REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-CIV-MOT-GEN-2019/00456

In the matter between:

DESERT FRUIT (PTY) LTD	**APPLICANT**
and	
OLIVE RIDGE (PTY) LTD	**1ST RESPONDENT**
JOHANNES HENDRIK VAN DER WALT *N.O.*	**2ND RESPONDENT**
WAYNE SMITH *N.O.*	**3RD RESPONDENT**
MINISTER OF LAND REFORM	**4TH RESPONDENT**

Neutral Citation: *Desert Fruit (Pty) Ltd v Olive Ridge (Pty) Ltd* (HC-MD-CIV-MOT-GEN -2019/00456 [2021] HAHCMD 181 (22 April 2021)

CORAM: **MASUKU J**
Heard: 30 March 2021
Delivered: 22 April 2021

Flynote: Civil Procedure – Rules of Court – Rule 67 dealing with referral of applications to trial or oral evidence where a dispute of fact arises – considerations to be taken into account in making that decision – the effect of the objectives of judicial case management in Rule 1(3) on the exercise of the court's discretion.

Summary: The applicant moved an application in terms of section 260 of the Companies' Act, 2004 alleging that the respondents were guilty of unreasonably,

prejudicial, unjust or unfair conduct. The application was opposed by the respondents and they filed their answering papers, to which the applicant filed a replying affidavit. The matter proceeded to case management where the parties agreed that there were disputes of fact that were apparent in the matter and they would seek a consensus as to how to proceed with those. Eventually, the provisions of rule 32(9) and (10) did not yield the proverbial fruit and the applicant lodged an application for referral of the matter to trial, alternatively, to oral evidence, which the respondents opposed.

Held: rule 67 grants the court a discretion where a dispute arises in the course of the application, to either dismiss the application, refer it to trial or refer particular aspects to oral evidence.

Held that: this discretion, like in all other matters, must be exercised judicially. In particular, the court must take into account making an order that is suitable and will ensure a just and expeditious resolution of the matter.

Held further that: the overriding objectives of determining matters justly, speedily and cost effectively, must play a pivotal role in the court's exercise of its discretion in terms of rule 67, as stated by the Supreme Court in *Konrad v Ndapanda* 2019 (2) NR 301 (SC).

Held: that on a proper conspectus of the matter, the parties realised that there were disputes of fact and recorded this is their joint case management report. The proper way of resolving that dispute, in line with the *Konrad* judgment, would be to refer the matter to trial as that would properly align with the overriding objectives of judicial case management so as to enable the court to see and hear the witnesses adducing their evidence.

Held that; in any event, a reading of s 260 suggests that a party complaining of oppressive conduct and seeking the intervention of the court, must bring an application, as envisaged in the Rules of Court and which is what the applicant did.
The court granted the application with costs and referred the matter to trial.

ORDER

1. The main matter between the parties cited above, (the application and the counter-application), is hereby referred to trial.
2. The papers filed of record are to serve as pleadings for purposes of the order granted in paragraph 1 above, and as evidence or witnesses' statements.
3. The parties are granted leave to augment the papers filed of record, through the leading of oral evidence, through the adduction of oral evidence, if so advised.
4. Costs of the application are granted in favour of the applicant against the respondents, the one paying and the other being absolved, consequent to the employment of one instructing and one instructed counsel.
5. The costs referred to in paragraph 4 above are not subject to the provisions of rule 32(11) of this Court's Rules.
6. The matter is postponed to 28 April 2021 at 15:30 before Schimming-Chase J for further directions and management.

RULING

MASUKU J:

Introduction

[1] At the heart of this interlocutory application lies one question, namely, the propriety of referring the main application and the counter-application to trial. The applicants, cited above moved for the said referral and the respondents, on the other hand, save the Minister, who is not an active party to these proceedings, vigorously oppose the application.

The parties

[2] The applicant, Desert Fruit (Pty) Ltd, is a company duly registered and incorporated in terms of the company laws of this Republic. Its registered office is situate in Windhoek, Namibia. The 1st respondent is Olive Ridge (Pty) Ltd, also a company duly registered and incorporated in terms of the company laws of this Republic. Its registered office is also situate in Windhoek, within the jurisdiction of this court.

