

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING**

CASE NO.: I 1587/2016

In the matter between:

**CENTRAL GAS NAMIBIA CC**

**PLAINTIFF**

and

**TRIPPLE J ENERGIES (PTY) LTD**

**FIRST DEFENDANT**

**TRANSNAMIB HOLDINGS LIMITED**

**SECOND DEFENDANT**

**CAMEL FUELS (PTY) LTD**

**THIRD DEFENDANT**

**Neutral Citation:** *Central Gas Namibia CC v Tipple J Energies (Pty) Ltd* (I 1587/2016)  
[2019] NAHCMD 243 (23 June 2020)

**Coram:** RAKOW, AJ

**Heard:** 13 March 2020

**Delivered:** 23 June 2020

**Flynote:** Practice – Non-compliance with court orders – Rule 28 (8) on discovery and Rule 53 on sanctions for non-compliance with court orders or directives considered and applied

**Summary:** The matter concerns the Plaintiff and the First Defendant primarily and goes as far back as back as 25 September 2018 with the filing of a rule (28)(8)(a) notice requesting discovery of additional documents by the First Defendant from the Plaintiff. It later transpired after various postponements for purpose of discovery that the First Defendant failed to comply with court orders regarding the issue of discovery.

Held – Rule 28(11) is the only way in which a party is entitled to gain physical access to discovered documents and upon physical access having been gained, it is for such a party to make his or her own copies of the said at its own cost. A party is therefore not entitled to the physical delivery of discovered documents. This must be seen as the general approach to all “delivery” of discovered documents. It is therefore the granting of access to these documents rather than physical delivery.

Held – The document against which the issue of confidentiality was raised must be sufficiently described for the court to gauge and determine the claim of confidentiality.

Held further – It is therefore clear from the above that the First Defendant failed to respond to the form 11 request for specific discovery of certain documents. Their general claim to confidentiality also does not meet the requirements as set out in *South African Poultry Association and Others v Minister of Trade and Industry and Others*.

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## ORDER

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a) The First Defendant is ordered, within seven (7) days from the date of this order, to comply with the rule 28(8)(a) request.

- b) The first defendant is ordered to pay the costs of this hearing, namely, the costs of one instructing and two instructed counsel. Rule 32(11) shall not be applicable in this instance.
- c) The matter is postponed to **21 July 2020** at 8h30 for a status hearing.
- d) The parties to file a joint case status report on or before 16 July 2020.
- e) Should the First Defendant not comply with the order in paragraph 1 above, the Plaintiff may apply to court on papers duly amplified for an order in terms of Rule 53 striking out the First Defendant's defence.

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## RULING

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RAKOW, AJ:

### Introduction

[1] The Plaintiff in this matter is Central Gas Namibia CC, a closed corporation with limited liability and registered in terms of the close corporation laws of Namibia. The First Defendant is Triple J Energies (Pty) Ltd, a company with limited liability, also registered in terms of the company laws of Namibia. The matter before court only concerns the Plaintiff and the First Defendant. Summons in this matter was issued by the Registrar on 24 May 2016, making it a matter which has been on the court roll for some time. The matter has however become partly settled between the Plaintiff and the Second Defendant, TransNamib Holdings Limited.

### History

[2] As the matter progressed, various exchanges of pleadings followed and the matter was from time to time postponed with specific orders from court regarding the exchange of process. A counterclaim on behalf of the Third Defendant, Camel Fuels (Pty) Ltd, was also instituted and various amendments to the pleadings also filed. During the whole

case management process, a number of case status and other case reports were filed by the parties.

[3] The history of the issue before court goes as far back as back as 25 September 2018 with the filing of a rule (28)(8)(a) notice requesting discovery of additional documents by the Defendant from the Plaintiff. The request included a number of items but also detailed monthly management accounts, year-end trial balances and accounting officers' adjustments which agree to the annual financial statements, details of leases and loans payable from 2016 to June 2018, printouts of year end fixed asset registers from 2016 to 2018, creditors printouts at the end of each financial year from 2016 to 2018, to name but a few.

