

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/00508

In the matter between:

GONDWANA OCLLECTION NAMIBIA (PTY) LTD

APPLICANT

and

HOLLARD INSURANCE COMPANY OF NAMIBIA LIMITED

RESPONDENT

Neutral Citation: *Gondwana Collection Namibia vs Hollard Insurance Company of Namibia Limited* (HC-MD-CIV-ACT-CON-2020/00508) [2021] NAHCMD 156 (13 April 2021)

CORAM: MILLER AJ

Heard: 19 March 2021

Delivered: 13 April 2021

ORDER

- a) The relief claimed in paragraph 1 of the Notice of Motion in the Main application is refused.
- b) The matter is finalised and struck from the roll.
- c) Gondwana is ordered to pay the costs which will include the costs of one instructing and three instructed counsel.

RULING

MILLER AJ:

[1] For the purposes of this judgment I will follow the approach adopted by the parties to these proceedings and refer to them simply as ‘Gondwana’ (the applicant in the main application) and ‘Hollard’ (the respondent in the main application).

[2] The proceedings before me commenced on 09 December 2020. Gondwana by way of application instituted proceedings against Hollard in the following terms.

‘Take Notice that Gondwana Collection Namibia (Pty) Ltd (hereinafter called the applicant) intends to make application to this court for an order.

1. Condoning the applicant's non-compliance with the forms and services as provided for in the rules of the High Court and hearing this matter as a matter of urgency as contemplated in rule 73(3).
2. Declaring that the respondent is liable to indemnify the applicant in terms of the insurance policy with policy number TO CAM 430220 for the losses, suffered by the applicant as a result of the interruption of its business due to the outbreak of COVID-19 in Windhoek on 13 March 2020 and the measures implemented by the Government of Namibia as a result of the outbreak of COVID-19 in Windhoek on 13 March 2020, and the subsequent measures implemented by the Government of Namibia as a result of the outbreak of COVID-19 in Namibia, and in respect of which the applicant notified a claim to the respondent under claim number 2200073.

3. That the respondent pays the costs of this application, including the cost of one instructing and two instructed legal practitioners.

4. Further and/or alternative relief.”

And that the accompanying affidavit of GYSBERT JOHANNES JOUBERT, BERNARD SHIDUTE HAUFIKU, TANYA FORTSCH will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has appointed Fisher, Quarmby & Pfeifer of c/o Robert Mugabe Avenue & Thorer Street, Windhoek, Namibia, Namibia. At which he or she will accept notice and service of all process in these proceedings.

TAKE NOTICE FURHTER that if you intend to oppose this application you are require to-

1 notify applicant’s legal practitioner in writing within 5 days from date of service of this application, of your intention to oppose this application, by service a copy of your intention to oppose on applicant at the address stated herein ad filing the original at the registrar.

2 and within 14 days of the service of notice of your intention to oppose, to file your answering affidavits, if any

And further that you are required to appoint in such notification an address within a flexible radius form the court referred to in rule 65(5) at which you will accept notice and service of all documents in these proceedings.

If no notice of intention to oppose is given, the application will be moved on the 31st day of March 2021 at 09:00 AM.’

[3] The Notice of Motion was subsequently amended only in so far as Gondwana sought a costs order on an attorney and client scale.

[4] By notice to oppose on 02 January 2021 Hollard opposed its application. Thereafter the matter was assigned to me as the Managing Judge in terms of its Rules of this Court.

[5] I scheduled a case management conference for 03 February 2021. Consequent upon the submissions of counsel at that conference, and having been advised that certain interlocutory applications were in the offing. I issued the necessary orders relating to the filing date for the interlocutory applications and the filing of answering and

replying affidavits and Heads of Argument and determined 19 March 2021 for a date upon which I would hear the interlocutory matters.

[6] The interlocutory application was duly filed and having read the matter I reserved my ruling until 13 April 2021.

[7] The interlocutory application filed by Hollard reads as follows:

1. The application of Gondwana Collections Namibia (Pty) Ltd ("Gondwana") in case number HC-MD-CIV-MOT-GEN-2020/00508 ("the application") be struck from the roll for lack of urgency.

2. Alternatively, and in the event of the Court finding that the application is urgent, then and in that event, that Gondwana be ordered to provide Hollard with a copy of the agreement it entered into with insurance Claims Africa ("ICA"), and in terms of which agreement ICA handles Gondwana's claim on a commission basis (i.e. no claim, no pay), and that Hollard be granted leave to approach the Court on the same papers, amplified insofar as is required, for a declaratory that the application is null and void.

