**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**Case no: HC-MD-CIV-ACT-DEL-2018/04068**

In the matter between:

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA** **PLAINTIFF**

and

**JOHANNES TSHEEPO UUPINDI** **FIRST DEFENDANT**

**PEHOVELO LEONARD MOKANYA** **SECOND DEFENDANT**

**Neutral citation:** *The Government of the Republic of Namibia v Uupindi* (HC-MD-CIV-ACT-DEL 2018/04068) [2022] NAHCMD 335 (6 July 2022)

**Coram:** PRINSLOO J
**Heard:** **16 June 2022**
**Delivered:** **6 July 2022**

**Flynote:** Civil – action proceedings – application for leave to file additional expert witness statement – witness to be declared as expert in terms of rule 29 – witness to be called as expert in terms of rule 93(5) – variation of order – condonation – founding affidavit contains no personal knowledge of facts of the matter – no details on its default to deliver its expert summaries and statements – non-compliances not adequately explained application dismissed with costs.

**Summary**: The plaintiff (the applicant herein), brought an application on 11 May 2020 seeking the relief that, firstly, the applicant be granted leave to file and serve an additional expert witness statement of Eugene Luwellin Camm and that such witness is to be declared as an expert in terms of rule 29 of the Rules of the High Court to be called as an expert at the continuation of the trial in terms of rule 93(5). Secondly, that the witness, Leevi Krist Kapenda be declared as an expert in terms of rule 29 of the Rules of the High Court to be called as an expert at the continuation of the trial. Thirdly, that a variation of the pre-trial order of 22 October 2020 in respect of paras 1 and 2 thereof be granted. And lastly, that condonation in respect of the non-compliance as far as it relates to the expert summary and rule 29 application be granted. The first defendant, who is the respondent herein, opposed the application. The second defendant elected to abide by the decision of the court.

*Held that:* the plaintiff filed an extensive founding affidavit, but the deponent of the founding affidavit has no personal knowledge of the facts of the matter. As a result, the plaintiff fell into the trap of placing all its reliance on confirmatory affidavits, which is utterly unhelpful.

*Held that:* the founding affidavit of the plaintiff does not provide the court with any details with regards to its default to deliver its expert summaries and statements, especially if one considers the period that elapsed between the date of the pre-trial order (3 September 2020) and the date of the ruling on 9 December 2021, striking a similar application from the roll.

*Held further that*: the plaintiff did not comply with the multiple court orders to file its expert summaries and statements. None of these non-compliances were adequately explained in the founding affidavit. Therefore, I believe that it is not even necessary to consider the plaintiff's prospect of success because of previous "flagrant" non-compliance with the rules, which demonstrate a "glaring and inexplicable" disregard for the processes of the court.

The plaintiff's application dated 11 May 2022 is dismissed with costs.

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**ORDER**

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1. The plaintiff's application dated 11 May 2022 is dismissed with costs. Such costs to include the cost of one instructed and one instructing counsel. Cost to be limited to rule 32(11).
2. The matter is postponed to 28 July 2022 at 15h00 for the allocation of a further hearing date.

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**JUDGMENT**

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PRINSLOO J:

[1] The plaintiff, who is the applicant in the current matter, brought an application on 11 May 2020 seeking the following relief:

a) That the applicant is granted leave to file and serve an additional expert witness statement of Eugene Luwellin Camm and that such witness is declared as an expert in terms of rule 29 of the Rules of the High Court to be called as an expert at the continuation of the trial in terms of rule 93(5).
b) That the witness Leevi Krist Kapenda be declared as an expert in terms of rule 29 of the Rules of the High Court to be called as an expert at the continuation of the trial.
c) A variation of the pre-trial order of 22 October 2020 in respect of paras 1 and 2 thereof.
d) Condonation in respect of the non-compliance as far as it relates to the expert summary and rule 29 application.

[2] The first defendant, who is the respondent herein, opposed the application. The second defendant elected to abide by the decision of the court.

[3] I will refer to the parties as they are in the main action.