[3] The 2nd respondent is Mr. Johannes Hendrik Van der Walt, an adult male trustee for the time being of the Wayne Smith Family Trust. His residential address is in Stellenbosch in the Republic of South Africa. The 3rd respondent is Mr. Wayne Smith, an adult male and trustee for the time being of the Wayne Smith Trust. His residential address is also in Stellenbosch, South Africa.

[4] The 4th respondent is the Minister of Land Reform and is appointed in terms of Art. 32(2)(i)(bb) of the Constitution of Namibia. No relief is sought against the Minister and he has, in that regard not filed any papers in the matter.

Background

[5] The main bone of contention among the parties, i.e. the applicant and the respondents, save the Minister, is the propriety of the granting of an application in terms of the provisions of s. 260 of the Companies Act, 2004. It is alleged that there is some unfairness resulting from conduct on the part of the respondents that is alleged to be unreasonably prejudicial, unjust or inequitable.

[6] The applicant, in consequence, applied to the court seeking an order directing the trustee of the Wayne Smith Trust to sell the shares in and claims against the 1st respondent to it. It also applied for other relief relating to purchase price of the shares, namely, that it should be of equal value to the value of 0.33% subscription by the Trust and for other relevant steps to be complied with in terms of the Competition Act of Namibia.

[7] The respondents opposed the application and filed their answering affidavits, to which the applicant replied. The matter went through the entire gauntlet of case management prescribed by rule 71. In this regard, a comprehensive and detailed

joint case management report was filed on behalf of the parties dated 17 November 2020. It was made an order of court on 3 December 2020. This resulted in the court allocating dates of hearing of the matter, namely 29 to 1 April 2021 and 10 to 14 May 2021, respectively. A question that the parties had to address in the joint case management report, was whether the matter should be heard on the papers or oral evidence would be required for the purpose of bringing the dispute between the parties to an end.

[8] The parties, in the joint case management report, under paragraph C, recorded the following:

> 'The parties will consider whether or not the matter or parts thereof will be referred to oral evidence. The parties will consider this and revert to court on or before 30 November 2020. To this end, the Parties propose that the matter be postponed for a further case management hearing to be heard at the earliest possible convenience thereafter.'

[9] Under paragraph L of the joint case management report, the parties stated that, 'Subject to the court's availability and whether or not the matter or parts of thereof will be referred to oral evidence, the Parties propose that the matter be set down for hearing for 2 days if not referred to oral evidence, and 10 days if referred to oral evidence – any time during April 2021.

[10] It would appear that as the matter progressed towards hearing, a secondary dispute arose between the parties and it related to the question whether or not the matter should be referred to oral evidence. The parties duly engaged in terms of rule 32(9) and (10).

[11] The long and short of it, is that the respondents refused to have the matter resolved on the basis that it should be referred to oral evidence. It appears that their position was that the factual disputes referred to as a basis for seeking the matter to be referred to oral evidence did not arise or become apparent during the exchange of papers but had existed long before the application was launched.

[12] Because a favourable conclusion to the rule 32(10) process could not be reached, obviating the need to bring an interlocutory application to court, the

applicant launched the present application, seeking that the matter be referred to trial, alternatively to oral evidence. This application is vehemently opposed by the respondents. It is the reason why the court is now saddled with making a decision on this very matter.

Determination

[13] The relevant provision in the rules that refers to reference of matters to trial or to oral evidence is rule 67. It provides that where a matter cannot be properly decided on the papers, i.e. affidavits, the court may dismiss the application or make any order that it deems meet, with a view to ensuring a just and expeditious decision of the matter. It is this application that the applicant has made.

[14] In response, the respondents deny that the disputes have recently arisen. It is their contention that the disputes of fact became apparent long before the application was launched, namely, during the disciplinary proceedings launched by the applicant against the 3rd respondent. It is further alleged that the disputes were pointed out in the answering affidavits filed in opposition to the main application but the applicant waited until the last minute to bring the application.

[15] The respondents further alleged that, 'This delay is obviously carefully choreographed to ensure that the two weeks for which the first respondent and the Trust have now been forced to reserve the services of counsel will be wasted.' For this reason, and others that need not be individually recorded, the respondents moved the court to dismiss this application with costs, which would result in the main application being dismissed in terms of rule 67, as well.

