REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING: APPLICATION TO COMPEL DISCOVERY

Case No.: HC-MD-CIV-ACT-CON-2020/02288

In the matter between:

HELIOS ORYX LIMITED **PLAINTIFF**

And

ELISENHEIM PROPERTY DEVELOPMENT
COMPANY (PTY) LTD **DEFENDANT**

Neutral citation: *Helios Oryx Limited v Elisenheim Property Development Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02288) [2022] NAHCMD 499 (23 September 2022).

Coram: PRINSLOO J
Heard: **6 September 2022**
Delivered: **23 September 2022**

Flynote: Civil Procedure – Interlocutory – Application to compel discovery – Separate legal entities – Minutes and resolutions of an entity that is not a party to these proceedings – *Locus standi* challenge poorly pleaded – Defendant failed to make out case for relief sought – Relief sought dismissed.

Summary: On or about 29 December 2016 and in London, United Kingdom, the following parties, (a) Plaintiff as the lender; (b) Trustco as the borrower; (c)Helios Credit Gempar Limited as arranger, and (d) Wilmington Trust (London) Limited as replacement agent, duly represented, concluded a written Facilities Agreement. At the time of concluding the Facilities Agreement, the plaintiff and the defendant, duly represented, concluded a Guarantee Agreement, in terms of which the defendant guaranteed Trustco's performance to the plaintiff. On 2 August 2019 and at London the plaintiff, Trustco and other parties, including the defendant, entered into a Rescheduling and Override Agreement.

Subsequent to the agreement entered into by the parties, a default event and/or termination event was allegedly committed by Trustco. On 15 April 2020, the plaintiff issued a letter of demand to Trustco, informing it of the default or termination event, requiring payment of the overdue amounts by 17 April 2022, further claiming that the failure to timeously pay would entitle the plaintiff to invoke the acceleration clause in terms of the Facilities Agreement. Pursuant to the letter of demand, the plaintiff issued an acceleration notice to Trustco, in which the plaintiff declared all the amounts owed under the Facilities Agreement to be immediately due and payable and thereby demanded payment of USD19, 634,795.54. In terms of the Guarantee Agreement entered into between the plaintiff and the defendant, the amount owed by Trustco to the plaintiff constituted a guaranteed obligation.

On 9 March 2022, the defendant requested additional documents to be discovered in terms of rule 28(8)(*a*) of the Rules of Court, to which the plaintiff responded on 30 March 2022. On 29 April 2022, the defendant filed a second request for additional documents to be discovered to which the plaintiff responded on 24 May 2022. The application before me is to compel specific discovery in terms of rule 28(9), in terms of which the defendant seeks an order that the plaintiff makes further discovery as requested in its notice in terms of rule 28(8) filed in terms of the Rules of Court.

Held that: it is not acceptable that the defendant seeks a different relief in its replying papers than in the notice of motion on which this application is based on and it is trite that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in a replying affidavit.

Held that: the defendant attempts to make out a case for relevance in respect of the Sub-Advisory Agreement relevant to the plaintiff's *locus standi*. On behalf of the plaintiff it was argued that there is no issue regarding the *locus standi* of the plaintiff whereas it was submitted on behalf of the defendant that the *locus standi* of the plaintiff is a real issue between the parties. However, I have had regard to para 8.4 of the defendant's plea and I need to agree with Mr Babamia that the purported *locus standi* challenge, if at all, is poorly pleaded.

Held further that: nothing was presented to this court to go behind the discovery affidavit of the plaintiff. I am further of the view that the defendant failed to make out a case for the relief sought in its Notice of Motion and the application stands to be dismissed with costs. Such costs to include the costs of one instructing and two instructed counsel.

The relief sought is hereby dismissed.

ORDER

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1. The late filing of the defendant's application is hereby condoned.
2. The relief sought in the Notice of Motion dated 24 June 2022 is hereby dismissed with costs. Such cost to be limited to rule 32(11).
3. Such costs to include the costs of one instructing and two instructed counsel, where so engaged.
4. The case is postponed to **13/10/2022** at 15:00 for a Status hearing.
5. Joint status report must be filed on or before <u>10 October 2022.</u>

RULING

PRINSLOO J:

Introduction

[1] I will refer throughout this ruling to the parties as they are in the main action. Where reference is made to the plaintiff, it is the applicant, and the defendant is the respondent.

Background

[2] On or about 29 December 2016 and in London, United Kingdom, the following parties, duly represented, concluded a written Facilities Agreement:

a) Plaintiff as the lender;

b) Trustco as the borrower;

c) Helios Credit Gempar Limited as arranger, and

d) Wilmington Trust (London) Limited as replacement agent.