Background

[4] The common cause background facts can be summarized as follows:

a) On 03 September 2020, a pre-trial order was issued, and the issues for consideration during the trial were delineated in the said pre-trial order. In addition to that, the witnesses that the parties intend to call were listed.
b) In terms of the pre-trial order, the plaintiff was directed to deliver its expert summaries and statements on or before 3 December 2020.
c) The plaintiff failed to comply with the court order of 3 September 2020. During a further pre-trial conference on 27 October 2020, the plaintiff was directed to file its expert summaries and statements on or before 3 December 2020. On 1 December 2020, the plaintiff reported in a status report that they are still consulting experts who can assist them in preparing the said expert reports and required more time to file the expert statements. The matter was then postponed until 28 January 2021 to enable the plaintiff (and second defendant) to consult their respective experts to prepare and file their expert summary reports. However, by 28 January 2021, the expert summaries and statements were not filed as the plaintiff again reported that they were unable to do so.
d) On an undertaking by the plaintiff's legal practitioner that he is in the process of settling the issue of quantum, a trial date was allocated for the matter. By 3 June 2021 the plaintiff was yet to file their expert witness summaries and statements. During the court proceedings of 3 June 2021 the plaintiff was directed to file the said summaries and statements no later than 11 June 2021, as the trial date was imminent.

e) The trial date had to be vacated due to COVID 19 restrictions, and the matter was postponed to 8-12 November 2021 for trial.

f) On 23 September 2021, the court again indulged the plaintiff and granted it the opportunity to file its expert summary and statement before the commencement of the trial.

g) On 1 November 2021, the plaintiff delivered the expert summary and statement of Mr Leevi Kapenda.

h) On 8 November 2021, when the case was called to commence with the trial, the first defendant recorded his objection to the belated delivery of the expert statement of Mr Kapenda. At the time, the court overruled the objection as the court order of 23 September 2021 did not direct the plaintiff as to the date on which the expert summary and statement had to be filed.

i) On 12 November 2021, when the plaintiff called Mr Kapenda, the first defendant raised an objection to the evidence of Mr Kapenda on the basis that the witness is not qualified as an expert in terms of rule 29 of the Rules of Court and that the witness was not an expert on the matter on which his opinion was sought.

j) The plaintiff conceded that there was no compliance with rule 29 of the Rules of Court and launched an application similar to the current application.

k) The application was struck from the roll on 9 December 2021 due to the non-compliance with rules 32(9) and (10)[1] and as a result, the merits of the application were not considered.

l) On 3 February 2022 the matter was enrolled for continuation on 13 to 17 June 2022.

m) On 11 May 2022 the plaintiff lodged the current application, which resulted in the vacation of the further hearing date.

Founding affidavit

[1] *The Government of Republic of Namibia v Uupindi* (HC-MD-CIV-ACT-CON-2018/04068) [2021] NAHCMD 585 (9 December 2021).

[5] In support of the application, the applicant filed the affidavit of the Inspector-General Sebastian Ndeitunga. His evidence can be summarised as follows:

a) The damage to the plaintiff's vehicle was assessed by three different entities[2] and a quotation was provided to the plaintiff.
b) In August 2021 Mr Mutorwa, the plaintiff's previous counsel of record, instructed one Mr Amukoto to follow up with an expert witness. However, this did not materialise. Mr Mutorwa was unable to trace the persons who assessed the vehicle.
c) On 7 June 2021, the Inspector-General's office was requested by way of a letter from Mr Mutorwa to assist him in contacting the three businesses who provided quotations and to identify the persons who assessed the vehicle to give evidence as an expert for the plaintiff. However, before Deputy Commissioner Kazekondjo could finalise the arrangements, the case was postponed, and he stopped making the arrangements.
d) In mid-October 2021, his office was contacted by Ms Hinda and was informed that the trial was scheduled to commence on 12 November 2021. She indicated that the persons who assessed the vehicle are required. However, Ms Hinda indicated that officials at the Government Garage could furnish a statement regarding the damage to the plaintiff's vehicle. One such statement was filed on 1 November 2021.
e) The deponent avers that his office was unaware that the counsel had difficulty locating the persons who did the assessment and quotation of the damage.
f) He is aware of the application launched and heard in November 2021 and states that the plaintiff at all material times determined to launch an application to seek leave to file a further expert witness statement and comply with rule 29 of the Rules of Court.
g) To his knowledge, the plaintiff's counsel engaged the opposing counsel in terms of rule 32(9) on 16 March 2022.

