

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Municipal Council for the Municipality of Swakopmund and Victoria Kandenge (nee Tjiurutue) Alexander Forbes Namibia Retirement Fund: Municipality of Swakopmund The Government of the Republic of Namibia The Attorney General	Plaintiff 1 st Defendant 2 nd Defendant 3 rd Defendant 4 th Defendant	Case No: HC-MD-CIV-ACT-DEL-2017/04722 Division of Court: Main Division Heard on: 30 September 2021
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 30 September 2021	
Neutral citation: <i>Municipal Council for the Municipality of Swakopmund v Kandenge</i> (HC-MD-CIV-ACT-DEL-2017/04722) [2021] NAHCMD 446 (30 September 2021)		
Order:		

1. The plaintiff's application for specific discovery is declined.
2. I make no order as to costs.
3. The matter is postponed to 27 October 2021 at 15h15 for status hearing.
4. The parties shall file a joint status report on or before 20 October 2021.

Reasons for order:

USIKU, J:

Introduction

- [1] In this matter, the plaintiff applies for an order that compels the first defendant to:
- (a) make discovery pursuant to her obligations as a litigant to discover, in compliance with rule 28(1) read with rule 28(4) and,
 - (b) make specific discovery of her bank statements for the period of 1 November 2015 to 1 September 2016.
- [2] The plaintiff thus, seeks an order in the following terms:
- '1. Ordering the 1st defendant to, within 10 days from the date of this order, in compliance with rule 28:
- 1.1. make discovery, identify, and describe all documents, analogues or digital recordings that are relevant to matter in question and are proportionate to the needs of the case and in respect of which no privilege may be claimed and further to identify and describe all documents which the plaintiff intends or expects to introduce at the trial, referred to in rule 28(1) and (4);
 - 1.2. make discovery of the documents referred to in the plaintiff's notice in terms of rule 28(8)(a), namely
 - a) statements of the Bank Windhoek account, with account number: 8000360510, held in the name of the First Defendant, reflecting transactions (including cash deposits) during the period 01 November 2015 to 01 September 2016;
 - b) statements of the Bank Windhoek home loan account, with account number: 7000005038, held in the name of the First Defendant, reflecting transactions (including cash deposits) during the period 01 November 2015 to 01 September 2016.
 - 1.3. deliver a discovery affidavit to the documents referred to in 1.2 in compliance with rule 28(4), within 10 days of this order;
 - 1.4. deliver a bundle of the documents referred to in 1.2 to the plaintiff, within 10 days of this order.
2. Ordering the first defendant to pay the plaintiff's costs to the application.

3. Further and/or alternative relief.'

[3] At the hearing of the application, the plaintiff abandoned the portion of the application relating to compelling the first defendant to make general discovery, on the basis that the first defendant has, in the meantime, made discovery in terms of rule 28(1). The application, now, is therefore, confined to the specific discovery, sought under rule 28(8).

[4]The first defendant opposes the application.

Background

[5] The plaintiff instituted action against the first defendant consisting of 89 claims for payment by the first defendant of various amounts, on account of first defendant's alleged misappropriation, dishonesty or misconduct in the execution of her employment duties. In the first 88 claims, the plaintiff claims for payment in the amount of N\$281 791.90 representing damages suffered by the plaintiff. Claim 89 is for payment of N\$330 648, being costs incurred by the plaintiff towards professional auditors' fees to have the aforesaid claims investigated and quantified. The first defendant defends the action.

The application to compel

[6] In its application to compel specific discovery, the plaintiff states that the first defendant's bank statements may assist the court in determining some of the matters in question, mainly, if the first defendant misappropriated the funds she received and fraudulently accounted for, as alleged by the plaintiff.

[7] According to the plaintiff, a proper analysis of the bank statements may, inter alia, reveal:

- (a) cash deposits the first defendant may have made in her bank accounts in amounts similar and at times aligning with her misappropriation of the plaintiff's cash funds alleged;
- (b) the lack of expenses and spending from her bank accounts towards ordinary household expenses, which would reasonably be expected from a salaried employee in her position.

