

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: NORED ELECTRICITY (PTY) LTD v NDAHAMBELELA NANGHELO NELUMBU (HAUWANGA), CECILIA JOHANNES, SIEGLINDE BERNADETTE DIRIARDI (NAREBES) and JOSEPHAT NEGUMBO	Case No: HC-MD-CIV-ACT-OTH-2017/04328 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Rakow, J	Date of hearing: 3 February 2021
	Date of order: 8 February 2021
Neutral citation: <i>Nored Electricity (Pty)Ltd v Nelumbu</i> HC-MD-CIV-ACT-OTH-2017/04328 [2021] NAHCMD 32 (8 February 2021)	
Having read the record of proceedings as well as submissions made by counsels for the Applicant and the First and Second Respondents: IT IS HEREBY ORDERED THAT: 1. The application for condonation is dismissed. 2. The plaintiff to pay the costs of the application, including the wasted costs of five trial days.	
Reasons for orders:	
<u>Background</u> [1] The plaintiff instituted claims against the defendants as follows:	

AD CLAIM AGAINST FIRST DEFENDANT, ALTERNATIVELY FIRST, SECOND AND FOURTH DEFENDANTS JOINTLY & SEVERALLY

1. Payment of N\$853,920.40 plus interest at the rate of 20% per year calculated from 25 March 2013 to date of final payment.
2. Costs of suit on a scale as between attorney and own client.
3. Further or alternative relief.

AD CLAIM AGAINST SECOND DEFENDANT, ALTERNATIVELY SECOND, FIRST AND FOURTH DEFENDANTS JOINTLY AND SEVERALLY

4. Payment of N\$1,027,556.56 plus interest at a rate of 20% per year calculated from 18 March 2013.
5. Costs of suit on a scale as between attorney and own client.
6. Further or alternative relief.

AD CLAIM AGAINST THIRD DEFENDANT, ALTERNATIVELY THIRD AND FIRST DEFENDANTS JOINTLY AND SEVERALLY

7. Payment of N\$612,460.00 plus interest at a rate of 20% per year calculated from 19 June 2015.
8. Costs of suit on a scale as between attorney and own client.
9. Further or alternative relief.

AD CLAIM AGAINST FOURTH DEFENDANT, ALTERNATIVELY FOURTH AND FIRST DEFENDANTS JOINTLY AND SEVERALLY

10. Payment of N\$157,900.00 plus interest at a rate of 20% per year calculated from 6 August 2015.

[2] The matter proceeded through all the stages of case management with discovery order made in December 2017 to take place on or before 26 January 2018. The plaintiff then indeed filed its discovery affidavit by way of Ms Indongo-Intindi, discovering various documents, including the final report of PWC. The matter proceeded with various witness statements being filed and then Mrs Petherbridge withdrawing as legal representative for some of the defendants in September 2018. From there it took some time for other legal practitioners to come on record for the first and third defendant but the matter was eventually set down for trial during May 2020.

[3] The matter proceeded and was remanded for continuation of trial during the latter part of August 2020 when it could not proceed due to unforeseen circumstances. The matter was eventually postponed for continuation trial to beginning of February 2021. On 9 November 2020 the plaintiff engaged in rule 32(9) discussions with the defendants and wrote to them informing them that the PWC report was discovered and

handed over to them without the necessary annexures and appendices which should have accompanied the said document. The plaintiff wished to discover these additional documents and would be willing to share the said documents before bringing a condonation application for their filing. They requested the views of the defendants on this but none of the defendants responded to the request. The plaintiff filed their rule 32(10) report on 16 December 2020, however, the actual application was only filed on 27 January 2021, shortly before the trial was to resume on 1 February 2021. At that stage the eJustice system was experiencing technical problems and some of the defendants did not get to view the said application properly before the date of 1 February 2021. The legal practitioners for the plaintiff also filed bundles of discovered documents with the Law Society of Namibia and these bundles were not retrieved by some of the practitioners for the defendants, resulting in a situation where some legal practitioners did not have sight of these documents on the morning of 1 February 2021 when the matter resumed.

[4] Mrs Petherbridge who appears on behalf of the second and fourth defendants however indicated that she downloaded some documents from the eJustice system as well as retrieved a bundle of documents and that it amounts to slightly more than 400 documents. The matter was then postponed to 6 February 2021 for all the parties to have sight of these documents and to oppose the application for additional discovery if they so want to. Time lines were set down for the filing of opposing papers and the application was heard on the morning of 6 February 2021.

The arguments

[5] The Plaintiff argued that the documents needs to be discovered to put a complete PWC report before court and such discovery, although not needed, is to the benefit of all the parties. They conceded that they knew already since August 2020 that the complete report was not discovered when Mrs. Petherbridge alluded to it during cross-examination of the current witness testifying. The explanation put forward by the plaintiff for only filing these documents in late January 2021 is that the person dealing with the matter at the plaintiff was on maternity leave from the end of September 2020 till the end of December 2020. She did not manage to trace the various documents before she went on maternity leave and only did so when she returned in January 2021. The Plaintiff intends to call a certain Mr. Hashagen, the person who compiled the PWC report and the annexures are source documents for findings reflected in his report. The appendices are his working notes which he used to make calculations and findings contained in the report and as such do not need to be discovered as he can still use them during his evidence because they are working notes.

