

“ANNEXURE 11”

Practice Directive 61

**IN THE HIGH COURT OF NAMIBIA**

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| <b>Case Title:</b><br><i>Walvis Bay Salt Refiners (Pty)Ltd v<br/>Blaauw’s Transport (Pty) Ltd and 4 others</i>   | <b>Case No.:</b><br>I 3668/2014                         |
|  | <b>Division of Court:</b><br>High Court (Main Division) |
| <b>Heard before:</b><br>Honourable Mr. Justice Usiku   | <b>Date of hearing:</b><br>24 January 2019              |
|  | <b>Delivered on:</b><br>15 February 2019                |
| <b>Neutral citation:</b> <i>Walvis Bay Salt Refiners (Pty) Ltd v Blaauw’s Transport (Pty) Ltd</i> (I 3668/2014) [2019] NACHMD 23 (15 February 2019)  |   |
| <b>The Order:</b><br>Having heard <b>Adv. Totemeyer</b> (SC), on behalf of the plaintiff and <b>Adv. Vermeulen</b> (SC), on behalf of the defendants and having read documents filed of record:<br><br><b>IT IS ORDERED THAT:</b><br><br>1. The defendants are ordered to – within 15(fifteen) days from the date of this order – clearly, properly and unambiguously respond to paragraphs 1,2,3,5,6,8 and 10 of the plaintiff’s notice in terms of rule 28(8)(a) dated 14 October 2015.<br><br>2. The defendants are ordered to – within 15 (fifteen) days from the date of this order – |   |

discover and deliver to the plaintiff, the documents identified in paragraphs 4,7,9,11 and 12 of the plaintiff's notice in terms of rule 28(8)(a) dated 14 October 2015, and further duly comply with the said notice pertaining thereto.

3. The defendants are ordered to pay the plaintiff's costs of the application jointly and severally the one paying the other to be absolved, including the costs of one instructing and two instructed counsel.
4. The matter is postponed to 08 May 2019 at 15:15 for a status hearing.
5. The parties are directed to file a joint status report on or before 02 May 2019.

**Reasons for orders:**

Introduction

[1] This is an application to compel further and better discovery in terms of Rule 28(8). The applicant is the plaintiff in an action pending before this court, in which the respondents are the defendants. For ease of reference, I will refer to the parties as the plaintiff and the defendants respectively.

[2] The cause of action alleged in the plaintiff's particulars of claim is briefly, that the defendants are alleged to have stolen bulk coarse salt from the plaintiff during the period of 1<sup>st</sup> April 2004 to June 2012 and that the plaintiff suffered loss as a result of such theft.

[3] After the defendants' discovery affidavits had been served, the plaintiff delivered, on 14 October 2015, a notice in terms of Rule 28(8) stating that plaintiff believed that in addition to the documents already discovered by the defendants, there were other documents which might be relevant to the matters in question and that such documents were in the possession of the defendants. A description of such documents was given in the plaintiff's aforesaid notice. The plaintiff, therefore, requested the defendants to deliver a written statement setting out the nature of the documents delineated in the notice, which the defendants

presently have or previously had in their possession and specify in detail which documents are still in the defendants' possession. If no longer in their possession, the defendants were requested to state in whose possession such documents now are.

[5] The defendants responded thereto by delivering a supplementary discovery affidavit, in either of two ways, namely:

(a) the defendants have in their possession specified documents set out in the defendants' index of additional discovery filed on 16 June 2017, and that the requested documents in addition to those disclosed in the defendants' discovery affidavits and the defendants' index of additional discovery, are not in the defendants possession. A similar response is: to the extent that the requested documents do not appear in the defendants' index to their additional discovery, such documents "no longer exist" or "do not exist". I shall refer to the documents in respect of which such a response was given as "category 1 documents", or

(b) the documents sought are not relevant to the matter in question and do not pertain to any issue arising from the pleadings ; alternatively, are disproportionate to the needs of the case; further alternatively, the demand to discover constitutes an abuse of the pertinent rule of court and the defendants decline to make the discovery sought. I shall refer to documents in respect of which such a response was given, as "category 2 documents".

