

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Meat Corporation of Namibia v Groenewald</i>	Case No: HC-MD-CIV-ACT-CON-2016/02858 HC-MD-CIV-ACT-CON-2017/00219
	Division of Court: High Court
Heard before: Honourable Justice Herman Oosthuizen	Date of hearing: 20 April 2018
	Delivered on: 28 June 2018
Neutral citation: <i>Meat Corporation of Namibia v Groenewald</i> (HC-MD-CIV-ACT-CON-2016/02858) [2018] NAMCMD 194 (28 June 2018)	
Result on merits: Partially successful.	
The order: Having heard Mr Obbes , counsel for the plaintiffs, and Mr Ravenscroft-Jones , counsel for the defendant, and having read the documents filed of record: IT IS ORDERED THAT: 1. Prayer 1 of plaintiffs' Notice of Motion is declined. 2. The defendant is ordered to fully, properly and unambiguously respond to each and every request contained in paragraphs 5, 9, 13, 16, 18, and 19 of the plaintiffs' notice in terms of Rule 28(8)(a) dated 20 October 2017 and to do so on or before 31 July 2018 . 3. The defendant is further ordered to make available to plaintiffs, and hand over the memory stick with uncorrupted data referred to in paragraph 2 of his affidavit dated 7 December 2017, and to include the information lacking in his paragraph 2 on plaintiffs request (paragraph 5), still available.	

4. In the event of the defendant not complying with orders 2 and 3, the plaintiffs are granted leave to approach the court on the same papers, duly amplified, to seek the striking out of the defendant's plea and defence.

5. Each party to bear its own costs.

Reasons for orders:

1 On 20 October 2017 the plaintiff requested additional discovery from the defendant in terms of Rule 28(8)(a) on an incomplete Form 11. The Form 11 was incomplete in the sense that it did not contain the last two paragraphs in the prescribed Form 11. The second last paragraph in the prescribed Form 11 reads — “In such statements you must specify in detail which documents are still in your possession. If you no longer have any such documents which were previously in your possession you must state in whose possession they are now”. The fact that plaintiffs' Form 11 was incomplete matters not. The prescribed Form is incorporated in Rule 28(8)(a) and forms part of the requirements.

2. Defendant raised no objection against the aforesaid request being out of time in terms of the pre-trial order of July 2017 and did not reply thereto before the status hearing of 27 November 2017.

3. The Court then ordered defendant on 27 November 2017 to reply to the aforesaid request on or before 14 December 2017.

4. On 7 December 2017 the defendant filed a statement in terms of Rule 28(8)(a), which fell short of what he was required to do in *inter alia* the following respects:

4.1. Defendant was requested to discover/disclose any and all documents relating to the marketing of the mentioned participation cattle, including any correspondence exchanged between the parties or third parties relating to same. Vide paragraph 5 of the request.

4.2 Defendant answered/replied that all correspondence was electronic to the best of his knowledge, that his hard-drive crashed and he lost most of his data. In any event (he said) the plaintiff would be in possession of all such e-mails and correspondence.

4.3 Defendant's statement is not satisfying in that —

4.3.1 he only answered/focused on correspondence exchanged between him and plaintiffs in electronic mail, which was part of the request, and say all correspondence was electronic.

4.3.2 he did not answer the first part of the request.

4.3.3 he did not answer the last part of the request concerning third parties.

4.3.4 he did not answer "specifying in detail" which documents relating to the marketing of the cattle are still in his possession or in whose possession they are now.

4.3.5 he omitted to answer and specify in detail which documents consisted of hard copies, if any, and where they are.

4.4 Defendant was requested to discover/disclose all documents (including, but not limited to, export permits, veterinary permits, invoices, contracts, delivery notes, invoices, shipment documents, consignment notes, auditable records) relating to the cattle in paragraph 1 to 4 in the request. Vide paragraph 9 of the request.

4.5 Defendant answered /replied that these documents were delivered to the Department of Veterinary Services in Outjo and he did not retain copies.

4.6 The answer is non-specific and lacks detail for example it did not address invoices, veterinary movement permits, delivery notes, documents received from the Department of Veterinary Services in Outjo.

4.7 The answer pertaining to paragraph 13 of the request is likewise lacking in particularity in view thereof that the request relate to the request and deficient answer in respect of paragraph 9 of the request.

4.8 The answer pertaining to paragraphs 16, 18 and 19 of the request is likewise devoid of specificity and detail.

5. Plaintiffs caused their legal practitioner to write letters to defendant's legal practitioner raising their concerns with the answers to the request for additional particulars and the way in which defendant elected to answer their request for trial particulars.
6. Defendant supplied an additional reply to the request for trial particulars on 14 December 2017.
7. Plaintiffs launched the application to compel better discovery and particulars on 20 December 2017.
8. The main trial in the matter was set down to be heard from 29 January 2018 to 2 February 2018.
9. The trial date was vacated in order for the parties to resolve their interlocutory issues and an issue with late amendment of pleadings.
10. When it became clear that the parties are unable to resolve the issues raised in plaintiffs' Notice of Motion of 20 December 2017, the court, on 5 March 2018 ordered them to complete the process in respect of the 20 December 2017 application and to file heads of arguments.
11. Counsel for both parties filed exemplary sets of argument. For purposes of the court's interlocutory orders and reasons the court did not find it necessary to deal with the arguments and authorities by referencing them, although the court was guided thereby in its deliberation.
12. The court had regard to the parties' compromises recorded in their joint pre-trial report (signed and filed in two parts), the pleadings, the orders made, the discovery made, the two sets of trial particulars filed by defendant and the documents filed of record together with the applicable Rules and definition of "document" in the Court Rules.
13. A salient factor which contributed to the court's reasoning that the defendant's disclosure was insufficient as found in paragraph 4 supra, was that it is not expected from a commercial farmer to be so evasive in his replies.
14. In view of the defendant's answers in his second set of trial particulars, with the answers in his first set of trial particulars, the pleadings and the parties' pre-trial reports, which was ordered, the case law and the process of case management conducted, as well as defendants' answering affidavit concerning the requested trial particulars, the court did not find the complaints levelled by the plaintiffs thereanent to merit an

order as requested in prayer 1 of the Notice of Motion.

15. In the result the following orders are made:

15.1 Prayer 1 of plaintiffs' Notice of Motion is declined.

15.2 The defendant is ordered to fully, properly and unambiguously respond to each and every request contained in paragraphs 5, 9, 13, 16, 18, and 19 of the plaintiffs' notice in terms of Rule 28(8)(a) dated 20 October 2017 and to do so on or before **31 July 2018**.

15.3 The defendant is further ordered to make available to plaintiffs, and hand over the memory stick with uncorrupted data referred to in paragraph 2 of his affidavit dated 7 December 2017, and to include the information lacking in his paragraph 2 on plaintiffs request (paragraph 5), still available.

15.4 In the event of the defendant not complying with orders 2 and 3, the plaintiffs are granted leave to approach the court on the same papers, duly amplified, to seek the striking out of the defendant's plea and defence.

15.5 Each party to bear its own costs.

Judge's signature:	Note to the parties:
Counsel:	
Plaintiff(s)	Defendant (s)
C Visser of ENSAfrica Namibia (incorporated as LorentzAngula Inc.), Windhoek	A Naude of Dr Weder, Kauta & Hoveka Inc., Windhoek