

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

<b>Case Title:</b> HOLLARD INSURANCE COMPANY OF NAMIBIA & 11 OTHERS APPLICANTS and MINISTER OF FINANCE 1 <sup>ST</sup> RESPONDENT NAMIBIA NATIONAL REINSURANCE CORPORATION 2 <sup>ND</sup> RESPONDENT	<b>Case No:</b> HC-MD-CIV-MOT-REV- 2018/00127
	<b>Division of Court:</b> High Court, Main Division
<b>Heard before:</b> HONOURABLE JUSTICE COLEMAN, JUDGE	<b>Date of Hearing:</b> 19 May 2022
	<b>Date of Order:</b> 16 June 2022
<b>Neutral citation:</b> <i>Hollard Insurance Company of Namibia v Minister of Finance</i> (HC-MD-CIV-MOT-REV-2018/00127) [2022] NAHCMD 300 (16 June 2022)	
<b>Results on merits:</b> Merits not considered.	
<b>THE ORDER</b>	

1. The previous Minister of Finance, Honourable Calle Schlettwein, alternatively, the current Minister of Finance with a supporting affidavit by Minister Schlettwein, is ordered to address the order by Justice Geier dated 21 January 2020 on affidavit under oath, to be filed within 30 days of this order.
2. In the affidavit it is required that the deponent identifies the documents produced under the order and indicates specifically which documents cannot be produced, the reason it cannot be produced and where, in whose possession, it is.
3. First respondent is ordered to pay the costs of this application, not limited in terms of rule 32(11) of the rules of this court, to include the costs of one instructing and two instructed Counsel.
4. The matter is postponed to 4 August 2022 at 15h30 for Status Hearing.

#### **REASONS FOR ORDER:**

#### **COLEMAN J**

##### Introduction

[1] This is an interlocutory application in respect of the review record in a review application. The applicants obtained an order on 20 January 2020 essentially compelling the first respondent herein to disclose a variety of documents to applicants. Paragraph 2 of the order requires first respondent to make copies of the documents available to the applicants for inspection and copying. Paragraph 3 of the order requires first respondent to supplement the review record with the documents in question.

[2] First respondent appealed against the order. The Supreme Court, after levelling some criticism against the order, struck the appeal from the roll. As far as this court is

concerned the order is intact.

#### Applicant's case

[3] It is common cause that Minister Schlettwein is the decisionmaker taken on review here. While the order of 20 January 2020 refers to the first respondent – the Minister of Finance – it is in my view implicit that the actual decision maker must produce the documents, or at least be consulted in the process.

[4] Applicants' case is that Mr Schlettwein was not consulted when the documents were produced in terms of the order. Therefore, it is necessary, according to applicants, that Minister Schlettwein addresses the order.

#### First respondent's case

[5] In essence respondents assert that there is no factual or legal basis to require Minister Schlettwein to address the order of 20 January 2022 under oath.

#### Conclusion

[6] The rule framework applicable in respect of a dispute about a review record is set out in sub-rules 76(6) and (8) of the Rules of the High Court. In addition, rule 70(3) makes the discovery rules applicable to all applications '...subject to such modifications required by the context or they may apply to such extent as the court may direct.'

[7] Rule 28(8)(b)(ii), which deals with discovery, provides for an order that a party must state under oath that documents are not in his/her possession and where they are. In terms of rule 28(14) the managing judge may, on application by a party during the course of any proceedings, order the production of any document under oath.

[8] In my view the rule 28 provisions can be applied with necessary modifications to

review applications. Those modifications are determined as required by the context and are within the discretion of the managing judge.

[9] It is trite that the provisions of rule 76(2)(b) and obtaining a complete, reliable review record are for the benefit of the applicant in a review application.<sup>1</sup> It also follows that the record must be provided by the decisionmaker under review, or at least under his/her supervision.

[10] Producing the review record is entirely different from discovery. The review record is potentially the only source of information for an applicant as to how the administrative decision in question had been arrived at and what was considered. Therefore, the decisionmaker in question has a sacred duty to be honest and meticulous when producing the record. It is simply not good enough for an official, who may or may not have personal knowledge of the decision making, to convey through legal practitioners, that the Minister is not in possession of documents while it is apparent the Minister was never consulted.

[11] In my view rules 76 read with rule 28, with modification, provides a legal basis for the order which the applicants seek.

[12] Therefore, having read all the documents submitted in the interlocutory application and having regard to the submissions by Mr Heathcote on behalf of applicants and Mr Namandje on behalf of respondents, I make the following order:

[12.1] The previous Minister of Finance, Honourable Calle Schlettwein, alternatively,

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<sup>1</sup> Jockey Club of South Africa v Forbes 1993(1) SA 649 (A).

the current Minister of Finance with a supporting affidavit by Minister Schlettwein, is ordered to address the order by Justice Geier dated 21 January 2020 on affidavit under oath, to be filed within 30 days of this order.

[12.2] In the affidavit it is required that the deponent identifies the documents produced under the order and indicates specifically which documents cannot be produced, the reason it cannot be produced and where, in whose possession, it is.

[12.3] First respondent is ordered to pay the costs of this application, not limited in terms of rule 32(11) of the rules of this court, to include the costs of one instructing and two instructed Counsel.

[12.4] The matter is postponed to 4 August 2022 at 15h30 for Status Hearing.

<b>Judge's signature</b>	<b>Note to the parties:</b>
COLEMAN Judge	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Second defendant</b>
Mr Heathcote, assisted by Mr Maasdorp Instructed by Francois Erasmus & Partners	Mr Namandje, assisted by Mr Nekwaya Instructed by Office of the Government Attorney

