REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

***EX-TEMPORE* JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2021/00279

In the matter between:

OVERBERG FISHING COMPANY (PTY) LTD	**FIRST APPLICANT**
CATO FISHING COMPANY (PTY) LTD	**SECOND APPLICANT**

and

CALTOP INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
MERLUS FISHING (PTY) LTD	**SECOND RESPONDENT**
CALTOP FISHING OPERATIONS (PTY) LTD	**THIRD RESPONDENT**
MINISTER OF FISHERIES AND MARINE RESOURCES	**FOURTH RESPONDENT**

Neutral Citation*:* *Overberg Fishing Company (Pty) Ltd vs Caltop Investment (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2021/00279) [2021] NAHCMD 418 (27 July 2021)

CORAM: GEIER J
Heard: **27 July 2021**
Delivered: **27 July 2021**
Released: **16 September 2021**

Flynote: Urgent application – Irregular proceedings – Rule 65(1) of the Rules of Court makes it incumbent on any litigant that wishes to launch an application, to ensure that such application is to consist of a notice of motion to which a properly commissioned affidavit – Rule 128 of the High Court Rules also requires that any document, including an affidavit, which is executed outside Namibia, needs to be authenticated – Affidavit by applicant was not commissioned and sworn to before a Commissioner of Oaths – the founding affidavit, executed outside Namibia, was also not properly authenticated and to which also a untranslated certificate in Spanish had been annexed - an attempt at rectification of these defects was attempted subsequently shortly before the hearing though the filing of a translation of the Spanish certificate and through the filing of a further properly commissioned affidavit – as no leave had been applied for or been granted to file further affidavits these further documents did not serve properly before the court – accordingly what occurred in this matter was a nullity, which was not rescued by the last-ditch effort to try to rectify a defective situation, which all along must have been countenanced by the applicant's legal practitioners, in the acute knowledge that what they had filed - and the motion that they had initiated - was one, that did not pass muster - as far as what was required by the relevant Rules of the High Court – Urgent application accordingly struck as an irregular proceeding with costs.

Summary: The facts appear from the judgement.

ORDER

The application is struck from the roll with costs as an irregular proceeding, such costs to include the costs of two instructed counsel, where applicable, and one instructing counsel.

JUDGMENT

GEIER J:

[1] The urgent application that is serving before the court this morning is one that one does not normally find.

[2] The issue that arises from the papers is, that the founding papers, that is the founding affidavit, which is attached to the Notice of Motion, was not sworn to.

[3] It is clear that in terms of Rule 1 of the High Court Rules the concept ‘affidavit’ is defined and that it is indicated in the rule what the requirements in regard to affidavits are. Namely, that they have to be written, signed and then sworn to before a Commissioner of Oaths.[1] These requirements are then also echoed in Rule 65(1) of the Rules of Court, which make it incumbent on any litigant that wishes to launch an application, to ensure that such application is to consist of a notice of motion to which a properly commissioned affidavit or affidavits are annexed.[2]

[4] It is essentially common cause that these requirements were not complied with in this instance.

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[1] Compare : Rule 1 : "affidavit" means a written statement signed by the deponent thereof under oath or affirmation administered by a Commissioner of Oaths in terms of the Justices of the Peace and Commissioner of Oaths Act, 1963 (Act 16 of 1963);

[2] Compare Rule 65: Requirements in respect of an application (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.
(2) Where relief is claimed against a person or where it is necessary or proper to give a person notice of such application, the notice of motion must be addressed to both the registrar and that person, otherwise the notice must be addressed to the registrar only.
(3) Every application must conclude with the form of order prayed and be verified on oath or by affirmation by or on behalf of the applicant.

[5] It was thus not surprising that a legal point, raised under the guise of a notice, filed in terms of Rule 66(1)(c), was filed in this regard, in which the point was taken on behalf of the first respondent. The third and fourth respondents took a slightly different approach in that they also first embodied the same technical objection in their answering papers, in which they then went over to place certain additional facts before the court, by way of a full answering affidavit.

[6] The applicants obviously being aware of the shortcomings of their founding papers endeavoured to respond through the filing a translation of a notarial certificate, which had accompanied the founding papers in the Spanish language. During the course of yesterday afternoon, the English translation was then also filed of record from which it appeared that a certain public notary of the Notarial College of Madrid, residing in Madrid, had legitimated the signature of the deponent to the founding papers and through which he endeavoured to certify that that deponent's signature to that document was affixed in his presence.