#### Application for leave to compel

[6] The plaintiff, dissatisfied with the responses given by the defendants, contends in respect to category 1 documents, that:

(a) the defendants failed to specify in which respects the documents listed in the items of the defendants' index served to address the specific request made by the plaintiff in plaintiff's Rule 28(8) notice;

(b) the defendants do not detail which of the documents requested were previously in the defendants' possession;

(c) insofar as the defendants responded that certain documents "do not exist" or "no

longer exist”, such response is insufficient and inadequate as the defendants do not delineate whether the documents existed or were previously in possession of the defendants or of anyone, and if no longer in their possession, the defendants fail to state in whose possession such documents now are, if known.

[7] In respect to the category 2 documents, the plaintiff contends that such documents are relevant. The plaintiff, therefore, prays for an order in the following terms:

- ‘1. The Defendants (respectively) are ordered to – within 15(fifteen) days from the date of this order – clearly, properly and unambiguously respond to paragraphs 1,2,3,5,6,8 and 10 of the Plaintiff’s notice in terms of rule 28(8)(a) dated 14 October 2015.
2. The Defendants (respectively) are ordered to – within 15 (fifteen) days from the date of this order – discover and deliver to the Plaintiff, the documents identified in paragraph 4,7,9,11 and 12 of the Plaintiff’s notice in terms of rule 28(8)(a) dated 14 October 2015, and further duly comply with the said notice pertaining thereto.
3. The costs of this application only in respect of those Defendants electing to oppose this application (on the scale referred to below). In the event of more than one defendant opposing, costs are sought against such defendant, jointly and severally, the one paying the others to be absolved. In the above events, costs are sought including the costs of one instructing and two instructed counsel.
4. Further or alternative relief that this Honourable Court may deem fit.’

[8] In their answering papers, the defendants contend that their responses to the plaintiff’s Rule 28 (8) notice are adequate and the plaintiff has no basis to allege otherwise. In respect to the category 2 documents, the defendants argue that such documents are irrelevant to the plaintiff’s cause of action.

Whether the defendants’ response in regard to the category 1 documents constitutes proper response to the plaintiff’s notice in terms Rule 28(8)

[9] Rule 28 (8) provides as follows:

'(8) if a party believes that there are, in addition to documents, analogues or digital recordings disclosed under subrule (4), other documents including copies thereof or analogues or digital recordings which may be relevant to any matter in question in the possession of any other party and which are not repetitive or a duplication of those documents, analogue or digital recording already discovered –

(a) the first named party must refer specifically to those documents, analogues or digital recordings in the report in terms or rule 24 on Form 11: and

(b) the managing judge must at the case management conference give any direction as he or she considers reasonable and fair, including an order that the party believed to have documents, analogues or digital recordings in his or her possession must –

(i) deliver the documents, analogues or digital recordings to the party requesting them within a specified time; or

(ii) state on oath or by affirmation within 10 days of the order that such documents, analogues or digital recordings are not in his or her possession in which case he or she must state their whereabouts, if known to him or her.'

[10] In regard to documents under consideration in this category, the defendants' responses were either that the documents: "do not exist", "do not exist, if they exist they are not in my possession" or "do no longer exist".

[11] I am of the opinion that a litigant who has been requested to discover documents under Rule 28(8) cannot acquit himself of that duty by merely saying: the requested documents "do not exist" or "are no longer in existence". To accept, as sufficient an affidavit to that effect, would be to open widely the door to evasion. The defendants, by using answers of the type described above, failed to specify how the documents listed in items 1 to 22 of the defendants' index, served to address the specific request made in paragraph 1 of the plaintiff's notice in terms of Rule 28(8).

[12] A litigant requested to discover documents under Rule 28 (8) must clearly indicate:

(a) the documents he/she presently has in his/her possession, and,

(b) the documents he/she previously had in his/her possession, and if no longer in

possession of such documents he/she must state in whose possession they are now, if known to him/her.

[13] In the event of a document that is lost, the recipient of a Rule 28(8) notice must show that a thorough and exhaustive search has been conducted as a result of which the document in question was not found and that it is not possible for the defendant to do anything further in compliance with the plaintiff's request.

[14] In view of my opinion stated above, it follows that the responses given by the defendants to the plaintiff's Rule 28(8) notice, do not constitute proper responses. The plaintiff is, therefore, entitled to the relief as set out in paragraph 1 of its notice of motion.