[4] On 25 April 2019, the Plaintiff filed a rule 28(8)(a) notice for the discovery of additional documents to be disclosed, requesting the First Defendant to disclose its annual financial statements and detailed management accounts in respect of the 2016/14, 2017/18 and 2018/19 financial years; the year-end trial balances and accounting officer's adjustments which agree to the annual financial statements; the details of leases and loans payable by the First Defendant in respect of the 2016/14, 2017/18 and 2018/19 financial years; printouts of year end fixed asset registers from 2016 to 2018; creditors printouts at the end of each financial year from 2016 to 2018 and detailed schedules in support of amounts stated in the First Defendant's annual financial statements in respect of members' loans, trade and other receivables, finance lease obligations and trade payables. These requested items were also requested by the First and Second defendant from the Plaintiff in their notice of 25 September 2018.

[5] In a status report received on 30 November 2018 pertaining to a court hearing on 6 December 2018, the court was informed that the issue of the requests for discovery be kept in abeyance until such time as the negotiations between Plaintiff and Third Defendant has been finalized. The matter was postponed to 5 March 2019. The parties then filed a joint status report on 28 February 2019 indicating that the Plaintiff will respond to the notice filed for specific discovery on or before 26 March 2019 and that any other party wishing specific discovery will give notice thereof on or before 5 April 2019.

The matter was postponed on 5 March 2019 for a status hearing to 30 April 2019. On 26 April 2019, the parties filed a joined case status report indicating that the Plaintiff is in the process of obtaining the relevant documents requested for specific discovery and that the Plaintiff also filed a request for specific discovery in terms of rule 28(8)(a) and the First Defendant undertook to respond thereto by 31 May 2019. The court order for 30 April 2019 reads that the parties must file their bundles of discovered documents or before 16 May 2019. The next status report was received on 21 June 2019 and indicated that the Plaintiff filed its response on the Defendants' notice in terms of Rule 28(8) and that the First and Second defendant did not reply on the Plaintiff's notice in terms of Rule 28(8) filed on 25 April 2019.

[6] When the proceedings continued in court before my brother Justice Ueitele, Mr Pretorius represented the Plaintiff and Mr Tjombe the First and Second defendant. The Third Defendant was represented by Ms Cilliers. Mr Pretorius addressed the court initially and indicated that they are still in the process of discovery and that the parties request the matter to be postponed in order for the Defendant to indicate which documents they intend to discover on or before 16/5/2019.<sup>1</sup> The court then enquired regarding the age of the file as it has been on the court roll from 2016, dealing with the two requests for discovery and then proceeded and instructed that:

'Each party must provide the requested documents by not later than 10 May.'<sup>2</sup>

He then confirmed date as 16/5/2019 with Mr. Tjombe. The court proceeded and made the following order:

'The parties must file the documents requested, the additional discovery documents requested by not later than 16 May.'

The remainder of the order dealt with the filing of witness statements and the filing of expert witnesses. The matter was postponed for a pre-trial conference to 25/6/2019.

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<sup>1</sup> Page 3 of record of proceedings of 30/4/2020; line 5-15.

<sup>2</sup> Page 4 of record of proceedings of 30/4/2020; line 18 – 19.

[7] In a joint status report received on 21/6/2019, the parties indicated that the Plaintiff has now complied with its obligation and had made discovery. The First and Second Defendants had however not responded on the Rule 28(8) notice filed by the Plaintiff. The parties agreed that they were to file their reply on or before 4/7/2019. The court order for 25/6/2019 instructed the parties to hold a pre-trial conference and the matter was postponed to 16/8/2019. This order contains no reference to the discovery. The matter was subsequently postponed to 10/9/2019 with no further reference to the discovery by the parties in either the court orders or the joint status reports filed by the parties.

[8] On 9/9/2019, the Plaintiff filed a unilateral status report in which they reported that both the Plaintiff and the First Defendant delivered requests for specific discovery. It was also agreed between the parties that the Plaintiff will respond on or before 16/5/2019 and the Defendant on or before 31/5/2019. The Court further made an order on 30 April 2019 compelling the Plaintiff and the First Defendant to file their bundles of discovered documents on or before 16 May 2019. The Plaintiff did respond on the court order and filed their further discovery on 16 May 2019 and because of the default of the Defendant in filing their further discovery, they could not comply with the remainder of the court order regarding the filing of witness statements. The First Defendant acknowledged that it did not comply with the court order to file its further discovery. The Plaintiff referred to a letter written on 16 July 2019 to the First Defendant indicating that they are still awaiting the response on their rule 28(8) request. The Plaintiff indicated that in light of the non-compliance with the request for specific discovery they will proceed and ask for the court to refuse the First Defendant from opposing the Plaintiff's claim.

