

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

**RULING: APPLICATION FOR POSTPONEMENT
APPLICATION FOR LEAVE TO FILE A SUPPLEMENTARY DISCOVERY AFFIDAVIT
CONDONATION FOR APPLICANT'S FAILURE TO COMPLY WITH THE RULES OF
COURT RELATING TO DISCOVERY**

Case No: HC-MD-CIV-ACT-OTH-2017/01488

In the matter between:

NAMIBIA AIRPORTS COMPANY **PLAINTIFF**

and

**IBB MILITARY EQUIPMENT AND
ACCESSORY SUPPLIES CLOSE CORPORATION** **DEFENDANT**

Neutral Citation: *Namibia Airports Company v IBB Military Equipment And Accessory Supplies Close Corporation* (HC-MD-CIV-ACT-OTH-2017/01488) [2019] NAHCMD 550 (02 December 2019)

Coram: **PRINSLOO J**
Heard: 31 October 2019
Delivered: 02 December 2019

Reasons: 12 December 2019

ORDER

Ruling:

1. Prayers 1 and 2 of the Notice of Motion is granted as follows:
 - (a) Prayer 1: (i) The main action is postponed in terms of Rule 96(3) to date hereunder;
(ii) Applicant to pay the wasted costs occasioned by the postponement as tendered.
 - (b) Prayer 2: (i) The Applicant is granted leave to file a supplementary discovery affidavit and the Applicant's failure to comply with the Rules of Court is condoned;
(ii) Applicant to pay the cost of the latter application. Such cost to include the cost of one instructed and one instructing counsel. Such cost to be limited to Rule 32(11).

Further conduct of the matter:

2. The case is postponed to **30 January 2020** at **15:00** for a status hearing.
3. Joint status report **must** be filed on or before 27 January 2020.

RULING

PRINSLOO J

[1] The matter before me is one of a number of interlocutory applications between the parties. In this instance the plaintiff filed a Notice of Motion on 11 October 2019 praying for the following relief:

- (a) The hearing of the main action during the week of 28 October 2019 be postponed and/or change of dates in terms of Rule 96(3) to dates to be arranged with the Registrar; and
- (b) Plaintiff to be granted leave to file a supplementary discovery affidavit, and that the court condones the applicant's failure to comply with the Rules of Court relating to discovery.

[2] I will refer throughout this ruling to the parties as they are in the main action¹.

Application for postponement

[3] From the onset I must point out that due to the number of interlocutory applications that followed since September 2019 the papers filed and arguments advanced overlap to a very large extent and I will therefore attempt to limit myself and not go into the finer detail of the affidavits filed.

[4] The matter was enrolled for trial for two non-consecutive weeks on the fixed roll, namely 23 September 2019 to 26 September 2019 and 28 October 2019 to 1 November 2019. The two weeks were not consecutive as there were no such dates available. The matter did not proceed the first week of set down and the matter was then postponed to the subsequent week, which was the week of 28 October to 1 November 2019. However, during the course of the first week Oosthuizen J attended to a Rule 61 application to set aside NAC's supplementary discovery affidavit. IBB succeeded in its application and the court set aside the belated discovery of NAC as an irregular step². The court also made a substantial cost order in favor of the defendant.

¹ Plaintiff referred to as NAC and Defendant referred to as IBB.

²*IBB Military Equipment and Supplies CC v Namibia Airports Company Limited* (HC-MD-CIV-CON-2017/03477) [2019] NAHCMD 421 (21 October 2019).

[5] On 11 October 2019 NAC filed an application for postponement of the trial for the week of 28 October to 1 November 2019 on notice of motion. During a status hearing held on 18 October 2019 certain time lines were set for the filing of answering and replying papers as well as for heads of arguments and the application for postponement was set to be heard at 10h00 on the morning of 28 October 2019.

[6] On 28 October 2019 at approximately 08h37 the defendant filed an application to strike out in terms of rule 58 of the rules of court resulting in the rule 58 application to be argued first and the original application as set out in the notice of motion to be heard on the afternoon of 29 October 2019 and the morning of 30 October 2019. The matter was however adjourned on the afternoon of 30 October 2019, not because the court ruled on the application but because of time constraints.

[7] The application for postponement was brought on reasons that are threefold in nature: (a) that there was no sufficient time to attend to the matter in the week for which it was set down for as the matter was initially scheduled to run over a period of two weeks; (b) the plaintiff applied to be allowed to file a supplementary discovery affidavit; (c) pursuant to the ruling of Oosthuizen J on the rule 61 application, the plaintiff instituted review proceedings in the Supreme Court against Oosthuizen J's decision which was filed with the Registrar of the Supreme Court on 23 October 2019.

