragraph [22]

[23] At the time of drafting the notice and the letter to respondent's legal practitioner, this matter was still very much under case management as is evident from case management orders dated 9 June, 16 June and 23 June 2016. Applicants proceeded to set the case down for hearing well knowing that the issue of further discovery has not been laid to rest.

[24] The applicant did not proceed in terms of rule 28(9)⁵ as they alluded to in their letter to the respondents.

[25] Applicants were merely paying lip service to sub rule (9) by having a heading to their letter as '**RULE 32(9) and (10)**'. One can surely not say that applicant sought amicable solution by writing a letter and then wait nine (9) months to launch the application without taking any positive steps in between.

[26] On this issue I can do no better than to refer the discussion by Masuku J in the matter of *Bank Windhoek Limited v Benlin Investment CC*⁶ regarding the exchange of letters where he said as follows:

'[12]...As indicated earlier, the onus to move the matter for amicable resolution, lies with the party seeking to move the interlocutory application before delivery of the application. I am of the view that the mere writing of a letter, calling on the other party to say 'how you intend to resolve the matter amicably', cannot, even with the widest stretch of the imagination, amount to compliance with the rules. (Emphasis added)

And further

[16] The writing of letters provides a very easy way of being shallow in consideration of issues, dismissive in approach and polarized in engagement. This becomes

⁵(9) If a party believes that the reason given by the other party as to why any document, analogue or digital recording is protected from discovery is not sufficient, that party may apply in terms of rule 32(4) to the managing judge for an order that such a document must be discovered.

⁶ [2017] NAHMD 78 (15 March 2017) para 12.

so even if there are matters that may be canvassed, even if not eventually settled in full or at all. The face to face engagement on such issues brings such cursory and perfunctory approach to a screeching halt. After the meeting, you understand your case better as that of your opponent, which assists the resolution or approach to the live issues going forward. This benefit must not be lost behind the veil of avoiding active engagement by the mere superficial exchange of letters.'

[27] I fully agree with the applicant that the respondents' legal practitioner had an obligation to respond to the notice issued in April 2016 or the further letter received in June 2016, regardless if he/she was of the opinion that the notice was not on the prescribed form 11 as set out in the rules. Rule 19 sets out the obligations of parties and legal practitioners in relation to judicial case managements and more specifically rule 19(i) which places a duty on the parties "(i) to act promptly and minimise delay".

[28] The Court heard an argument that these sub-rules under discussion are sterile formalism. However these sub-rules are in place to avoid protracted and costly interlocutory proceedings, with the aim to achieve a fair and timely disposal of matters and causes⁷. I can only repeat Masuku J sentiments in *Bank Windhoek Limited v Benlin Investment CC*⁸ regarding the sub-rules as follows:

'It must be mentioned and pertinently so, the rule 32 (9) and (10) are not merely incidental rules. They actually go to the core of the edifice that should keep judicial case management standing tall and strong. The two subrules fully resonates with and give expression to the overriding core values of judicial case management as found in rule 1(3).....'

[29] Having considered the preceding authorities, I am satisfied that there was no substantive compliance with the sub- rules *in casu* and as sub-rule (9) and (10) are

⁷With reference to Rule 1(3)(b): (b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.

⁸ Paragraph 17

peremptory in nature, and the failure of the applicant to comply with them are fatal. I thus do not deem it necessary to rule on the application to strike or the application for additional discovery.

[30] In conclusion, the Court must comment on the point which was raised that there would be no prejudice to the parties should the Court condone the non-compliance of the rules. I respectfully disagree with that proposition. Five (5) court days were allocated to the hearing of the main matter. Due to the applicant's failure to fully comply with the relevant rules timorously, these days had to be vacated. In the overriding core values of judicial case management, rule 1(3)(e) recognises the fact that "judicial time and resources are limited and therefore allotting to each cause an appropriate share of the Court's time and resources, while at the same time taking into account the need to allot resources to other causes". It is thus crystal clear that prejudice is not just limited to the litigating parties but it also includes the Courts.

[31] In the result I make the following order:

1. The application to compel further discovery in terms of rule 28(8) is struck from the roll.
2. The first and second applicants are ordered to pay the respondents costs of this application jointly and severally, the one paying the other to be absolved.
3. Matter is postponed to 04 April 2017 at 8:30 for pre-trial on the case management roll of Geier J for allocation of a new trial date.

JS Prinsloo
Acting Judge

APPEARANCE:

FOR THE PLAINTIFF:

Adv. N. Bassingthwaite

INSTRUCTED BY:

Angula Co. Incorporated, Windhoek

FOR THE DEFENDANT:

Adv .Obbes

INSTRUCTED BY:

Metcalfe Attorneys, Windhoek