3. Alternatively, and in the event of the Court finding that the applications is urgent and that it does not constitute a nullity, then and in that event, that the application be struck from the roll for being premature and academic in that Hollard has not yet rejected or accepted Gondwana's insurance claim under claim number 2200073. Alternatively, that the application be struck from the roll on the basis that Gondwanan clearly foresaw material factual disputes in respect of the issue as to whether or to Gondwana complied with its obligation to provide the following information to Gondwana:

3.1 The exact date on, and manner in which, each cancellation by a tourist/travel agent took place.

3.1 The particular destination/s at which each tourist who cancelled would have stayed.

3.3 The country of origin of each tourist who cancelled.

3.4 A detailed list of those tourist who referred to the Namibian factual situation when they cancelled.

4. Alternatively, and in the event of the curt finding that the applications is urgent and that it does not constitute a nullity and that it is not premature and academic and that Gondwana did not foresee a material factual dispute, then and in that event, that:

4.1 Hollard is entitled to issue and obtain the *subpoenas duces tecum* attached to Hollard's founding affidavit nits interlocutory application marked "JL12: to JL16"

4.2 The relief claim in the notice of strike out attached to Hollard's founding affidavit in its interlocutory application marked "JL17" is granted.

4.3 It is declared that Hollard shall be entitled to cross-examine the following witnesses of Gondwana:

4.3.1 Gysbert Johannes Joubert;

4.3.2 Dr Bernard Shidute Haufiku.

5. Gondwana shall pay Hollard's costs, such cost to include the costs of one instructing and three instructed legal practitioners.

6. Further and or alternative relief.'

[8] The first issue which arises from that application is that of urgency. The starting point on this issue is Rule 73 of in Rules of this Court and more particularly Rules 73(3) and 73(4) Rule 73 is permissive in the sense and that it confers upon the Court a discretion to be exercised judicially to dispense with the Rules relating its form and service and to dispose of the matter in accordance with procedures which are as far as practical in accordance with the Rules.

[9] Rule 73(4) obliges the deponent of the affidavit filed in support of the application to set out explicitly.

10.1 the circumstances which the avers render the matter urgent and;

10.2 the reasons why he claims he could not be afforded substantial redress at a hearing in due course.

[10] In considering these requirements, I am of the view that first and foremost the relevant facts play an important role in persuading a Court to exercise the discretion one way or the other. This will include inter alia, the history of the dispute, the conduct of the parties, the timing of when the application, as one of urgency, is to the launched, the extent to which the alleged urgency is due to the failure of the application to take timeous steps to institute the proceedings when it had its opportunity to do so, and to

what extent all the basic principles of procedural fairness are impacted. The list is not exclusive.

[11] An important consideration which goes into the balancing exercise must be convenience of the Court. It is admittedly one of several factors although not decisive in itself. It remains however a relevant consideration.

[12] It is important to bear in mind always that although all the relevant factors must be considered, they need not necessarily be afforded the same weight in consideration of the question whether the Court should condone the non-compliance with the Rules or not. What weight is to be afforded to each separate fact, circumstance or consideration will inevitably vary from case to case.

[13] The Rules of the High court, regulate and control the business and processes of the High Court. The court will be alive to possible abuses of in particular its processes. One such possible abuse which came to the court's attention is a developing practice to enrol matters for a specific day, with specific timelines for the exchange of papers, under the guise of urgency. Matters are enrolled in this manner long before the specified date set for hearing. This bypasses the structure of judicial case management which is a cornerstone and one of the foundations upon which Rules rest. It is a practice that must be discouraged.

[14] Having said that there will always be cases which require urgent relief by the court which is the reason for Rule 73. The matter was dealt with by a Full Bench of this Court in the matter of *Stocks and Stocks Leisure (Namibia) (Pty) Ltd vs The Swakopmund Station Hotel (Pty) Ltd t/a The Swakopmund Station Hotel & Entertainment Centre and Entertainment Centre and Others*¹.

¹ *Stocks and Stocks Leisure (Namibia) (Pty) Ltd vs The Swakopmund Station Hotel (Pty) Ltd t/a The Swakopmund Station Hotel & Entertainment Centre and Entertainment Centre and Others* 2020 (4) NR 1117

[15] When these proceedings were eventually instituted there was no pressing urgency. At best for Gondwana, it can be said that its case is one of semi-urgency. The Rules of the High Court, contain no provision for a so-called semi urgent roll. I believe the reason for the absence thereof is to be found in the Rules relating to judicial case management. A Managing Judge is appointed once a matter is opposed. What is required of the Managing judge is clearly spelled out in Rules 17 and 18 of the Rules and includes the power to shorten the time for compliance with any other Rule and to shorten any time prescribed for the doing of anything or the taking of any steps in the course of litigation amongst other things. It is quite conceivable that under the Rules the Managing judge is able to expedite the hearing of any matter that is semi urgent for want of a better word. The rules provide for sufficient room for flexibility on how litigation proceeds. This will include amongst others the determination of a suitable date for the hearing of the matter.

[16] I mention these considerations for the reason that unless an applicant can bring himself or itself within the four corners of Rule 73(4), the progress and course of the litigation will be as determined by the managing judge according to the requirement of the particular case.

[17] In considering the requirements of Rule 73(4) I am guided by earlier decisions emanating from this Court and more particular the decision in the *Mweb Namibia (Pty) Ltd vs Telecom Namibia Ltd and Others*².

The following summary appears in the judgment.