[9] During the next appearance on 10/9/2019, the legal representative for the First Defendant was not at court and the matter was postponed for a sanctions hearing and the legal representative of the First Defendant was to file an affidavit to show case no later than 25 September 2019 for the non-appearance at court on 10/9/2019 as well as the non-compliance with the court order dated 30 April 2019. The sanctions hearing then took place on 15/10/2019.

[10] Regarding the non-compliance to court order dated 30 April 2019, in essence, counsel highlighted that to date; the First Defendant has not received the requested documents which are imperative to producing their witness statements. In the alternative, counsel submitted that what was received was a notice to go and inspect the requested documents. Counsel further submitted that the failure on their part to file expert report and witness statements was simply due to the First Defendant not being provided with the required documents.

[11] During the proceedings of 15/10/2019 Mr. Elago on behalf of the First Defendant indicated that he is fully aware that there was a court order that required them to exchange bundles of discovered documents.<sup>3</sup> Upon a direct question from the court regarding the failure to file their discovery, Mr. Elago indicated that it was a failure on both parties but eventually conceded that they did not comply.<sup>4</sup> He then requested the Court to extend the time line for them to comply with the order and said : 'we would practically be able to provide or furnish that which is being requested by end of November .... I have previously requested the documents, I will have to go back to my client again and make sure that we provide the copies, if the Court makes the order in terms of Rule 28(8)(b)(i) and I would equally implore the Court to make the same order repeatedly against the Plaintiff for them to provide us with that document so that we can be able to move the matter forward.'<sup>5</sup>

[12] The court made the following order, after receiving the confirmation from Mr. Elago regarding the furnishing of the requested documents (This order was made on 19 November 2019):

- 'a) The non-appearance of the first defendant on 10 September 2019 is condoned.
- b) The parties must deliver the requested documents on or before 29 November 2019.
- c) The parties must on or before 17 January 2020 hold a pre-trial conference at which meeting the parties must discuss and address the issues contained in rule 26 (6).
- d) The parties must file a draft joint pre-trial order on or before 17 January 2020.
- e) The matter is postponed to 21 January 2020 for a pre-trial conference.

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<sup>3</sup> Page 6 of record of proceedings of 15/10/2019; line 18 – 20.

<sup>4</sup> Page 21 of record of proceedings of 15/10/2019; line 18 – 27.

<sup>5</sup> Page 24 of record of proceedings of 15/10/2019; line 3 – 17.

f) The first defendant must pay the wasted costs, such costs to include the costs of one instructing and two instructed counsel.'

[13] On 28/11/2019, the First Defendant's reply on the specific discovery request, was received. In essence, Mr. Jorge Machado, who filed the affidavit and is a director of the First Defendant, responded and indicated that the First Defendant objects to the disclosure of the requested documents pending the determination of the privity of contract issue between the Plaintiff and the First Defendant. In response, the Plaintiff filed a case status report setting out the history of the matter and directing the court's attention to the fact that the legal representative of the First Defendant did not object once against the production of the said documents during the sanctions proceedings in October 2019, neither during the period since April 2019 when they were first ordered to disclose the said documents. The documents which the Plaintiff requested from the First Defendant are the very same documents the First Defendant requested from the Plaintiff. They then asked the court to deal with the matter of discovery before continuing with a pre-trial conference.

[14] During the court proceedings on 21/1/2020, the Plaintiff was represented by Ms Maritz and the First Defendant by Ms Kavitjene. The court enquired from Ms Kavitjene why there was now a change of heart regarding the disclosure of the documents so requested. She could not assist the court as she was only standing in for one of her colleagues and had no instructions regarding the issue. The court remarked: 'somebody is not applying their minds to this case. Because the Court made this order previously there was no objection, it was actually offered, it was tendered by your colleague.'<sup>6</sup>

[15] The court then proceeded as follows:

Court: Yes but I want an explanation as how the position came to change.

Ms Kavitjene: How the position changed.

Court: Because then there was no proper consultations before (between) your colleagues and your clients.

Ms Kavitjene: Perhaps that could be the reason My Lady; I do not (intervention)

Court: But they must then explain it. So what is the way forward what are you going to do?'