[2] ELC Body Worx CC, Extreme Body Works and Dunendini Investment.

[6] In concluding the founding affidavit, the witness proceeded to deal with the qualifications of Mr Eugene Camm of ELC Body Worx CC and that of Mr Leevi Kapenda, who is in the employ of the Namibian Police Force.

[7] Inspector-General Ndeitunga asserts that the plaintiff's application is bona fide because the plaintiff has a sound basis for its claim and good prospects of success in the main proceedings.

Opposition by the first defendant

[8] The first defendant raised two main points in opposition to the application of the plaintiff[3].

[9] The first defendant's departure point in opposing the relief sought by the plaintiff is the founding affidavit filed in support of its application.

[10] The first defendant avers that:

a) The founding affidavit is vague and fraught with bald statements.
b) The allegations in support of the relief sought are:
    i. without any or sufficient cause;
    ii. without adequate, acceptable, detailed and reasonable explanation; and
    iii. to the prejudice of the conduct of his defence.

[11] The first defendant further avers that to grant the relief sought would not be countenanced by the ethos of judicial case management because:

*In respect of the first and second prayers*

[3] The issues abandoned during oral argument on behalf of the first defendant are omitted from this discussion.

a) the plaintiff's entire founding affidavit filed in support of the plaintiff's application is premised on hearsay evidence;
b) no good cause is set out in the founding affidavit for the belated launching of the application and the plaintiff deals with the prospects of success in the action instead of the prospects of success in the application;
c) The founding affidavit does not make out a case for the expertise of the expert and the evidence to be tendered.

*In respect of the second prayer only*

a) the plaintiff conceded during the hearing on 12 November 2021 that Mr Kapenda is not an expert and that Mr Kapenda's evidence stands to be disqualified as an expert due to his lack of independence as Mr Kapenda is employed by the plaintiff.

*In respect of the third and fourth prayers*

a) the prayer is vague and overbroad. In addition thereto the founding affidavit does not make out a case for the plaintiff's non-compliance with rule 29 as per the court order dated 22 October 2021.

[12] The first defendant filed a comprehensive answering affidavit, which I will not repeat for purposes of this rule, in an attempt not to overburden the record.

Arguments advanced

*On behalf of the plaintiff*

[13] Ms Ihalwa argues that the opposition by the first defendant is reliant on technical points. One such example is the issue of hearsay evidence contained in the founding affidavit. In this regard, Ms Ihalwa argued that this argument has no merits.

[14] Ms Ihalwa submits that Inspector-General Ndeitunga is the designated person with the authority to act on behalf of the plaintiff. Where Inspector-General Ndeitunga had no personal knowledge, a confirmatory affidavit was filed as required. Therefore, the founding affidavit cannot be regarded as hearsay evidence. Ms Ihalwa referred the court to *Drift Supersand (Pty) Ltd v Mogale City Local Municipality*[4] regarding the purpose of confirmatory affidavits and why she argues that the founding affidavit cannot be considered as hearsay evidence.

[15] Ms Ihalwa contends that the current application is that of seeking indulgence from court, similar to a condonation application and therefore the application must meet the requirements in order to provide an explanation in respect of the issues on which the indulgence is sought, which includes the prospects of success.

[16] Ms Ihalwa conceded that the plaintiff did not previously comply with rule 29 of the Rules of Court and that the plaintiff will also not shy away from the delay in bringing the current applications but submitted that the delay could be attributed to the first defendant as well. Ms Ihalwa submitted that the draft application was submitted to the first defendant as far back as 6 April 2022. However, due to the delay in responding to the application, the plaintiff could only file the application on 11 May 2022.

