

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-EXP-2016/00275

In the matter between:

THE NAMIBIAN COMPETITION COMMISSION

APPLICANT

and

PUMA ENERGY (PTY) LTD

RESPONDENT

Neutral citation: *The Namibian Competition Commission v Puma Energy (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2016/00275) [2018] NAHCMD 36 (16 February 2018)

Coram: UEITELE J

Heard: 5 December 2017

Delivered: 16 February 2018

Flynote: Applications and motions – Affidavits – Number of sets of affidavits – Sequence to be followed – Affidavit tendered late and out of time – What party has to show to have such affidavit admitted.

Summary: Applications and motions – Affidavits – Court may in its discretion permit the filing of further affidavits – Respondent seeking leave to file a further

affidavit – Court concluding that further affidavits allowed only in special circumstances or if the court considers such cause advisable – Court further expecting an explanation as to why the filing of further affidavits is necessary – Respondent failing to adduce evidence to this effect – As a consequence, court of the view that Respondent failed to establish that special circumstances exist – Application dismissed with costs.

ORDER

1. The respondent's application to file a supplementary affidavit is refused.
2. The respondent must, subject to Rule 32 (11) pay the applicant's costs, the costs to include the costs of one instructing and one instructed Counsel.
3. The matter is postponed to 7 March 2018 to the case management roll of Justice Geier for directions as to the further conduct of the matter.

JUDGMENT

UEITELE J:

Introduction

[1] This matter concerns the filing of a further affidavit. The parties in this matter are, The Namibia Competition Commission, which is a juristic person established in term of s 4 of the Competition Act, 2003¹ who, on an *ex parte* basis and in terms of ss 16(1)(f) and 33² of the Competition Act, 2003, approached the Court in September

¹ Act No. 2 of 2003.

² Section 16(1)(f) of the Competition Act, 2003 reads as follows:

'16 Functions, powers and duties of Commission

(1) The Commission is responsible for the administration and enforcement of this Act and, in addition to any other functions conferred on the Commission, it has the following powers and

2016 as the applicant. I will, in this judgment, for the sake of convenience refer to the applicant as the Commission.

[2] The respondent is Puma Energy (Namibia) (Pty) Ltd a private company which is in the business of trading in energy products such fuel and jet fuel, and it is registered and incorporated in accordance with the Company laws of Namibia. I will, in this judgment, for the sake of convenience refer to the respondent as Puma.

Background to this application

[3] On 23 March 2016 the Commission received a class complaint from the Namibia Aircraft Owners and Pilots Association of Namibia (AOPA) to the effect that Puma is allegedly, in contravention of s 26 of the Competition Act, 2003 abusing its dominant position at the Eros and Ondangwa airports.

[4] Following that complaint, the Commission on the 14th day of September 2016 approached this Court on an urgent, *ex parte* and *in camera* basis seeking an order in terms of which a search and seizure warrant in terms of s 34 of the Competition 2003 is issued. The Commission furthermore sought an order directing that the search and seizure warrant so issued must take place for a continuous period of 24 hours. When the Commission launched its application it was represented by Mr Patrick Kauta of the Law Firm Dr Weder, Kauta & Hoveka.

[5] On the same date the Commission obtained an order in terms of s 34 of the Competition Act, 2003 authorising it to enter and search the premises of Puma situated at Old Mutual Tower Building in Independence Avenue, Windhoek, and at the Eros Airport, Windhoek. Between 15 and 17 September 2016 the search authorised by the Court took place and, during the search, a number of hardcopy

functions:

- (a) ...
- (f) to be responsible for investigating contraventions of this Act by undertakings and for controlling mergers between undertakings.'

And Section 33 (1) reads as follows:

'33 Investigation by Commission

(1) The Commission may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of-

- (a) the Part I prohibition; or
- (b) the Part II prohibition.'

documents and electronic devices were seized. Apart from the documents and electronic devices that the Commission seized, the Commission also created forensic images of the electronic devices and Puma's server.