'a failure to set out the circumstance upon which a party relies that it is an urgent matter on why the claims on how to or could not be afforded substantial redress at the hearing in due course may fatal to the application

b) The fact that inseparable damaged may be suffered or not enough to make out a case for urgency. Although it may be a ground for an interdict, it does not make the application urgent.

² 2012 (1) NR 331 (HC)

c) An applicant has to show good cause why the time provided for in the Rules must be abandoned and why the applicant cannot be afforded substantial redress or a hearing in due course.

d) In exercising the discretion a Court must keep in mind is that there are varying degrees of urgency.

e) Although Rule 73 claims a deviator from the prescribed procedure and time period in urgent application parties and legal practitioners must as far as practicable give effect to its object of the procedural fairness when determining the procedure to be followed in such instances to afford a respondent reasonable time to oppose the application.’

[18] Counsel who appeared on behalf of Hollard correctly submitted that in Hollard was given sufficient time to consider their position and to oppose the application. The real question is, however, what weight it should be accorded in the final analysis of the facts relevant to the exercise of my discretion. There are as I had indicated in this judgment and the MWEB judgment other considerations at play

[19] It is convenient at this stage to turn to a consideration of the relevant facts and circumstances. Gondwana seeks a declarator that Hollard obliged to compensate it for the financial losses it suffered as a consequence of the COVID 19 disease and the measures adopted by the Namibian Government in response thereto. To that end it reported its claim at the end of March 2020. Since that date Gondwana and Hollard engaged in correspondence with another about the claim.

[20] I do not deem it necessary to detail each and every exchange that took place. What is important to note in this context is that it soon became apparent that there was no way in which Hollard could be persuaded to honour the claim any time soon or even to admit that it was liable apart from quantifying the claim.

[21] Gondwana on various occasions threatened to launch urgent proceedings. This dates back to 24 July 2020, 28 July 2020 and 10 September 2020. The only inference to be drawn is that as early as at any of these dates the need for the institution of legal proceedings became a reality. There is simply no explanation why the institution of the

proceedings were delayed until December 2020. It is clearly not as a result of the parties trying to reach an amicable solution. It was more of a case of one party attempting to persuade the other of its merits of its stance as far as the claim was concerned, or accusing each other of not complying with its obligations.

[22] If Gondwana is correct in the belief that Hollard is deliberately stalling the process, the realization on the facts disclosed to me would have set in the some time before Gondwana approached the court seeking declaratory relief. When Gondwana eventually decided to approach this Court, it task it upon, itself to unilaterally determine dates for the exchange of papers and the determination of a date for the hearing. In that way it sought to circumvent the Rules and to jump the queue, so to speak.

[23] I will deal with the claim that Gondwana will not be afforded substantial redress if the matter was to be heard in an ordinary course. Gondwana makes the case that the COVID 19 pandemic if I may call it that causes it to suffer financial losses, mainly because the main patrons being foreign tourists had to cancel their bookings. It goes on to allege that despite the intervention of Bank Windhoek to come to Gondwana's assistance financially, that as from end of March 2021 it will have to curtail its operations and retrench staff members.

[24] This perhaps explains why the date of 30 March 2021 was chosen as a date for this hearing. The allegations made in this regard lack detail and are mostly expressed in broad terms. I am prepared to accept and Gondwana will continue to suffer financial losses. What is not explained is why in the circumstance it will be unable to obtain redress in proceedings instituted in the ordinary course. Gondwana does not say that it will cease to exist nor does it say that Hollard will. The relief Gondwana seeks is confined to a declaration that Hollard is liable to compensate it. That leaves the quantification of the claim in limbo. The issue of a declarator at this stage will do nothing to alleviate to financial hardship Gondwana said it will have to endure as from the end of March 2021. It will at best for Gondwana a step in the right direction but by no means a solution in itself. It will continue to suffer losses until the claims is

quantified. How long that will take I am not able to say. Given the facts and circumstances of the case, more weight must be attached to the delay in bringing the proceedings, the issue of substantial redress and the convenience of the Court, and the issue of procedural fairness.

[25] Unlike in the Stocks and Stocks case where liquidation proceedings were a real possibility that is not the case in casu. In conclusion when taking account all the relevant facts and circumstances and affording each the weight it brings to bear on the issue I am not persuaded that Gondwana was able to meet the requirements of Rule 73(4) and that I should exercise my discretion not to permit non-compliance with the Rules.

[26] As far as costs are concerned each party employed three instructed counsel. Given the wide ranging issues that were debated and the volume of a papers filed it was a prudent step. I will accordingly allow the costs of three instructed counsel.

[27] In the result I make the following order:

- a) The relief claimed in paragraph 1 of the Notice of Motion in the Main application is refused.
- b) The matter is finalised and struck from the roll.
- c) Gondwana is ordered to pay the costs which will include the costs of one instructing and three instructed counsel.

K MILLER
Acting Judge

APPEARANCES:

APPLICANT:

S McCulloch

Fisher, Quarmby & Pfeifer

RESPONDENT:

F. G Erasmus

Francois, Erasmus & Partners