[17] In respect of the expert witnesses, that the plaintiff intends to call, Ms Ihalwa contends that the curriculum vitae of Mr Camm speaks for itself. As an auto mechanic, he is duly qualified to give an opinion on the damage to the plaintiff's vehicle.

[18] Ms Ihalwa further contended that the qualifications of Mr Kapenda are before the court, and he is duly qualified to testify as an expert and that the issue of Mr Kapenda's alleged lack of independence is a non-starter.

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[4] *Drift Supersand (Pty) Ltd v Mogale City Local Municipality* (1185/2016) [2017] ZASCA 118 (22 September 2017) para 31.

[19] Ms Ihalwa submitted that if the court accepts the two witnesses as experts, it would not be necessary to amend the pre-trial order.

[20] On the prospects of success Ms Ihalwa submitted that the factual aspect of the case is not in dispute and will be addressed during closing submissions in the main action. Therefore, in her view, the plaintiff has good prospects on the merits of the matter.

On behalf of the first defendant

[21] Mr Muhongo argues that the plaintiff, by virtue of its application, is reacting to an objection that was raised by the first defendant during the trial. He further argues that the legal practitioners of the plaintiff took a lackadaisical attitude in the general conduct of the plaintiff's matter and invited the court to consider the current application in the context of *Arangies v Unitrans Namibia (Pty) Ltd*[5], where our Apex Court address the question as to what point a court should indulge an errant party.

[22] Mr Muhongo argued that if the court considers the history of the matter, it will be apparent that the plaintiff was called upon over a period of more than a year to deliver its expert statements and summaries and has not done so. Mr Muhongo referred the court to the founding affidavit wherein Inspector-General Ndeitunga submitted that the application is for sound reasons and bona fide; however, the plaintiff does not show good cause in respect of the indulgence it is seeking from this court. Yet the plaintiff fails to explain the delay in launching the application between the period of 9 December 2021 to 11 May 2022 (when the current application was launched).

[23] In addition, counsel contended that the deponent of the founding affidavit has no personal knowledge of the current matter and the confirmatory affidavits filed do not assist the plaintiff as the confirmatory affidavits merely make common cause with the statements made in the founding affidavit. Mr Muhongo also referred the court to the

[5] *Arangies v Unitrans Namibia (Pty) Ltd* (1 of 2018) [2018] NASC 401 (27 July 2018) para 12.

*Drift Supersand* matter[6] which Ms Ihalwa referred to, but in a different context. I will return to the *Drift Sand* matter during my discussion of the application.

[24] Mr Muhongo further argued that the plaintiff did not show any prospects of success and emphasised that the prospects of success in the context do not refer to the prospects in the main action but in the context of what the plaintiff attempts to achieve with this application. The court was invited to take note of the expertise of the witnesses the plaintiff intended to call as expert witnesses. Whereby Mr Muhongo argued that Mr Kapenda is not an independent witness who gives an independent expert view but bases his opinion on a police manual for the determination of the value of the damage to the plaintiff's vehicle. There is no evidence of the pre-collision value of the vehicle or the value of the vehicle in its damaged state in Mr Kapenda's statement and, it is therefore, unhelpful. According to Mr Muhongo, the evidence of Mr Camm suffers the same fate, and the plaintiff's prospects of success depend on making the relevant assertions to assist the court. In this case, it does not.

[25] Mr Muhongo argued that the plaintiff attempted to patch up its case as it went along, which goes against the ethos of judicial case management.