<sup>6</sup> Page 4 of record of proceedings of 21/01/2020; line 15-18

<sup>7</sup> Page 5 of record of proceedings of 21/01/2020; line 18 - 26



[16] And then later the record of the court proceedings continued

Court: Remember what you are seeking now, you are seeking an indulgence of the Court to vary a Court Order that was based on an agreement between the parties in a status report and an undertaking that was given in Court during that hearing that the documents are now available. You want us not to vary that Court Order because (of that) Court order you actually currently are in contempt of that Court Order although you filed this. That Court Order was based on agreements and by concessions given in Court (which resulted) in that specific Court Order. Now you want us to ignore that Court Order and the agreements that were previously reached in this Court.

Ms Kavijtjene: My Lady that is not what I am saying. All I am saying is what we have before us is what is before us My Lady.

Court: But I am not satisfied with what we have before us.

Ms Kavijtjene: My Lady we can be given an opportunity to file an explanation we would consult our client and find out what changed, but this is the information before the Court My Lady and unfortunately I cannot take it any further that what we have before us.

Ms Maritz: My Lady if I may? My Colleague is not correct in saying that there was a change in circumstances. The change in circumstance was not brought to the Court's attention or our attention. There was an agreement as per the Court order of 30 April based on the joint status report (that) these documents will be made available..... granting them a further opportunity to go and explain would put us at September 2019 where we had a sanctions hearing and they could have explained all this and raised their objection.

Court: Which did not happen.

Ms Maritz: Which did not happen My Lady.

Court: The problem is for me to now (indistinct) be unfair because I will have to give them an opportunity to formally explain their position.<sup>8</sup>

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<sup>8</sup> Page 7 -8 of record of proceedings of 21/01/2020; line 24 – 31.

[17] The necessity of quoting the record of the court proceedings for 21 January 2020 comprehensively is to illustrate what the court's intention was with making the order that followed. The court ordered the First Defendant to file a condonation application for non-compliance with court orders of 30 April 2019 and 19 October 2019 (this date should read 19 November 2019). The Plaintiff was granted time to file any opposition to this application on or before 11 February 2020 and the matter to be heard on 20 February 2020.

#### The application

[18] The First Defendant filed a notice of motion on 6/2/2020 seeking the Applicant's non-compliance with this Honourable Court's Order of 21/1/2020 in the main action be condoned (presumably this request should read court orders of 30 April 2019 and 19 October 2019); Directing in terms of Rule 63(6) the parties to appropriately formulate the issue raised on the pleadings of there being no privity of contract between the Applicant and the First Respondent (Plaintiff and First Defendant in the main) and that all further proceedings be stayed pending determination of the issue so formulated under order 2. This application is supported by an affidavit of Jorge Pais Machado who is the Managing Director of the First Defendant. The Defendant in essence raised the issue that the parties were again asked to deal with the issue of the non-compliance with the court order of 30 April 2019 in the January 2020 order. He further indicates that the order of 19 November 2019 was complied with and the notice for specific discovery was responded to in the form of an affidavit stating why the First defendant refuses to discover and deliver documents. This, he submits, constitute compliance on the discovery aspect. As there is no court order for 19 October 2019, he is able to deal with the non-compliance referred to in the order of 21 January 2020.

[19] The First Defendant further requested that the Court give direction on how the court would deal with one pertinent issue and that discovery of the specific documents is not material to determining the privity of contract issue which is pertinent to resolution of the matter against the first defendant. The fact that the issue between the Plaintiff and the Second Defendant became settled has a bearing on the future conduct of this matter.

[20] A statement of James Grobler was filed in answering the issues raised by the First Defendant. He is the majority member of Central Gas Namibia CC and duly authorized to oppose the Applicant/ First Respondent's application. He sets out the history of the matter and submits that in respect of the sanction proceedings heard during October 2019, the First Defendant failed to show cause why sanctions should not have been ordered against it in respect of its failure to comply with the Plaintiff's request for specific discovery in terms of the court order of 30 April 2019.

[21] He continued and indicated that the objections now raised by the First Defendant should have been raised before the Court made the order for specific discovery on 19 November 2020 and even before the first order of 30 April 2019 was made. Regarding the request for an direction that was sought for the parties to deal with the issue raised of there being no privity of contract between the Applicant and the First Defendant, he answers that the plaintiff's claim against the First Defendant is not based on contract, hence the issue of privity of contract do not arise at all and is not pertinent to resolution of the matter against the fir First Defendant st defendant as alleged. He denies that the First Defendant makes out a case for the condonation that is sought. He then proceeds and requests that the First Defendant's application dated 6 February 2020 be dismissed with costs and an order refusing to allow the First Defendant to oppose the Plaintiff's claims against it, refusing to allow the First Defendant to support its defence, striking out the First Defendant's pleadings, including its defence, with costs and directing the First Defendant to pay the Plaintiff's costs caused by its non-compliance, all such costs to include the costs of one instructing and two instructed legal practitioners.