[8] It is important to note that pursuant to lodging of the said review application the Registrar of the Supreme Court advised the plaintiff that the review application would not be considered as the plaintiff did not adhere to s 16 of the Supreme Court Act 15 of 1990. On 13 November 2019 the plaintiff then filed a new application in terms of s 16 to the Supreme Court petitioning the Chief Justice for a review of the matter.

[9] It is NAC's position that if it succeeds with the review application the supplementary discovery affidavit filed will no longer be irregular and the signed version of the procurement policy, which it intends to discover, will be admissible during trial.

NAC also maintained that the order of Oosthuizen J did not preclude it from bringing a proper application for condonation with its failure to comply with the rules of Court.

[10] The granting of a postponement is in the discretion of the court. What has crystalized during the years is the following:³

- (a) The applicant for postponement bears the onus. He must make out his case on the papers.
- (b) A postponement is not had for the asking.
- (c) An application for postponement must be brought as soon as the reason giving rise to it is known.
- (d) There must be a full and satisfactory explanation by the applicant seeking postponement of the reasons necessitating a postponement.

[11] Unlike in the *Hailulu* matter referred to above the application in the current matter was brought in compliance with rule 96 (3) which provides that when a matter has been set down for hearing a party may, on good cause shown, apply to the judge not less than 10 court days before the date of hearing to have the set down changed or set aside.

[12] The application was brought well within the time provided by the rule after engaging IBB in terms of rule 32(9).

[13] IBB vigorously opposed the application for postponement on a number of grounds and one of the main grounds of opposition is the fact that it was reported to court in a status report dated 22 August 2019 that the matter is trial ready.

[14] What the court will consider primarily is whether there is any prejudice caused by a postponement to the opposing party and whether the prejudice, if any, can properly be mitigated by an appropriate cost order.

³ *Hailulu v Anti-Corruption Commission And Others* 2011 (1) NR 363 (HC) para 36.

[15] In *Myburgh Transport v Botha t/a SA Truck Bodies*⁴ being the *locus classicus* in respect of postponement applications, the Supreme Court found that:

'A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. *Madnitsky v Rosenberg (supra at 398-9).*'

[16] The argument advanced on behalf of NAC was that it would be undesirable to have a part-heard trial and that it is inevitable that new dates will have to be allocated in 2020. From this court's perspective this is not a good enough reason to postpone a matter. Obviously it is desirable to have consecutive trial dates, but it is not always possible and it would not be practical to postpone a matter for that reason alone. The overriding objective of the Rules of Court is to deal with a matter as speedily, efficiently and cost effectively as possible.

[17] Unfortunately the matter could not get out of the starting blocks as yet as the matter was inundated with interlocutory applications. This court cannot ignore the fact that there is a pending review before the Supreme Court. I do not wish to engage the grounds for the review but the long and the short thereof is that even though the initial review application was not in compliance with the relevant act a further review application in terms of s 16 of the Act was submitted and the outcome of the review proceedings can be decisive with regards to the further conduct of this matter. As a result I am of the considered view that the review proceedings should be finalized before the matter proceed to trial.

The application for leave to file a supplementary discovery affidavit and condonation for applicant's failure to comply with the Rules of Court relating to discovery

⁴ 1991 NR 170 (SC).

[18] The second part of the application before me relates to leave to file a supplementary discovery affidavit and this application overlaps with the application for postponement as NAC argues that relevant documents have not been discovered and these documents should form part of the evidence at trial to ensure a proper ventilation of all the relevant issues.

[19] It was the case of IBB that if the court allows the supplementary discovery it will change the litigious landscape of this matter altogether. So the question is thus if it will be proper at this late stage of the matter to allow the supplementary affidavit.

[20] The documents specifically relates to (a) Deloitte's forensic report; (b) pleadings and judgments from litigation involving the scanners tender; (c) disciplinary proceedings against Mr Silombela. This relates to the disciplinary proceedings instituted arising from procurement irregularities; (d) the fourth and last category of documents relates to the NAC procurement policy and procedure, including the signed procurement policy.

[21] In his founding affidavit Mr Uirab, the new CEO of NAC, explains that in early August 2019 NAC briefed new senior counsel due to capacity constraints of the previous senior counsel and also because the new senior counsel represented it in the NAC's successful review of a tender award to China State Engineering Construction⁵. NAC's new counsel had to get up to speed with the matter and familiarizing himself with the voluminous discovered documents and was only in the position to consult with the relevant witnesses in late August 2019. During those consultations it became apparent that NAC did not discover the signed version of the procurement policy, which lead to the filing of the correct supplementary discovery affidavit, which was the subject matter of the interlocutory application before Oosthuizen J.