Discussion

[26] It is common cause that the evidence in motion proceedings is contained in affidavits filed by the parties. In *Nelumbu and Others v Hikumwah and Others*[7], Damaseb DCJ made it clear that the affidavits constitute both the pleadings and the evidence in motion proceedings. The Honourable DCJ continues to say that since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must ensure that all the evidence necessary to support its case is included in the

[6] *Drift Supersand (Pty) Ltd v Mogale City Local Municipality* (1185/2016) [2017] ZASCA 118 (22 September 2017) para 31.
[7] *Nelumbu and others v Hikumwah and Others* 2017 (2) NR 433 (SC) para 40.

affidavit. In other words, the affidavits must contain all the averments required to sustain a cause of action or a defence[8].

[27] In the current instance, the plaintiff filed an extensive founding affidavit, but the deponent of the founding affidavit has no personal knowledge of the facts of the matter. As a result, the plaintiff fell into the trap of placing all its reliance on confirmatory affidavits, which is utterly unhelpful.

[28] In the *Drift Supersand* matter[9] the court said the following on the use of confirmatory affidavits:

'[T]he Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof in so far as it relates to me and any of activities". This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.'

[29] In *Eskom Holdings SOC Ltd v Masinda*[10] the South African Supreme Court criticised the practice of adducing hearsay evidence by way of hearsay allegations in its main answering affidavit, supported by so-called 'confirmatory affidavits' by the witnesses who should have provided the necessary details, but who merely sought to confirm what had been said in the main affidavit 'insofar as reference [has been] made to me', as a slovenly practice.

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[8] *Nelumbu and others v Hikumwah and Others* 2017 (2) NR 433 (SC) para 41.

[9] *Drift Supersand (Pty) Ltd v Mogale City Local Municipality* (1185/2016) [2017] ZASCA 118 (22 September 2017) para 31. Also referred to in *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* (216/2020) [2021] ZASCA 90; [2021] 3 All SA 791 (SCA) (25 June 2021) para 36.

[10] *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) para 3 p 388 – 389.

[30] The so-called confirmatory affidavits filed by the plaintiff are exactly that what the Supreme Court refers to. No further evidence is contained in the confirmatory affidavits and to simply make common cause with the averments in the founding affidavit does not detract from the fact that the Inspector-General had no personal knowledge of the matter and everything contained in his affidavit constitutes hearsay evidence. The deponent, on different occasions, indicates that his office was informed of a particular position. He had no personal knowledge of it. What is interesting, is that Inspector-General Ndeitunga commences his affidavit by saying that the contents of the affidavit are within his personal knowledge unless otherwise stated. In the next paragraph, he states that although he considers and signs off instructions, he is not personally responsible for handling the legal matters involving the Namibian Police and that in that regard, Deputy Commissioner Kazekondjo is the official dealing with the file. Yet the confirmatory affidavit of Deputy Commissioner Kazekondjo is generic and meaningless. In my view, it was crucial to have witnesses within the Namibian Police to depose to the events leading up to the current application.

[31] The statements made in the founding affidavit are contentious as the first defendant alleged that the plaintiff was lax in its conduct of this matter and that the founding affidavit does not make out good cause or prospects of success in order to be granted the indulgence sought by this court.

[32] The founding affidavit does not provide the court with any details with regards to its default to deliver its expert summaries and statements, especially if one considers the period that elapsed between the date of the pre-trial order (3 September 2020) and the date of the ruling on 9 December 2021, striking a similar application from the roll.

[33] The plaintiff further does not deal with the further delay from the ruling date (9 December 2021) to the date of launching the current application on 11 May 2022.

[34] The plaintiff is seeking an indulgence from this court, and the plaintiff acknowledges that it bears the onus to satisfy the court that there is sufficient cause to

warrant the granting of the application sought. I would have expected the plaintiff to launch its application as soon as its same-style application was struck from the roll on 9 December 2021, to have the court attend to the application. However, five months elapsed, and then, on the eve of the continuation of the trial, the plaintiff launched the current application, causing the hearing date to be vacated.

[35] I fully agree with Mr Muhongo that the way in which the plaintiff conducts this matter, with specific reference to the expert witnesses, is unacceptable. The plaintiffs were indulged over and over to locate its expert witnesses and secure the relevant statements. Still, for a year and a half, this did not happen. As a result, when the trial commenced in November 2021, the plaintiff's instructed counsel had to consistently put out fires and patch the plaintiff's case, leading to no less than two interlocutory applications during the trial week.