### The Arguments

[22] The arguments on behalf of the First Defendant regarding the response on the specific discovery is that a response was expected from them, not discovery of specific documents. The Plaintiff has indicated by way of a notice inviting the First Defendant to their offices to come and inspect the documents they sought to have discovered and that in a similar manner they responded in indicating that the documents sought to be specifically discovered by the Plaintiff is privileged. In essence, they were ordered to comply and they did. The status reports highlight that there was a request for specific

discovery on which the First Defendant had to answer upon. The undertaking was always to respond to a request and that is what they did.

[23] The second part of their argument relates to the contract that is forming the basis of specific delivery of movables is between the Plaintiff and the Third Defendant and the Second Defendant enjoys rights in terms of a lease agreement. The First Defendant enjoys rights with the Second Defendant and the matter between the Second Defendant and the Plaintiff has since become settled. Their contention has always been that they do not have a legal obligation to deliver that which is sought by the Plaintiff. They insisted that privity of contract remains an issue which is material to the determination of liability as far as the First Defendant is concerned. This is therefore the basis for their request seeking direction from the Court to assist in dealing with the matter under rule 63(6). This request was only raised together with the condonation application and was not discussed with the legal practitioners appearing on behalf of the Plaintiff.

#### Specific questions raised by the court

[24] During the arguments before court, the First Defendant raised certain issues regarding the non-compliance of the Plaintiff with the orders to specifically deliver the discovered documents. This, as well as some other issues came to the attention of the court when dealing with the matter and the court raised a number of additional questions with the parties. These were:

- a) Why the Plaintiff should not be visited with sanctions in terms of rule 54 for the failure to comply with court orders in terms of rule 53, regarding the court orders for 30 April 2019 and 15 November 2019 ordering the delivery of various documents requested under rule 28(8) of the rules;
- b) Why the specific delivery ordered by both Justice Uitele and Justice Rakow cannot be seen as an order for delivery to the party who requested them, of documents, analogues or digital recordings, within a specific time as contemplated by rule 28(8)(b)(i).

- c) What is the meaning of the word “delivery” as used in rule 28(8)(b)(i)? What does “delivery in law” mean in this regard with reference to the submissions made on behalf of the Plaintiff on 20/2/2020, page 14 line 11 – 13 of the typed record?
- d) What rule governs the notice drafted by the Plaintiff inviting inspection of the documents requested under rule 28(8)(a)?
- e) If the documents sought by the Plaintiff are declared to be privileged, can the court *mero moto* proceed in terms of rule 28(10) and inspect such documents?
- f) Further, if the first defendant believes that the matter revolves around the issue of privity of contract whereas the plaintiff thinks otherwise, should the court entertain the first defendant’s position by having a special case procedure in terms of rule 63? What would be the way forward?

[25] Counsel for the Plaintiff proceeded and drafted a lengthy response to these questions in an attempt to assist the court to deal more specifically with these questions. The First Defendant declined to use the opportunity to address some of these issues, which in essence were raised by them in their initial arguments and did not file any response on these questions. They indicated that they stand with the arguments that are already before court. Counsel for the Plaintiff dealt with the questions as they were raised and the court wants to express its gratitude for their kind assistance in this regard. The court proceeds with each of these questions separately.

Why the Plaintiff should not be visited with sanctions in terms of rule 54 for the failure to comply with court orders in terms of rule 53, regarding the court orders for 30 April 2019 and 15 November 2019 ordering the delivery of various documents requested under rule 28(8) of the rules?

[26] The second court order referred to should actually be the court order for 19 November 2019 and not 15 November 2019. Counsel for the Plaintiff argued that the Plaintiff is not facing any sanctions hearing at this stage and is not on trial for failure to

comply with these court orders. They are further not in default of these court orders as the reference to “documents” in those orders refers to the response on the request of specific discovery, which is made in the format of an affidavit and therefore not necessarily the specific documents per se, but an affidavit setting out the documents that is discovered. There was further no talk between the parties to the effect that bundles of discovered documents would be delivered and therefore, the court order of 30 April 2019 referring to bundles of discovered documents was an incorrect reflection of what actually transpired that day as well as what was agreed between the parties as stated in the joint status report that was filed.