[3] In terms of Facility A of the Facilities Agreement the plaintiff and/or other lenders would lend and advance to Trustco the sum of USD15,000,000. In terms of Facility B, the plaintiff and/or other lenders would consider whether to make a further loan available for a further sum of USD25,000,000[1].

[4] At the time of concluding the Facilities Agreement, the plaintiff and the defendant, duly represented, concluded a Guarantee Agreement, in terms of which the defendant guaranteed Trustco's performance to the plaintiff.

[5] On 2 August 2019 and at London the plaintiff, Trustco and other parties, including the defendant, entered into a Rescheduling and Override Agreement. Material terms of the Rescheduling and Override Agreement were that:

a) The Rescheduling Agreement amended and supplemented the Facilities Agreement to the extent set out in the Rescheduling Agreement;

[1] 1.38 Facility B means the uncommitted term loan facility made available under the agreement described in Clause 2.1.2 thereof.

b) Trustco would repay the amount owed to the plaintiff (the original exposure) constituted by the total aggregate amount of the principle amount outstanding on 30 June 2019, including interest on the original exposure, which would continue to accrue and become due and payable in terms of the Facilities Agreement as set out in the Rescheduling Agreement. Specified amount would be payable on the specified dates set in the said agreement, i.e. 15 November 2019 and 15 February 2020 respectively;

c) A termination event would arise where Trustco fails to timeously pay any amount payable pursuant to the Facilities Agreement.

[6] Subsequent to the agreement entered into by the parties, a default event and/or termination event was allegedly committed by Trustco.

[7] On 15 April 2020, the plaintiff issued a letter of demand to Trustco, informing it of the default or termination event, requiring payment of the overdue amounts by 17 April 2022, further claiming that the failure to timeously pay would entitle the plaintiff to invoke the acceleration clause in terms of the Facilities Agreement.

[8] Pursuant to the letter of demand, the plaintiff issued an acceleration notice to Trustco, in which the plaintiff declared all the amounts owed under the Facilities Agreement to be immediately due and payable and thereby demanded payment of USD19, 634,795.54.

[9] In terms of the Guarantee Agreement entered into between the plaintiff and the defendant, the amount owed by Trustco to the plaintiff constituted a guaranteed obligation.

[10] On 31 January 2017, at Windhoek the defendant executed a covering mortgage bond in favour of the plaintiff over the immovable property now as ‘remaining extent of portion 5 (a portion of Portion 4) of Farm Elisenheim No. 68 in the Municipality of Windhoek, Registration Division K, Khomas Region, measuring 1,077,6306 (one thousand and seventy seven, six three nil six) hectares held by Deed of Transfer No T7857/2005.’

[11] The plaintiff pleads that in terms of the mortgage bond, the defendant acknowledged liability in the sum of USD47,000,000 or any lesser amount arising from any cause whatsoever, together with interest and for a further sum of USD9,400,000 in respect of any costs or associated proceedings. In addition thereto the plaintiff pleads that (in summary):

a) The mortgage bond would operate as a continuing covering security for the capital amount with interest thereon;

b) The defendant would repay all amounts owed to the plaintiff and that which may be secured by the mortgage bond, in accordance with the Guarantee;

c) The defendant would pay interest in accordance with the Guarantee;

d) In the event of default, all amounts owed would become immediately due, and payable and the plaintiff would be entitled to have the mortgaged property declared executable;

e) Any certificate signed by the Director of the plaintiff reflecting the nature and extent of the amount owed would constitute *prima facie* proof of the amount of the defendant's indebtedness;

f) In the event that the plaintiff had to take steps to obtain payment, the defendant would be liable for costs on a scale as between attorney and client.

[12] On 22 April 2020, the plaintiff issued a letter of demand to the defendant in terms of the Guarantee, demanding immediate payment in the amount of USD19,635,523.77.

[13] Action proceedings were instituted by the plaintiff against the defendant for payment of the aforementioned amount. It should be noted that in terms of the plaintiff's amended particulars of claim dated 9 June 2021, the plaintiff is no longer seeking to enforce the mortgage bond security in the current proceedings.

<u>The application</u>

[14] On 9 March 2022, the defendant requested additional documents to be discovered in terms of rule 28(8)(*a*) of the Rules of Court, to which the plaintiff responded on 30 March 2022.

[15] On 29 April 2022, the defendant filed a second request for additional documents to be discovered to which the plaintiff responded on 24 May 2022.