[16] The task of the court is to decide whether the application moved by the applicant is meritorious in the first place. This determination will entail the court deciding in the process whether there are cogent legal reasons advanced by the respondents for the court not to grant the application as prayed. It is to that task that I now proceed in earnest.

Determination

[17] It would appear, from a reading of the papers filed by the parties that it is common cause that there are disputes of fact that cannot be properly resolved on application. The question is what the proper order is for the court to issue in the circumstances. The applicant argues that this is a proper case for the court, in exercise of its discretion, to refer the matter to oral evidence. The respondents, on the other hand, take the view that the disputes were apparent and foreseeable and that the applicant should not, with such foresight, have brought the matter on application in the first place. The application so argued the respondents, is fit for dismissal.

[18] Rule 67(1) reads as follows:

'Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order that the court considers suitable or proper with a view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may –

(a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or

(b) refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter.'

[19] It would appear to me that the above rule reposes some discretion in the court where an application in terms of this rule has been made by a party. In this regard, the court may dismiss the application or make any order that it considers suitable or appropriate in the circumstances of the case. The discretion reposed in the court should, like in all other cases, be exercised judicially and judiciously.

[20] The rule-maker did not end by pointing out the possible orders the court may issue in an application in terms of rule 67. He proceeded to give the court guidance as to what must be the main consideration in the course that the court adopts in the exercise of the discretion. The rule maker stipulated that the court, in issuing the order must have as it primary focus, the 'just and expeditious decision' of the matter. It would seem to me that a dismissal of the matter, although it may be

merited in some circumstances, does not rank as a viable option because it ordinarily does not result in a 'just and expeditious decision of the matter'.

[21] If anything, a dismissal of the application results in a delay in the finalisation of the matter and more importantly, results in the costs of the proceedings being astronomical, thus defeating in a sense, the overriding objects governing judicial case management.[1] In this regard, it would therefor appear to me that it is in the most egregious of cases that the court should dismiss the application. This is because a dismissal does not ordinarily coincide with the objects of judicial case management. If truth be told, it runs counter to the overriding objects of judicial case management in most cases.

[22] Having said this, the court must not be understood to be saying that applicants should be reckless in launching proceedings before this court and not perform a due diligence exercise, if I may call it that, regarding the existence of disputes of fact before the launching of the application. A party, who proceeds headlong and brings an application although it is apparent that it is afflicted or infested with a myriad of disputes of fact, should not be heard to complain when the court decides to unleash the discretionary powers at its disposal by dismissing the application.

[23] In dealing with this particular rule, the Supreme Court has given supreme guidance on the proper approach to be adopted by this court. In *Konrad v Ndapanda*[2] the Supreme Court expressed itself in the following terms:

'[14] While it is within the discretion of the Court *a quo* to have dismissed the application since it could not be decided on affidavit, it should not follow that the application will always be dismissed with costs in such a case. There may be circumstances that will persuade a Court not to dismiss the application, but to order the parties to trial together with a suitable order as to costs. Also, in a proper case and where the dispute between that parties can be determined speedily, it might even be proper to invoke the provisions of the rules of court as to the hearing of oral evidence.

[15] The court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion based entirely on affidavit.

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[1] Rule 1(3).

[2] 2019 (2) NR 301 (SC) para 14-16.

[16] The exercise of the Court's discretion in Rule 67 should be read with the overriding objectives of the rules of Court to facilitate the resolution of disputes justly, efficiently and cost effectively as far as practicable. By dismissing the case the Court *a quo* left the issue as to the putative marriage and proprietary rights of the parties unresolved despite the disputes being alive in Court. In this instance the court *a quo* failed to resolve the issues in dispute justly, efficiently and cost effectively as far as practicable.' (Emphasis added).

[24] What does the application of the above *dictum* entail in the present application? It sends the clear message that at the heart of the exercise of the court's discretion on an application in terms of the rule under consideration, the court must seek to do justice between the parties 'justly, efficiently and cost effectively'. That must be the standard. Dismissal of the application, as the Supreme Court found in the *Konrad* matter, hardly meets the triumvirate of considerations underlined immediately above.