[7] Overnight the applicants also filed a further affidavit by the said deponent, now commissioned in Walvis Bay, probably, and in which the deponent, Mr Fernandez, explained that he was advised by his legal practitioners that in terms of Rule 128 of the Namibian High Court Rules, the founding affidavit had to be authenticated in accordance with the laws of Spain, being the country that he found himself at the time. He thus attended to a legal firm (in Spain) where he signed the affidavit before a notary public in the manner prescribed by that firm. He was made to understand that this was the correct procedure for the signing of an affidavit in Spain.

[8] The firm then sent scanned copies of the signed affidavit to his legal practitioner in Namibia who thereafter proceeded to upload the papers on e-justice and who then issued the application, which was served as an urgent application, as far back as 13 July 2021. Mr Fernandez then goes on to state in paragraph 5, of his affidavit:

'In so far as it might be contended that the manner in which the founding affidavit herein was authenticated/commissioned does not comply with the applicable law and/or the Rules of this Honourable Court, I confirm that I was duly authorised to depose to the founding affidavit by the applicants and in so doing authorised to launch and prosecute this application. I further confirm that the facts deposed in the founding affidavit fall within my personal knowledge, save where stated to the contrary or indicated by the context, and are both true and correct.'

[9] He then laments the fact that the timing of the Rule 66(1)(c) notice was unfortunate, as it took the first respondent a full two weeks to file such notice. He also lamented the late filing of the second and third respondents answering papers a few minutes ago. He then continues to ask for an order in terms of the notice of motion.

The Procedural Regulation of Argument

[10] At the hearing of the matter Mr Corbett SC who appeared with Mrs Garbers-Kirsten on behalf of the Applicant applied for some time to file replying papers in this matter. This application was opposed, and the court agreed with counsel for the respondents that, logically, the validity of the founding papers should be considered first. It was in this context that the argument then proceeded on whether or not this application fell to be struck as an irregular proceeding.

Argument on behalf of the respondents

[11] Mr Heathcote SC, who appeared on behalf of the third and fourth respondents, pointed out in support of his client's Rule 66(1)(c) notice that the notice of motion in terms of the applicable rule had to be accompanied by a duly commissioned affidavit. He also pointed out that the founding papers had not been properly authenticated and that they were in any event not properly commissioned. With reference to the translation, it was pointed out that it only certified that the deponent had affixed his signature to the document. He thus submitted that the application was a nullity and that it should be struck for these reasons, with costs, such costs to include the costs of two instructed- and one instructing counsel.

[12] Mr Tjombe, for the first respondent echoed the argument to some extent. He essentially pointed out again that Rule 65(1) of the Rules of Court had not been complied with, and that the application should thus be struck.

Argument on behalf of the applicants

[13] Mr Corbett SC in an unenviable attempt to rescue what seemingly was a defective application, conceded firstly that he was facing an uphill battle. He however rested his argument mainly on the contents of paragraph 5 of Mr Fernandez's affidavit, as filed overnight, in which Mr Fernandez had endeavoured to confirm the statements, which had not been made under oath in the so-called founding papers, *ex post facto*. He submitted that the applicant should be allowed to rectify the situation and indicated that the applicant could be back in court very quickly, should the court strike this application. He argued that if the court would uphold the technical point that this would put formalism over substance, and that, in any event, the applicants were also seeking the opportunity to reply. Ultimately the interests of justice required of the court to take a pragmatic view in this regard, particularly as there was no prejudice to the other parties. The matter should thus stand and should proceed.

Replying argument

[14] In reply, Mr Heathcote pointed out that the applicants had not sought leave to file a further affidavit, and in any event the papers that were before the court constituted a nullity, which aspect could not be cured. He also argued that one should not wait to the last minute to rectify a defective situation and that the applicants should have reacted promptly to the defective papers that they had received back from Spain, in order to cure the irregularities.

Resolution

[15] If one considers the case before the court, it is firstly clear that no leave was applied for, or granted, to file any further affidavits. Also, and although Mr Heathcote only touched on this aspect fleetingly, the requirements pertaining to Rules 32(9) and (10) were not complied with in this regard. It thus appears that counsel for the respondents are of course correct that, for these reasons, those further papers are thus not properly before the court.