[22] Mr Uirab further stated that during preparation for trial and more specifically at consultation of 19 and 23 September 2019 senior counsel became aware that the further documents had not been discovered.

⁵ *Namibia Airports Company Ltd v China State Engineering Construction Corporation* (HC-MD-CIV-REV-2017/00444) NAHCMD 171 (7 June 2019).

[23] Mr Uirab explained the issue regarding the Deloitte's forensic report as follows: The report was subject to privilege and could only be discovered once the privilege over the report was waived and consent was obtained from Deloitte to be able to use the report in legal proceedings. On 19 September 2019 NAC's legal representatives considered whether to waive the privilege over the report and as part of the consideration Deloitte had to be engaged to obtain consent to use the report in legal proceedings. On 20 September 2019 Deloitte requested NAC to provide a waiver of liability to Deloitte. On 24 September 2019 NAC provided Deloitte with an indemnity, paving the way for the forensic report to be provided.

[24] The reason advanced for not filing the relevant application seeking leave earlier is that as from 20 September 2019 NAC's counsel had to focus its time addressing IBB's rule 61 application.

[25] It was submitted by NAC's counsel that the documents NAC seeks to discover is clearly relevant to the main action as it shows pervasive procurement irregularities involving IBB in relation to the award that is the subject matter of the main action in casu. It was further argued that should NAC be given the opportunity to file a further discovery affidavit it will give NAC the opportunity to discover the relevant documents and supplement its witness statements accordingly. In turn IBB will have an opportunity to make any discovery it deems necessary in response, as well as file additional witness statements.

[26] IBB levelled a lot of criticism against the founding affidavit deposed to by Mr Uirab. Due to the comprehensiveness of the answering papers and subsequent argument I will only wish to highlight some of the issues raised, which are as follows:

- (a) That this is NAC's second attempt to discover, with reference to the document that was disallowed in terms of the 26 September 2019 ruling by Oosthuizen J.
- (b) The timing of the application.

- (c) That NAC is making a mockery of the oath taken by the deponents of the discovery affidavits. It is argued that the new counsel, which in essence was not new counsel, had to realize at the end of August 2019 that the documents referred to above had to be discovered through additional discovery, yet when the supplementary discovery affidavit was deposed to and filed on 04 September 2019 there was only reference made to the procurement policy document that NAC sought to discover.
- (d) That NAC has the intention to further disregard the court orders of 14 March and 22 August 2019 as Mr Uirab states that the documents to be discovered may not be exhaustive of the outstanding documents and that still needs to be discovered. Counsel argued that NAC makes provision for further discovery affidavits relating to outstanding documents and evidence that still need to be discovered, which again mocks the view that discovery is sincere, bona fide, truthful, reliable and complete.
- (e) That there is an attempt by NAC to exonerate itself from any blame or accountability and to blame its legal representatives. Counsel argued that the allegations in the founding affidavit are vague as to the reasons why the previous counsel could not further attend to the matter and it does not state when new counsel was instructed to deal with the matter, etc. It was further argued that allegations concerning the involvement of new senior counsel of NAC appears to be deliberately couched in the most obfuscating terms. Counsel argued that there is as much a duty upon instructing counsel as there is on instructed counsel to consider and prepare a proper discovery affidavit. And further to that there is not any attempt to present an application on behalf of Mr Kavendji, the instructing counsel, as to why he did not attend to this aspect in preparation for trial. As for instructed counsel it was argued that he had a duty to acquaint himself immediately with all aspects of his client's case and ensure that he is satisfied with the pleadings. Counsel raised the question as to why this application was not moved as soon as the new counsel came on board.

Position in law and application to the facts

[27] In *Gamikaub (Pty) Ltd v Schweiger*⁶ Masuku AJ (as he then was) was faced with a similar situation in respect of an application for further discovery at a stage where it would derail the trial and stated as follows:

[15] I am of the considered view the court must be astute in answering this question and must do so from the very point of discussing the *raison d'etre* for discovery of documents in trial proceedings. One can do no better in this regard than to quote from the luminary works of Erasmus⁷, where the learned author states the following in regard to discovery:

“The object of discovery was stated in *Durbach v Fairway Hotel Ltd*⁸ to be ‘to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means, the issues are narrowed and the debate of points which are incontrovertible is narrowed.’ Discovery has been said to ‘rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or will lose its edge or become debased. . . The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries a duty to put those documents in proper order for both the benefit of his or her adversary and the court in anticipation of the trial action. Discovery assists the parties and the court in discovering the truth and, by doing so, helps towards a just determination of the case. It also saves costs.”