[27] The request that was received in terms of rule 28(8)(a) of the High Court rules was also formulated in a manner that sought delivery of a written statement setting out what documents and tape recordings of a specific nature their client have presently or had previously in his possession. It proceeded and continued to refer to a statement. The said statement was delivered to the First and Second Defendant and thereafter they asked for copies of the said documents where-upon they were informed that the specific documents are available for inspection. This was not a court order and neither did the First and Second Defendant take any further steps, meaning that they were satisfied with the response. The court order of 30 April 2018 was therefore not a court order made in terms of rule 28(8)(a).

[28] Regarding the court order of 19 November 2019 wherein the court condoned the First Defendant’s non-appearance on 10 September 2019 and further ordered all the parties to deliver the requested documents on or before 29 November 2019 and ordered the First Defendant to pay the wasted costs, was clearly after a sanctions hearing was ordered against the First Defendant and not the Plaintiff. The Plaintiff was not on trial and the Plaintiff was not heard on the point as to why an order should not be made against it. The Plaintiff in any event already responded to the request and filed its written statement to the request for specific discovery. Therefore the order ordering the Plaintiff to again file the said document was a mistake.

[29] The court was referred to the matter of *Hilifilwa v Mweshixwa*<sup>9</sup> where Masuku J said the following:

‘What is clear is that the court is given a panoply of alternative suitable orders to issue as a means of sanctioning a party that has failed ‘without reasonable’ explanation or excuse to comply with a court’s order or direction. What is implicit in the foregoing rule is that the sanctions take place after the party has been afforded an opportunity to explain and show cause why they may not be so censured. There is good reason why this should be the case. It boils down to the principles of natural justice, which require that a man or woman should not be judged unheard. Put differently, no person should have an adverse order issued against him or her without him or her having been afforded an opportunity to address or deal with that proposed order or sanction.’

Why the specific delivery ordered by both Justice Uitele and Justice Rakow cannot be seen as an order for delivery to the party who requested them, of documents, analogues or digital recordings, within a specific time as contemplated by rule 28(8)(b)(i)?

[30] Counsel for the Plaintiff argues in answering this question that neither of the court orders, for 30 April 2019 and 19 November 2019 were orders made in terms of rule 28(8)(b)(i) as the matter has not reached the stage of rule 28(8)(b). The order of 30 April 2019 was an order made by agreement between the parties pursuant to the status report delivered on 25 April 2019. They further argue that the order of 19 November 2019 could not have been made against the Plaintiff as it was an order made pursuant to a sanctions hearing against the First Defendant.

[31] An order in terms of rule 28(8)(b) can only follow after a party complied with a request for specific discovery in terms under rule 28(8)(a) as the word “and” appears at the end of rule 28(8)(a). They further argue that the wording of rule 28(8) is different from its predecessor rule 35(3) but it can certainly not require physical delivery of identified documents at the opponent’s offices. The parties could therefore not adhere to the delivery of any documents within a specific time as the orders made by Justice Uitele and Justice Rakow cannot be said to have been made in terms of rule 28(8)(b)(i).

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<sup>9</sup> [2016] NAHCMD 166 (I 3418/2013) 10 June 2016.

What is the meaning of the word “delivery” as used in rule 28(8)(b)(i)? What does “delivery in law” mean in this regard with reference to the submissions made on behalf of the Plaintiff on 20/2/2020, page 14 line 11 – 13 of the typed record?

[32] Arguments again pointed out that the orders made were not made in terms of rule 28(8)(b)(i) and that the request for specific discovery itself did not require the Plaintiff to physically deliver copies of the requested documents but only required a written statement. Delivery as used in rule 28(8)(b)(i) is defined, unless the context otherwise indicates, in rule 1(1) as to mean to serve copies on all parties and file the original with the registrar and the service or filing could be by electronic means. In the context of rule 28(8)(b)(i) the word “deliver” indicates that the same cannot have the meaning ascribed to it in rule 1(1). Discovered documents are never filed at Court and bundles of documents may be made for purposes of the trial and handed up during trial but not in advance.