[6] On 10 October 2016, Puma filed a notice of its intention to oppose the *ex parte* application. In addition to opposing the *ex parte* application, Puma also launched a counter application in terms of which it sought an order declaring both the issuing of the warrant and the execution of the warrant unlawful. The Commission opposed the counter application and the parties exchanged pleadings between 31 October 2016 and January 2017. On 1 February 2017, the Managing Judge issued an order setting the matter down for hearing on 10 May 2017.

[7] On 10 May 2017 the matter came before me for hearing. When the matter was allocated to me it was inadvertently omitted to notify me that I would be hearing the matter. Therefore, I only became aware that the matter was before me for hearing on the morning of 10 May 2017 and, because I had not prepared and had not read the papers, I postponed the matter to hear the application, and counter application to 5 December 2017.

[8] On 30 November 2017, Puma gave notice through its legal practitioners that it would, at the hearing on 5 December 2017, apply for leave to file a Supplementary Affidavit. The Commission gave notice that it opposed Puma's application for leave to file a further affidavit. At the hearing on 5 December 2017 the parties agreed that I first hear and determine Puma's application to file a supplementary affidavit. This judgment thus, only deals with that application.

The number of affidavits in Motion proceedings

[9] Approximately 112 years ago Innes CJ, in the matter of *Transvaal Government v Standerton's Farmers' Association*³ said that the proper practice in motions and applications was that after any affidavits in support of the application had been filed, the respondent should file his opposing affidavits and then the applicant his reply. No further affidavits, said the Chief Justice, should be received by the Registrar. If either party desired, on good grounds, they should be tendered from

³ 1906 TS 21.

the bar. This age old practice is now contained in Rule 66 (2) of this Court's Rules. That rule reads as follows:

'The applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in sub-rule (1)(b), deliver a replying affidavit and the court may in its discretion permit the filing of further affidavits.' Underlined for emphasis

[10] In the matter of *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd*,⁴ this Court stated that it may in its discretion permit the filling of further affidavits. Quoting from the South African case of *Juntgen T/A Paul Juntgen Real Estate v Nottbusch*,⁵ it said:

'Generally a Court has a discretion, which is inherent to the just performance of its decision reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case.'

[11] In the South African case of *James Brown & Hamer (Pty) Ltd v Simmons N.O*⁶ the Court said:

'It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable.'

[12] The above principle was endorsed by this Court when it held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering

⁴ 2007 (1) NR 222 (HC), Also see the matter of *Gabrielsen v Coertzen* Case No: (P) I 3062/2009 an unreported judgment of this Court delivered on 29 June 2011.

⁵ 1989 (4) SA 490 (W).

⁶ 1963 (4) SA 656 (AD) at 660.

affidavits will be permitted where, for instance, 'there is a possibility of prejudice to the respondent if further information is not allowed.'⁷ The court will allow the filing of further affidavits only in exceptional circumstances and will expect an explanation as to why the filing of further affidavits is necessary.⁸

[13] The court exercises a judicial discretion when it considers whether or not to allow the filing of a further affidavit. In the exercising of the discretion, the Court essentially asks the question '*Do the circumstances of the case demand the filling of an additional affidavit?*' The authorities that I have perused indicate that special circumstances have been held to exist and a departure from the general rule has been allowed where there was something unexpected in the applicant's replying affidavits⁹ or where a new matter was raised therein and also where the Court desired to have fuller information on record.

[14] Where, however, there is a possibility of prejudice to the respondent if further information is not allowed the Court will, so the learned authors *Herbstein and van Winsen*¹⁰ say, admit the further affidavits. There must, however, be a proper and satisfactory explanation which negatives *mala fides* or culpable remissness as to the cause of the facts or information not being put before the Court at an earlier stage and what is more important is that the Court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs.

Did Puma demonstrate the existence of special circumstances?

[15] In the instant case, Puma is seeking leave to admit a further affidavit on the ground that M Kauta who is representing the Commission is allegedly 'irretrievably conflicted'. In the words of Nonna Mahlafonya, who deposed to the founding affidavit in support of the application to file a further affidavit, Mr Kauta:

'...acts for the Commission to assist in the discharge of its statutory functions, bringing and defending cases against Puma, and assisting the Commission to exercise its powers in

⁷ See the unreported judgment in the matter of *Maritima Consulting Services CC v Northgate Distribution Services Ltd* A 282-2014) [2015] NAHCMD 121 (delivered on 29 May 2015)

⁸ *James Brown & Hamer (Pty) Ltd v Simmons* N.O 1963 (4) SA 656 (AD).