[28] On the other hand, the learned authors Herbstein & Van Winsen⁹ say the following with regard to discovery:

‘The function of discovery is to provide the parties with the relevant documents or recorded material before the hearing so as to assist them in appraising the strength or

⁶ (I 3762/2013) [2015] NAHCMD 88 (15 April 2015).

⁷ Superior Court Practice, Juta & Co.

⁸ 1949(3) SA 1081 (SR).

⁹ *The Civil Practice of the High Courts of South Africa* 5 ed, Juta (2012) Vol. I at 777.

weaknesses of their respective cases, and thus to provide the basis for a fair disposal of the proceedings before or at the hearing. Each party is therefore enabled to use before the hearing or to adduce in evidence at the hearing documents or recorded material to support or rebut the case made by or against him or her to eliminate surprise at or before the hearing relating to documents or recorded evidence and to reduce the costs of litigation.'

[29] The abovementioned authorities relate to cases in the South African jurisdiction, and although there are a difference in wording and to some extent the procedures adopted or prescribed, of the respective rules of court, the principles enunciated therein are however fully applicable even in this jurisdiction and will offer a useful guidance¹⁰.

[30] A few issues can be distilled from the foregoing quotations regarding the need to make discovery in action proceedings. These include¹¹:

- (a) avoiding the element of surprise and ambush in the conduct of litigation;
- (b) to promote fair play and transparency as it were between and amongst protagonists;
- (c) to properly assess the strengths and weaknesses of the respective cases;
- (d) to properly identify the real issues in dispute between the parties;
- (e) to redeem the time expended on litigation; and
- (f) to curtail costs by avoiding useless causes.

[31] It stands to reason therefore that in cases where there has been less than full and frank disclosure of the documents in the possession of a party to an action, the search for the truth and the identity of the real issues in dispute may be concealed and thus prove elusive, resulting in costs escalating unnecessarily.

[32] In the *Gamikaub* matter the court cautioned against applications of this nature, especially when brought at the stage where the trial has commenced, and indicated that

¹⁰ *Gamikaub (Pty) Ltd v Schweiger* supra para 17.

¹¹ *Gamikaub (Pty) Ltd v Schweiger* supra para 18.

it is an abuse of the discovery procedure, in instances where the procedure may be sought to be invoked for no other reason than to harass, intimidate or bully a litigant on the other side.

[33] I accept that some criticism can be levelled against the founding affidavit if one puts the affidavit under the magnifying glass, as would be the case in most affidavits, however I am satisfied that the application before court is bona fide and that NAC satisfactorily explained why the application for leave to file a supplementary discovery affidavit was only filed at this late stage of the proceedings. Having considered the application advanced on behalf of NAC I am satisfied that the application for discovery even at this late stage is meritorious.

[34] On the issue of the timing of the application I am satisfied that Rule 28 (14) makes provision for an application as in the present circumstances and it provides as follows:

‘On application by a party the managing judge may, at any management conference or pre-trial conference or during any proceeding, order on Form 13 the production by another party thereto under oath or affirmation of any document or tape recording in his or her possession or under his or her control relating to any matter in question in that proceeding and the managing judge may deal with the document or tape recording that is produced in any manner he or she considers proper.’ (my emphasis)

[35] I am satisfied that once NAC’s counsel became aware of the fact that certain documents were not discovered they proceeded to engage the opposing party and filed the relevant application, obviously after they learned their lesson the hard way by virtue of the ruling by Oosthuizen J.

[36] The documents NAC seek to discover are plainly relevant to the main action and should properly be discovered to present to this court the complete picture of the dispute between the parties.

Condonation

[37] The principles relating to application for condonation is trite which I will not repeat for purposes of this ruling, save to say that I am satisfied that NAC made out a case for the condonation prayed for to be granted.

Costs

[38] I have considered the possible prejudice that might be suffered by IBB and is of the opinion that it can be mitigated by an appropriate cost order. It is also worth mentioning that the wasted costs were tendered by NAC from the onset.

[39] In respect of the application for leave to file a supplementary discovery affidavit NAC is seeking an indulgence from this court and should be liable for the cost of this application.

[40] My order is therefor as set out above.

JS PRINSLOO
Judge

APPEARANCES:

Applicant: Mr Bhana
Instructed by Kanguuehi & Kavendjii Inc

Respondent: Mr T Barnard
Instructed by Dr Weder, Kauta and Hoveka