

“ANNEXURE 11”

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Marmorwerke Karibibi (Pty)Ltd v Transnamib Holdings Limited</i>	Case No.: HC-MD-CIV-ACT-CON-2017/01542
	Division of Court: High Court (Main Division)
Heard/trie before: Honourable Mr Justice B Usiku J	Date of hearing: 22 March 2019
	Delivered on: 22 March 2019
Neutral citation: <i>Marmorwerke (Pty) Ltd v Transnamib Holdings Limited</i> (HC-MD-CIV-ACT-CON-2017/01542) [2019] NACHMD 67 (22 March 2019)	
The Order: Having heard Adv. Obbes , on behalf of the Plaintiff and Adv. Shifotoka on behalf of the Defendants and having read documents filed of record: IT IS ORDERED THAT: 1. The defendant is hereby ordered to, within 20 (twenty) days from the date of this order: (a) deliver a discovery affidavit (of and for the defendant) which fully and properly complies with the provisions of rule 28(4); (b) fully and properly respond to the plaintiff’s notice in terms of rule 28(8), dated 27 March 2018.	

2. The defendant is directed to pay the plaintiff's costs for this application, such costs to include costs of one instructing and one instructed counsel. It is directed that such costs shall not be capped in terms of rule 32(11);
3. The matter is postponed to 19 June 2019 at 15:15 for a status hearing.
4. The parties are directed to file a joint status report on or before 13 June 2019.

Reason for orders:Introduction

[1] In this matter the plaintiff prays for an order to compel the defendant to properly discover, which includes specific discovery.

[2] The plaintiff contends that a reading of the affidavits delivered by the defendant demonstrates a failure to fully and properly comply with the provisions of the High Court Rule 28 and the applicable legal principles relevant to discovery.

[3] The defendant opposes the application, and contends that it has filed Rule 28 compliant affidavits. The defendant later conceded that there was non-compliance with rule 28 in certain material respects in respect of the affidavits filed. The defendant admits that some of its discovery affidavits, having been deposed to by a Chief Executive Officer (CEO) of the defendant on behalf of the defendant-company, do not state in the terms that "the company" does not have in its possession, the documents other than those disclosed.

[4] *In Gamikaub Pty Ltd Heinrich v Schweiger* (I 3762/2013) [2015] NACHMD 88 (15 April 2015), Masuku, J referred to the matter of *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at p.65 regarding the contents of affidavits filed on behalf of companies where the following remarks were made:

'Where an affidavit is made by a director or officer of the company the affidavit must state in terms

that the company has not in the possession, custody or power of its attorney or other agent or any other person on the company's behalf, any document, etc. This is not an insignificant detail, it is a matter of substance. Great weight is given to these affidavits and they should not be drawn in so loose a manner as to leave an avenue of escape to the document if it should turn out that the relevant documents were in the possession of some other officer of the company.'

[15] I agree with the foregoing principles and I am of the view that such principles should be applied to the present matter. The deponent to the defendant's affidavits in the present matter should state that the documents are no longer in the company's possession.

[6] I have read the four affidavits filed by the defendant in this matter. In regard to the September 2017 affidavit, this affidavit does not comply with the provisions of Rule 28(4) in that it does not specify separately the documents referred to in Rule 28(4) (a) and (b). Furthermore, the affidavit does comply with the requirements regarding the contents of affidavits filed on behalf of companies, as was pointed out in *Gamikaub Pty Ltd v Heinrich Schweiger*, referred to above.

[7] As regards the January 2018 affidavit, the affidavit also does not comply with the requirements regarding the contents of affidavits filed on behalf of companies.

[8] Insofar as the April 2018 affidavit is concerned, this affidavit does not comply with the requirements of Rule 28 (4) in that it does not specify separately the documents referred to in Rule 28 (4) (a) and (b).

[9] In regard to the July 2018 affidavit, the affidavit does not comply with the requirements regarding contents of affidavits filed on behalf of companies.

[10] Furthermore, there is no response by the defendant to plaintiff's Rule 28 (8) notice. I do not agree with counsel for the defendant to the effect that the April 2018 affidavit addresses the plaintiff's notice in terms of Rule 28(8). The April 2018 does not deal with the requested documents specified under paragraphs (a) – (g) of the notice, seriatim, and does not address whether any of such document had been in possession of the defendant.

Furthermore, it does not address the whereabouts of the documents in question, if known to the defendant.

[11] I am of the opinion that the defendant was not justified in persisting in its opposition to the application, in view of its concession that the affidavits filed are not rule-compliant. For this reason, I would give an order to the effect that costs to be granted shall not be capped in terms of Rule 32 (11).

[12] In the premises, I am of the view that the plaintiff has made out a proper case warranting the granting of the relief which the plaintiff seeks in its notice of motion.

[13] In the result, the following order is made:

- a) The defendant is hereby ordered to, within 20 (twenty) days from the date of this order:
- (i) deliver a discovery affidavit (of and for the defendant) which fully and properly complies with the provisions of rule 28(4);
 - (ii) fully and properly respond to the plaintiff's notice in terms of rule 28(8), dated 27 March 2018.
- b) The defendant is directed to pay the plaintiff's costs of the application, such costs to include costs of one instructing and one instructed counsel. It is directed that such costs shall not be capped in terms of rule 32(11);
- c) The matter is postponed to 19 June 2019 at 15:15 for status hearing.
- d) The parties are directed to file a joint status report on or before 13 June 2019.

Judge's signature	Note to the parties:
	Not applicable

Counsel:	
Plaintiff	Defendants
Adv D Obbes Of Engling, Stritter & Partners, Windhoek	Adv. E. Shifotoka Of Conradie & Damaseb, Windhoek