⁹ *Rens v Gutman* N.O 2002 4 All SA 30 (C).

¹⁰ In their book *The Civil Practice of the Supreme Court of South Africa*, 5 ed, p 433

respect of Puma. Yet at the same time Mr Kauta acts as a director and the Chairperson of a company that directly competes (actually and potentially) with Puma. By so doing Mr Kauta compromises the independence required of the Commission; and places himself in a position where he cannot simultaneously discharge his fiduciary duty to Namcor and his duty to act for the Commission in the discharge of its public functions.'

[16] The conflict of interest is alleged to have arisen by virtue of the fact that when the search and seizure warrant was issued back in September 2016, the application was moved by Mr Kauta, who then represented the Commission in those proceedings. From the affidavits filed of record it is apparent that Mr Kauta was appointed as a Director and Chairperson of Namcor only during October 2016. Puma then further argues that, shortly after this, Mr Kauta was appointed as Member and Board Chairperson of Namcor.

[17] In the affidavit in support of the application to file a further affidavit Mahlafonya explains that he is the Regional Counsel of Puma, but he does not tell the Court where he is based. He further proceeds and tells the Court that on 25, 26 and 27 October 2017 he attended interviews of Puma's Managing Director held by the Commission. The interviews were conducted by Mr Kauta. He further states that subsequent to the interviews he became aware of the fact that Mr Kauta is the Chairperson of the Board of Directors of Namcor and that he was appointed to that position on 1 October 2016.

[18] The affidavit of Mahlafonya is lacking in details on the circumstances surrounding the alleged knowledge about Mr Kauta's appointment as Director of Namcor. Mr Mahlafonya does not tell the Court how he came to the knowledge of Mr Kauta's appointment and what the source of his knowledge is. He also does not tell the Court what Puma's knowledge, with respect to the appointment of Mr Kauta as Chairperson of Namcor, is. The information about Mr Kauta's appointment has been in the public domain for a period of more than twelve months prior to the launch of this application. I am of the view that the dearth in Mahlafonya's affidavit can only be ascribed to an attempt by Puma to conceal its culpable remissness to place before Court the information being put before the Court at this late stage. The explanation by Puma is in my view neither proper nor satisfactory.

[19] In the present matter I take cognisance of the following facts. The decision to investigate Puma was triggered by a class complaint from the Namibia Aircraft Owners and Pilots Association of Namibia. There is no evidence placed before this Court that Mr Kauta in any way played a part in the decision by the Commission whether or not to investigate Puma. At the time when Mr Kauta moved the *ex parte* application he was not the Chairperson of Namcor. After his appointment as Chairperson of the Namcor Board of directors there is no evidence that he is part of the decision making body of the Commission, his role is limited to that of rendering legal services.

[20] Upon a consideration of all the facts that I have set out in the preceding paragraphs, I am of the view that the circumstances of this case do not demand that I allow the supplementary affidavit to be filed. I am of the further view that a refusal to allow the supplementary affidavit to be filed would not be unfair. All said, I conclude that Puma has failed to establish that special circumstances exist that should persuade the court to exercise its discretion in favour of permitting the filing of a supplementary affidavit. I have not been provided with any reasons why the cost must not follow the course and why rule 32 (11) must not apply.

[21] I therefore make the following order:

1. The respondent's application to file a supplementary affidavit is refused.
2. The respondent must, subject to Rule 32(11) pay the applicant's costs the costs to include the costs of one instructing and one instructed Counsel.
3. The matter is postponed to 7 March 2018 to the case management roll of Justice Geier for directions as to the further conduct of the matter.

SFI Ueitele
Judge

APPEARANCES

APPLICANT: R Bhana SC (assisted by C E van der Westhuizen)
instructed by Dr. Weder Kauta & Hoveka, Windhoek

RESPONDENT: G Engelbrecht (assisted by B de Jager)
instructed by Engling Stritter & Partners, Windhoek