[25] In the Oxford Advanced Dictionary, the word 'efficient' is given the following meaning, namely, 'doing something well and thoroughly with no waste of time, money or energy'. Cost effectively, appears to be included in the definition of efficiency but probably needed emphasis in this case because there is always a hue and cry regarding the ever swelling costs of litigation. Judicial case management, was designed for, among other things, to lower the costs of litigation and to speed up the flow of the management and finalisation of cases.

[26] I am of the considered view that in the instant case, to give in to the entreaties of the respondents, would run counter to the objectives of judicial case management. In that regard, this court would be partaking in committing the very sin that the Supreme Court called out in the *Konrad* matter. This is so because dismissing the application would require the applicants to pay the costs of the application and to then institute action proceedings, which is a process that can be ordered by this court at this juncture, without dismissing the application, with the concomitant and in that event unavoidable order as to costs.

[27] I do not consider lightly the fact that the parties themselves recognised the fact of the existence of disputes of fact as the application developed. This was recorded in the case joint case management report. The parties in this regard, required further time to consider how the issue of the disputes would be handled and they did so.

[28] In dealing with this matter, it should not be forgotten that the main issue in dispute between the parties is an application in terms of s 260 of the Companies Act. The said provision reads as follows:

> '(1) Any member of a company who complains that any particular act or omission of a company is unreasonably prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner which is unreasonably prejudicial, unjust or inequitable to him or her or to some part of the members of the company, may, subject to subsection (2), make application to the court for an order under this section.' (Emphasis added).

[29] The Act does not define what an application is. It is, however, a term of art in the legal profession. It is defined in the rules of this court, which inevitably apply where any application, in pursuance of any law, including the Companies' Act, is made before this court. An application is defined in the rules as 'an application on notice of motion in terms of Part 8. Rule 65, in Part 8 prescribes that 'every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies . . .'

[30] It is accordingly clear that the applicant was bound, in terms of the applicable law, i.e., s 260 of the Companies Act, to bring the proceedings in the form of an application. This is the procedure prescribed by the Act and it would, in the circumstances, not only be at variance with the objectives of rule 1(3) of the rules to dismiss this application, but it would also be contrary to the procedure prescribed by the Companies Act. In this regard, the court is able, by exercising its discretion properly, to meet the procedure prescribed in section 260 and at the same time act in tow with the overriding objectives of judicial case management. Overriding objectives surpass transient gains and tactical advantages, it must be added.

[31] There has been a lot of dance and song by the respondents regarding the application and how it is doomed to fail. It is precipitous of the court to lend its ear to those arguments by the respondents at this stage. They predominantly deal with the merits, which fall beyond the remit of the matter placed before court for adjudication at this stage.

Conclusion

[32] In view of the foregoing considerations, I am of the considered view that this is a proper case in which the justice of the entire case, particularly the decision of the matter on its merits, and the efficient and cost effective determination of the matter, in unison, call for the granting of the application as prayed, as I hereby do.

Order

[33] Having due regard to the determination of the issues in contention stated above, the following order presents itself as the appropriate one to issue in the circumstances:

1. The main matter between the parties cited above, (the application and the counter-application), is hereby referred to trial.
2. The papers filed of record are to serve as pleadings for purposes of the order granted in paragraph 1 above, and as evidence or witnesses' statements.
3. The parties are granted leave to augment the papers filed of record, through the leading of oral evidence, through the adduction of oral evidence, if so advised.
4. Costs of the application are granted in favour of the applicant against the respondents, the one paying and the other being absolved, consequent to the employment of one instructing and one instructed counsel.
5. The costs referred to in paragraph 4 above are not subject to the provisions of rule 32(11) of this Court's Rules.
6. The matter is postponed to 28 April 2021 at 15:30 before Schimming-Chase J for further directions and management.

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T. S. Masuku

Judge

APPEARANCES

APPLICANT:	A. Corbett SC (with him D. Obbes) Instructed by Ellis Shilengudwa Inc.
RESPONDENTS:	R. Van Riet SC (with him A. R. Newton) Instructed by Koep & Partners