Whether the category 2 documents are discoverable or not on the ground irrelevancy

[15] The issue for consideration now concerns the relevance of the category 2 documents to the matters in question in the action.

[16] Rule 28(8) (read in the context of the whole of Rule 28), requires discovery of all documents "which may be relevant to any matter in question" in the action. The onus is on the plaintiff to satisfy the court that documents in question are relevant to the action. The test of discoverability, (where no privilege or like protection is claimed) is that of relevance. The oath of the party alleging non-relevance is prima facie conclusive, unless it is shown on one or other bases that the court ought to go behind that oath.<sup>1</sup>

[17] In *Santam v Segal* 2010 (2) SA 160 (N) at 165 D-G, Patel, J made the following lapidary remarks on the issue of relevance:

'(10) Apropos relevance, the important point to note is that assessment of relevance is objective and not subjective. It is not for a party's legal representative to decide what he thinks the issues are and what documents are relevant to them. He has to provide access to documents which could be part of the issues and what documents could be relevant to them. The question of relevance is normally answered by reference to the pleadings. The basic principle was formulated in *Compagnie Finan-*

<sup>1</sup> *Continental Ore v Highveld Steel & Vanadium Ltd* 1971 (4) SA 589 at 598 E.

*ciere et Commerciale Du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 at 63; and restated in *Thorpe v Chief Constable of Greater Manchester Police* [1989] 1 WLR 665 at 668

“ . . . any document must be disclosed which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences. Discovery is thus not necessarily limited to documents which would be admissible in evidence.”

See also *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

Accordingly, the test is wider than direct relevance to the pleaded issues.’

[18] In the present case, the plaintiff contends, generally, that the documents in question are relevant to the matters in question in the action, namely: the alleged theft of bulk coarse salt and the plaintiff’s loss relating thereto. In its founding affidavit in support of its application, the plaintiff goes in detail in specifying the reasons, why it seeks discovery of the documents under paragraphs 4, 7,9,11 and 12 of its Rule 28(8) notice.

[19] On the other hand, the defendants argue that the documents in question are not relevant and advanced their reasons for the foregoing contention.

[20] I have considered the arguments put forth by the parties. I have also considered that the defendants do not assert in their response to the plaintiff’s notice in terms of Rule 28(8) (insofar as category 2 documents are concerned) that they are not in possession of the documents in question or that those documents are privileged. On the basis of the evidence put forth by the plaintiff, I am satisfied that the plaintiff has established an arguable case entitling it to the discovery of the documents in question. In addition, I am also satisfied that on the pleadings, the interest of justice also requires disclosure of the documents in question. To withhold discovery, under the circumstances, would be ‘contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation.’<sup>2</sup>

[21] For the reasons advanced above, I am of the view that documents in question are relevant and should therefore be disclosed.

<sup>2</sup> *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 at 1083.

Order

[22] In the premises, I make the following order:

- a) The defendants are ordered to – within 15(fifteen) days from the date of this order – clearly, properly and unambiguously respond to paragraphs 1,2,3,5,6,8 and 10 of the plaintiff's notice in terms of rule 28(8)(a) dated 14 October 2015.
- b) The defendants are ordered to – within 15 (fifteen) days from the date of this order – discover and deliver to the plaintiff, the documents identified in paragraphs 4,7,9,11 and 12 of the plaintiff's notice in terms of rule 28(8)(a) dated 14 October 2015, and further duly comply with the said notice pertaining thereto.
- c) The defendants are ordered to pay the plaintiff's cost of the application jointly and severally the one paying the other to be absolved, including the costs of one instructing and two instructed counsel.
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- e) The parties are directed to file a joint status report on or before 02 May 2019.

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| <b>Judge's signature</b>   | <b>Note to the parties:</b>  |
|  | Not applicable   |
| <b>Counsel:</b>  |  |
| <b>Applicant</b>   | <b>Defendants</b>  |
| Adv R Totemeyer (SC) with Adv D Obbes<br>Instructed by: MB De Klerk & Associates | Adv WJ Vermeulen (SC) with Adv R Heathcote (SC)<br>Instructed by: Etzold - Duvenhage |



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