[8] The plaintiff submits that, the bank statements may present circumstantial evidence of the misappropriation of the plaintiff's funds, one of the matters in question in the suit.

[9] The plaintiff further states that it has notified the first defendant to make discovery of the bank statements by means of its notice in terms of rule 28(8) (a) dated 4 March 2021 and the first defendant declined to make discovery of the said bank statements.

[10] In response, the first defendant states that the required bank statements are private information, which are not relevant to the material facts set out in the pleadings and are disproportionate to the legitimate needs of the plaintiff to present its case. In addition the first defendant relates that the plaintiff is not entitled to obtain her bank statements in order to go on a fishing expedition to see if it has a case against her based on fraud or theft.

Legal principles

[11] Rule 28(8) provides that:

'(8) If a party believes that there are, in addition to documents, analogues or digital recordings disclosed under subrule (4), other documents including copies thereof or analogues or digital recordings which may be relevant to any matter in question in the possession of any other party and which are not repetitive or a duplication of those documents, analogue or digital recording already discovered -

- (a) the first named party must refer specifically to those documents, analogues or digital recordings in the report in terms of rule 24 on Form 11; and,
- (b) the managing judge must at the case management conference give any direction as he or she considers reasonable and fair, including an order that the party believed to have such documents, analogues or digital recordings in his or her possession must -
 - (i) deliver the documents, analogues or digital recordings to the party requesting them within a specified time; or
 - (ii) state on oath or by affirmation within 10 days of the order that such documents, analogues or digital recordings are not in his or her possession, in which case he or she must state their whereabouts, if known to him or her.'

[12] It appears apparent that the purpose of rule 28(8) is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate.

[13] A party who is not satisfied with the discovery made, has the *onus* of proving on the probabilities that the required documents exist, are in possession of the other party and are relevant.¹

¹ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa* 1999 (2) SA 279 at 320C.

[14] The test as to whether or not a document should be discovered is one of relevance, having regard to the issues defined in the pleadings.²

Analysis

[15] The issue to be decided now is whether the plaintiff has made out a case to compel the defendant to make specific discovery of her bank statements for the period of 1 November 2015 to 1 September 2016.

[16] On the pleadings, the core of the plaintiff's action appears to me to be that, the first defendant received cash payments, on behalf of the plaintiff, from visitors to municipal bungalows, and stole or misappropriated the whole or portions of such payments. In the alternative, the plaintiff pleads that the first defendant failed to act in good faith, or failed to act in the best interests of the plaintiff, which breaches caused plaintiff to suffer damages.

[17] Having had regard to the pleadings and the evidence adduced in this matter, I am not persuaded that a probability has been shown that, it is reasonable to suppose that the bank statements sought to be discovered contain information which may be relevant to any matter in question in the action, or contain information that is proportionate to the needs of the case. I agree with the submission by counsel for the first defendant that, on the pleadings, of the present case, whether the defendant deposited the money she is alleged to have stolen, in her bank account, or did something else to the money after the theft, is irrelevant to present action.

[18] I am, therefore, of the opinion that the plaintiff has not advanced sufficient evidence that it is reasonable to suppose that the required bank statements contain information which may enable the plaintiff either to advance its own case or to damage that of the first defendant. For the aforegoing reason, I am of the view that the required statements are not relevant and are not proportionate to the needs of the case. Accordingly the plaintiff's application in respect of specific discovery cannot succeed.

[19] Insofar as the issue of costs is concerned, I am informed that the first defendant is a client of the Directorate of Legal Aid and consequently costs may not be awarded against her. For that reason I am not going to make any order as to costs.

² *Rellams Pty Ltd v James Brown & Hamer* 1983 (1) SA 556 at 564A.

[20] In the result, I make the following order:

1. The plaintiff's application for specific discovery is declined.
2. I make no order as to costs.
3. The matter is postponed to 27 October 2021 at 15h15 for status hearing.
4. The parties shall file a joint status report on or before 20 October 2021.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	First Defendant:
Mr OL Davids Of Engling, Stritter & Partners Windhoek	Mr N Marcus Of Nixon Marcus Public Law Office Windhoek