[33] The discovery process does not in any way involve physical delivery of the discovered documents. Rule 28(11) reads as follows:

‘A party may at any time on Form 12 request a party who has made discovery in terms of this rule to make available any document, analogue or digital recording for inspection and the requesting party is entitled to make a copy of such document, analogue or digital recording at his or her own costs.’

Rule 28(11) is the only way in which a party is entitled to gain physical access to discovered documents and upon physical access having been gained, it is for such a party to make his or her own copies of the said at its own cost. A party is therefore not entitled to the physical delivery of discovered documents. This must be seen as the general approach to all “delivery” of discovered documents. It is therefore the granting of access to these documents rather than physical delivery.

What rule governs the notice drafted by the Plaintiff inviting inspection of the documents requested under rule 28(8)(a)?



[34] Counsel for the Plaintiff indicated that there is no rule that governs the notice inviting inspection of the documents delivered by them to the First and Second Defendant. Rule 28(11) only entitles the First Defendant to, on Form 12, request the Plaintiff to make available those documents for inspection and then to make copies at its own costs of these documents, should it want such copies.

If the documents sought by the Plaintiff are declared to be privileged, can the court *mero moto* proceed in terms of rule 28(10) and inspect such documents?

[35] The First Defendant did not list any documents in its response to provide a written statement indicating which documents it has under its control. The question therefore is 'what documents do the court wish to inspect?' What is also important is that the First Defendant did not raise privilege but only confidentiality. It is argued by the Plaintiff's counsel that as general rule, confidentiality is no ground for refusing to discover documents, the onus rests with the party to sufficiently describe the documents and state why the documents are privileged. If it was listed and described, the court might have a place to inspect such documents but the court cannot on the papers before it, declare the documents sought by the Plaintiff to be confidential and/or privileged and there is further no such application before court. Because there is no papers before court, the court cannot *mero moto* proceed in terms of rule 28(10).

[36] Form 11 does not require or permit a party to raise confidentiality but it can be raised at the form 11 stage. The most obvious time to raise it would be when discovery is made in terms of rule 28(4)(b). Although rule 28(9) may find application during any stage of the proceedings, it is clear that the rule envisages that a dispute as to confidentiality may only arise if a party believes "that the reason given by the other party as to why any documents, analogue or digital recording is protected from discovery is not sufficient" plays a pivotal role. The party raising the objection has an obligation to give a reason why a specific document is protected from discovery; you cannot just raise confidentiality in a sweeping manner as was done by the defendant in the current matter.

[37] The document against which the issue of confidentiality was raised must be sufficiently described for the court to gauge and determine the claim of confidentiality. How this must be done was laid down in the matter of *South African Poultry Association and Others v Minister of Trade and Industry and Others*:<sup>10</sup>

‘That the blanket claim to confidentiality, without setting out in respect of which particularised items confidentiality was claimed, undermined SAPA's claim to a confidentiality regime. There was for example no plausible reason why confidentiality had to attach to financial statements or treaties.’

Further, if the first defendant believes that the matter revolves around the issue of privity of contract whereas the plaintiff thinks otherwise, should the court entertain the first defendant's position by having a special case procedure in terms of rule 63? What would be the way forward?

[38] Counsel for the Plaintiff argues that there is at best a purported application before Court for directions in terms of rule 63(6) which is wholly inadequate. Rule 63 permits two options, either the court raise an issue *mero moto*, which was not done and which has nothing to do with discovery, or a party applies for the court to separate issues, which was also not done. It requires from such a party to define, describe and formulate the issues. Neither did the First Defendant comply with the provisions of rule 32(9) and 32(10) before launching the purported application. For this reason the court cannot deal with the purported application as set out in the notice of the First Defendant.

The non-compliance with the rules of court, practice directives or court orders

[39] The court gave the First Defendant therefore an opportunity to explain their non-compliance with the two court orders. Under part 6 as from rule 53 the Rules of Court, made under s 39 of the High Court Act, 16 of 1990, the consequence of failure to comply with the rules, practice directive or court order directions are set out. Rule 53 states:

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<sup>10</sup> 2015 (1) NR 260 (HC).

'53. (1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to -

- (a) .....
- (b) .....
- (c) comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
- (d) .....
- (e) comply with a case plan order or any direction issued by the managing judge; or
- (f) comply with deadlines set by any order of court,

the managing judge may enter any order that is just and fair in the matter including any of the orders set out in subrule (2).