[36] This court is now faced with yet another application where the plaintiff is craving the indulgence of the court, whereas the plaintiff was granted ample opportunity to get its affairs in order. I can do no better than add my voice to what Frank AJA said in A*rangies v Unitrans Namibia (Pty) Ltd*[11] when he remarked as follows:

'[12] If a client appoints a legal practitioner who is lax when it comes to preparation he will now run the risk that he will not be granted a postponement or indulgence to bolster his or her case if he or she did not prepare properly. The proof of such laxity will be the legal practitioner's inability to adhere to the case management process and/or the pre-trial order. This does not mean that the pre-trial orders cannot be altered. It simply means that there must be an acceptable explanation for the non-compliance. The nature of trials is such that unexpected evidence may arise, (although this aspect has been mitigated by the necessity of filing witness statements) new evidence may become available as a result of the publication of the case or issues arising from cross-examination may need to be addressed. The point is that unless a case is made out (other than the unpreparedness by design or omission or because of a lackadaisical attitude in general) for an alteration to a pre-trial order, this will not be granted. To

[11] *Arangies v Unitrans Namibia (Pty) Ltd* (1 of 2018) [2018] NASC 401 (27 July 2018) para 12.

do otherwise would be to assist in discrediting the administration of justice and in the destruction of the court's integrity in the eyes of the public. This would also undermine the rules of the High Court which are designed to stop this erosion of trust in the judiciary which occurred under the previous rules where cases could simply carry on without end. One simply cannot allow litigants (and their legal practitioners) to play the system so that the High Court gets the reputation that Charles Dickens ascribed to the Court of Chancery in Bleak House: '. . . ; which gives to the monied might, the means abundantly of wearing out the right; which so exhausts finances, patience, courage, hope; so overthroughs the brain and breaks the heart; that there is not an honourable man among its practitioners who do not give – who do not often give – the warning. 'Suffer any wrong that can be done to you rather than come here!"'

[37] Considering whether the explanation is sufficient to warrant the granting of the indulgence sought, the answer must be an unequivocal "NO". The plaintiff did not comply with the multiple court orders to file its expert summaries and statements. None of these non-compliances were adequately explained in the founding affidavit. Therefore, I believe that it is not even necessary to consider the plaintiff's prospect of success because of previous "flagrant" non-compliance with the rules, which demonstrate a "glaring and inexplicable" disregard for the processes of the court[12].

[38] I am further of the view that the plaintiff did not make out a case for it's non-compliance with rule 29 as per the court order dated 22 October 2020.

[39] The plaintiff's counsel argued that granting the current application would not prejudice the first respondent. I'm afraid I disagree with that submission because the first plaintiff is funding his defence from his pocket, whereas the plaintiff is funding its case from the government coffers.

Cost

[40] The last issue to consider is the issue of costs. Mr Muhongo requested the court to impose a punitive cost order against the plaintiff. However, the plaintiff already

[12] *Beukes and Another v SWABOU and Others* [2010] NASC 14 (5 November 2010) para 20.

tendered the wasted costs for the vacated hearing dates, and I believe that the current application overlaps with the vacation of hearing dates, therefore, the cost of the current application should be limited to rule 32(11).

Order

1. The plaintiff's application dated 11 May 2022 is dismissed with costs. Such costs to include the cost of one instructed and one instructing counsel. Cost to be limited to rule 32(11).
2. The matter is postponed to 28 July 2022 at 15h00 for the allocation of a further hearing date.

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JS PRINSLOO

Judge

APPEARANCES

| | |
|---|---|
| FOR PLAINTIFF: | L Ihalwa<br>Instructed by Government Attorneys, Windhoek |
| FOR FIRST DEFENDANT: | T Muhongo<br>Instructed by Fisher, Quarmby & Pfeifer, Windhoek |