[16] More importantly it however appears from the applicable rule relating to authentication, Rule 128 of the High Court Rules, that any document, which includes an affidavit which is executed outside Namibia, needs to be authenticated. 'Authentication' in terms of Rule 128(1) means 'the verification of any signature thereon'.[3] It seems in this regard that the certificate, which was belatedly filed in translated form, attempts the verification of Mr Fernandez's signature on the 'commissioned affidavit'. Sub-rule (2) of Rule 128 however places a further requirement on the authentication of documents executed in a country outside Namibia, (unless of course sub-rule (3) is of application, which is not), namely, that it must also appear, that the authentication has been done either by the Government authority of the particular country in question which is charged with the authentication of the document under the law of that country, or by a person, authorised to authenticate documents, in that foreign country.[4] I believe that legitimate criticism can also be levelled against the certificate that was filed in this regard and from which it does not appear that this latter requirement was in actual fact met. At best it can only be assumed that a notary public, in Spain, can authenticate documents legitimately? This particular facet was however not proved and the affidavit was thus not properly authenticated.

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[3] Compare Rule 128 : '(1) In this rule, unless the context otherwise indicates-"document" means any deed, contract, power of attorney, an affidavit, a solemn or attested declaration or other writing; and "authentication" means, in relation to a document, the verification of any signature thereon. *(emphasis added)*

[4] Compare : '(2) A document executed in any country outside Namibia is, subject to subrule (3), considered to be sufficiently authenticated for the purpose of use in Namibia if it is duly authenticated in that foreign country by-

(a) a government authority of that country charged with the authentication of documents under the law of that country; or

(b) a person authorised to authenticate documents in that foreign country, and a certificate of authorisation issued by a competent authority in that foreign country to that effect accompanies the document.' *(emphasis added)*

[17] Be that as it may, it remains a fact that, in addition, the affidavit was also not commissioned and sworn to before a Commissioner of Oaths, and that the irregular attempt at rectification of this occurred subsequently did not cure the defects.

[18] Mr Corbett urged the court not to put formalism before substance and that the interests of justice required the court to take a pragmatic view of this matter, particularly as there was no prejudice to the other parties. In my view, although these were generally persuasive arguments, they cannot prevail in this instance. Firstly, because clearly prejudice was occasioned in this instance by the manner in which the belated attempt was made to rectify an obviously defective situation. I agree that the applicants had approximately 14 days to rectify this glaring defect. They must have been aware of this defect for all this time from the outset, and not much can thus be made of Mr Corbett's argument that the point was belatedly raised when the attempt at rectification occurred at the eleventh hour. Accordingly, I do not accord it any weight. Clearly this aspect could in any event have easily been raised at the hearing, even without any notice, as even then, it would not have prejudiced anybody because the defect was so obvious and had been lingering for some time affording ample opportunity for rectification. Ultimately the facts show that only once the Rule 66(1)(c) notice landed, it triggered the belated attempt at rectification. This is not the way to litigate. This was prejudicial also to the other parties as demonstrated by Mr Tjombe's request, made during argument, to now also be allowed to file answering papers at the eleventh hour when the parties had a period of some fouteen days already to exchange their papers fully. All this would have resulted in an extremely disjointed application.

[19] Finally, it should be said that in terms of the applicable case law pertaining to urgent applications[5], the situation which arose before the court this morning, is precisely the one that should not have occurred. I recognise that the applicant in its 'founding papers' endeavoured to regulate the procedure to be followed in order to achieve also procedural fairness, and that the respondents, somewhat belatedly filed their answering papers, not in accordance with the procedure set in the notice of motion and that this

[5] Compare for instance *Bergmann v Commercial Bank of Namibia* Ltd 2001 NR 48 (HC) at 50H to 51A or *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd* 2012 (1) NR 331 (HC) at [25] for instance.

played a role in this regard. Finally, the blame for all this must however mainly be laid at the doors of the applicants as shown by the peculiar circumstances of this matter.

[20] Ultimately I believe that what occurred in this matter was a nullity, which was not rescued by the last-ditch effort to try to rectify a defective situation, which all along must have been countenanced by the applicant's legal practitioners, in the acute knowledge that what they had filed - and the motion that they had initiated - was one, that did not pass muster - as far as what was required by the relevant Rules of the High Court.

[21] In the result, I strike the urgent application as an irregular proceeding, with costs, such costs to include the costs of two instructed counsel, where applicable, and one instructing counsel.

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H GEIER
Judge

APPEARANCES:

APPLICANT:	AW Corbett SC (with him H Garbers-Kirsten) Instructed by Ellis Shilengudwa Inc., Windhoek
1st RESPONDENT:	N Tjombe Tjombe-Elago Inc., Windhoek
2nd and 3rd RESPONDENTS:	R Heathcote SC (with him CE van der Westhuizen) Instructed by LorentzAngula Inc., Windhoek