(2) Without derogating from any power of the court under these rules the court may issue an order -

- (a) refusing to allow the non-compliant party to support or oppose any claims or defences;
- (b) .....
- (c) dismissing a claim or entering a final judgment; or
- (d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance.'

[40] In *Benedicta Donatus v Dr. A. Muhamederahimo and Three Others*:<sup>11</sup>Masuku J said the following:

'It is clear from the foregoing that the court, in applying sanctions to an errant party, exercises a discretion and has at its disposal a panoply of alternatives in terms of punishing a party that is in default of a court order or direction. In this regard, it would seem to me that the court should enter an order that is just, appropriate and fair in all the circumstances. In this regard, it would seem to me that the court has to consider the case at hand; its nuances; the nature of the non-compliance; its extent; its effect on the further conduct on the proceedings; the attitude or behavior of the party or its legal representative, to mention some of the considerations, and thereafter make a value judgment that will at the end meet the justice of the case. '

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<sup>11</sup> (I 2304/2013; I 1573/2013) [2016] NAHCMD 49 (2 March 2016) at p.14 para [32].

[41] In the above matter, the defendant failed to make a good discovery as contemplated by the rules of court. I wish to quote further from this judgement as I find the reasoning of Masuku J applicable in this instance too:<sup>12</sup>

'In the instant case, the plaintiff's representatives have, in their heads of argument, prayed for an order striking out the defendant's defence as being the appropriate censure in the circumstances. This argument is not without foundation, considering the manner in which the defendant has, with the plaintiff and the court, to some extent, leaning backwards, to allow the defendant to put its house in order regarding the issue of discovery. It is fair to say that the plaintiff and the court have almost broken their backs in accommodating the defendant. Earlier in the judgment, as I set out the chronicle of the events in this matter, one issue sticks out like a sore thumb, and it is the drawn out extent of the defendant's non-compliance. It is fair to say that more than a year has passed with the defendant dancing incessantly around the issue of discovery. This should not be.

[34] .....

[35] It would seem to me that although the non-compliance by the defendant is serious and has been the subject of a number of extensions by this court, it would, however, appear that the striking of the defendant's defence is rather grave and too serious a sanction, having due regard to the nature of the claim and the amounts sought. This must not, however, be regarded as a cue by the court to litigants that it will always treat non-compliance by a party in this fashion. Each case, as indicated, will have to be treated in the light of its own peculiar facts and circumstances.

[36] I should however, mention that the order for the striking of a defence is very serious as it has the potential, if granted, to show to the errant party, what in footballing parlance, is akin to a red card. This card effectively excludes that party from further participation in the trial. For that reason, the dictates of justice and fairness would in my view require that this application should not merely be made orally or only in heads of argument. Good practice, propriety and fairness would suggest that it must on account of its gravity be on notice, preferably on application, and to which the defaulting party may have an opportunity to deal with it. Furthermore, it will always assist the court, before issuing such a drastic order, to have had the benefit of argument by both parties where they both still have their hands on the plough so to speak.'

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<sup>12</sup> *Benedicta Donatus v Dr. A. Muhamederahimo and Three Others Supra.*

[42] It is therefore clear from the above that the First Defendant failed to respond to the form 11 request for specific discovery of certain documents. Their general claim to confidentiality also does not meet the requirements as set out in *South African Poultry Association and Others v Minister of Trade and Industry and Others*.<sup>13</sup>

The court therefore orders as follows:

- a) The First Defendant is ordered, within seven (7) days from the date of this order, to comply with the rule 28(8)(a) request.
- b) The first defendant is ordered to pay the costs of this hearing, namely, the costs of one instructing and two instructed counsel. Rule 32(11) shall not be applicable in this instance.
- c) The matter is postponed to 21 July 2020 at 8h30 for a status hearing.
- d) The parties to file a joint case status report on or before 16 July 2020.
- e) Should the First Defendant not comply with the order in paragraph 1 above, the Plaintiff may apply to court on papers duly amplified for an order in terms of Rule 53 striking out the First Defendant's defence.

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E RAKOW

Acting Judge

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<sup>13</sup> Supra.

APPEARANCES:

PLAINTIFF:

R Heathcote (together with B de Jager)  
Instructed by Francois Erasmus & Partners  
Windhoek

FIRST DEFENDANT:

P Elago  
Tjombe – Elago In.  
Windhoek