[6] The plaintiff further filed an expert witness summary and CV on 31 August 2020 and a number of

discovered documents directly on the eJustice system which was conceded to be irregular as the plaintiff does not intend calling an expert witness and discover documents are not filed on eJustice. Mrs. Petherbridge however contents that these documents, although irregularly filed, had to be perused, causing some costs to be incurred and the defendants want to be reimbursed for these costs. The Plaintiff also filed an additional discovery affidavit for a certain Mr. Vatuva which they then indicated is actually duplication as the documents discovered in his additional discovery statement were already previously discovered. They again served the whole bundle of discovered documents of Mr. Vatuva on the defendants and indicated that there might have been some documents that were left out from the initial bundle handed over by them.

[7] The main contention from the defendants' side was the volume of documents served on them so shortly before the trial continued and the little time they had to peruse these and compare them with documents. The time period from when the plaintiff realised that additional discovery is needed till when the application was filed, was also not satisfactorily explained as the plaintiff had since end of August 2020 to bring the application for additional discovery and should not have waited till just before the trial continued to discover 400 plus documents. When they were approached in terms of rule 32(9) they never imagined that it would be such a voluminous number of documents. The argument was further that if the discovery is not necessarily needed but done only for the completeness of the documents before court, then it should not be allowed. The defendants stand to be prejudiced if the discovery is allowed as the trial commenced already and the second witness is under cross-examination. The additional discovered documents might lead to the recalling of witnesses and will definitely have a cost implication. If the discovery is allowed the defendants and their legal representatives will have to work through each of those documents again and that will also take time.

The law

[8] The pre-trial process in the court rules are divided in various stages, being the case planning stage, the case management stage and the pre-trial stage with various things in terms of the rules to happen in each of these stages. The process is designed in such a manner that the pleadings are dealt with, triable issues are clear before a trial start and all documents and witness statements are discovered and disclosed by all parties. Rule 28(2) specifically prohibits the use of evidential material not discovered by the parties at the trial by the defaulting party except with leave of the managing judge. The court can however order further discovery under rule 28(14) upon application to the court.

[9] In Erasmus's *Superior Court Practice*,¹ the learned author states the following in regard to discovery:

¹ Juta & Co.

'The object of discovery was stated in *Durbach v Fairway Hotel Ltd*² 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.'

[10] On the other hand, Herbstein & Van Winsen in their work *Civil Practice of the High Courts of South Africa*³ say the following regarding the purpose of 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 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.'

[11] In *Gamikaub (Pty) Ltd v Schweiger*⁴ Masuku J lists the objects of discovery therefore as follows:

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

[12] The Learned Judge then continues and says the following regarding the decision that the court is to make:

'[18] It stands to reason therefore that in cases where there has been less than full and frank disclosure of

² *Durbach v Fairway Hotel Ltd* 1949(3) SA 1081 (SR).

³ Herbstein & Van Winsen in their work *Civil Practice of the High Courts of South Africa* 5th ed, Juta & Co, 2012 Vol. I at p 777.

⁴ *Gamikaub (Pty) Ltd v Schweiger* (I 3762/2013) [2015] NAHCMD 88 (15 April 2015).

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. It would appear to me that what the court has to guard against in applications of this nature, especially when brought at the stage where the trial has commenced, 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. Where the object of the application is not base but is geared to assist in the proper identification, ventilation and determination of the real issues, the court must be very slow to refuse such applications as the truth can only be fully arrived at via the corridor of a full and frank disclosure.

[19] The question to be answered in the instant case is whether in all the circumstances, the defendant seeks to use this procedure for the nefarious purposes identified above or it is in the bona fide interests of full and frank disclosure and to avoid expending time and money on meritless pursuits that do very little to arrive at the truth and to decide the real issues in dispute.'

Conclusion

[13] The sentiments expressed by Masuku J in *Gamikaub (Pty) Ltd v Schweiger* find application in the current matter. It was conceded by the plaintiff that not much lies on the discovered documents as they are only been made available as they were not attached to the PWC report and will apparently not take the case any further as the report contains the findings which are based on the documents and the interpretation thereof. The set of appendices are also working notes which, according to the plaintiff does not need to be disclosed and therefore is not necessary to take the case further.

[14] The court is therefore not satisfied that a case for condonation of the late filing of the additional discovery was made out by the plaintiff and it is therefore not granted.

Costs

[15] The only further issue which remains is the issue of costs. The costs for the application are to follow the result and the defendants are therefore awarded the costs of the application. The fact that the application was however brought so closely to the date on which the trial was to continue, resulted in the wasting of 5 court days. The plaintiff did not satisfactory explain why this application was brought at such a late stage and should therefore bear the wasted costs of the 5 days.

Order

1. The application for condonation is dismissed.

<p>2. The plaintiff to pay the costs of the application, including the wasted costs of five trial days.</p> <p>3. The cost of the application is limited in terms of rule 32.</p>	
Judge's signature	Note to the parties:
Rakow, J	Not applicable.
Counsel:	
Applicants	Respondents
<p>E Angula</p> <p>Of</p> <p>AngulaCo Inc</p>	<p>F Gaes</p> <p>Of</p> <p>Uanivi Gaes Inc.</p> <p>For the First Respdent</p> <p>M Petherbridge</p> <p>of</p> <p>Petherbridge Law Chambers</p> <p>For the Second and Fourth Respondents</p> <p>K Amoomo</p> <p>Of</p> <p>Kadhila Amoomo Legal Practitioners</p> <p>For the Third Respondent</p>