[16] The application before me is to compel specific discovery in terms of rule 28(9), in terms of which the defendant seeks an order that the plaintiff makes further discovery as requested in its notice in terms of rule 28(8) filed in terms of the Rules of Court.

[17] On 24 June 2022, the defendant filed an application in the following terms:

> 'TAKE NOTICE THAT the defendant intends to make application to this Court, on a date determined by the managing judge, for an order:
>
> 1. Condoning the late filing of this application.
>
> 2. That the affidavits deposed to by Floors Jacobus Abrahams and Riaan Tobias Bruyns in support of the relief sought in this Notice of Motion be permitted in terms of Rule 32(8).
>
> 3. That the plaintiff is ordered to discover the following documents:
>
> 3.1. The minutes of meetings and resolutions taken by the credit committee of Helios Oryx Limited since December 2016 to date, concerning EPDC, Trustco and Trilinc.
>
> 3.2. Minutes of meetings and resolutions taken by the credit committee of Helios Oryx Limited for purposes of finalising the terms of the Standstill Agreement dated 27 December 2018.
>
> 3.3. Minutes of meetings and resolutions taken by the credit committee of Helios Oryx Limited for purposes of finalising the terms of the Restructuring and Override Agreement dated 2 August 2019.
>
> 3.4. Signed copy together with annexures of the Sub-Advisory Agreement as referred to in the Master Participation Agreement.
>
> 3.5. Helios Oryx Limited independent valuation report on Elisenheim Property Development Company in 2016.

4. Costs in the event of opposition.

5. Further and/or alternative relief.'

Response by the plaintiff to the request for further discovery

[18] The documents set out in sub-paras 3.1 to 3.3 of the Notice of Motion were documents requested as items 12, 21 and 22 in the defendant's second notice to request for further discovery.

[19] In response to the request by the defendant's notice in terms of rule 28(8)(*a*) for the aforementioned documents, Mr Paul Gerard Cunningham deposed to an affidavit, stating as follows:

> 'Ad paragraph 1.12 of the Second Notice:
>
> 15.1 The Plaintiff has no "credit committee".
>
> 15.2 Accordingly, to the best of my knowledge and belief, the Plaintiff does not have and has not ever had in its possession the documents sought by the Defendant.'

[20] The plaintiff reiterated this in respect of items 21 and 22 (3.2 and 3.3 above).

[21] The defendant, however, does not accept this explanation by the plaintiff because Mr Younes Oukhay directed an email to Trustco's managing director, amongst others, to confirm the parties to the Facility Agreement alignment on specific terms outlined therein. In the said email, Mr Oukhay indicated that *'subject to finalization and execution of satisfactory documentation (and the fulfilment of any conditions to the effectiveness set out therein), the lender has obtained a* ***credit committee*** *approval to enter into an agreement to effect the principle terms discussed at the meeting*…..' (my emphasis)

[22] As a result, the defendant submitted that Mr Cunningham, who deposed to the affidavit referred to above, is not truthful as the defendant believes such a credit committee exists.

[23] In sub-para 3.4 of the Notice of Motion the defendant is seeking a signed copy together with the annexures of the Sub-Advisory Agreement as referred to in the Master Participation Agreement. Sub-para 3.4 was item 23 of the second notice to request for further discovery.

[24] In response to item 23, Mr Cunningham responded as follows:

> 'Ad paragraph 1.23 of the Second Notice:
>
> 26.1 The Plaintiff is not a party to the Sub-Advisory Agreement.
>
> 26.2 Accordingly, to the best of my knowledge and belief, the Plaintiff does not have and has not ever had in its possession the documents sought by the Defendant.'

[25] The defendant is not content to accept the response of Mr Cunningham, as according to the Master Participation Agreement, the parties are defined as follows:

a) The plaintiff as the 'Counterparty';
b) Helios Investment Partners LP as 'Participant Sub-Advisor';
c) Trilinc Global Impact Fund- Africa Ltd ('Trilinc') as 'Participant'.

[26] The defendant contends that in terms of the Sub-Advisory Agreement (SAA), Helios Investment Partners LLP may cause Trilinc to purchase an interest in one or more of the plaintiff's facilities and therefore, it is improbable that the plaintiff is not a party to the SAA and that it would not have a copy of the SAA, in the circumstance where an interest of the plaintiff forms the subject matter of the SAA. In addition thereto, it is clear from the Master Participation Agreement that it must be read together with the SAA.

[27] The defendant criticizes the fact that the plaintiff found it appropriate to discover the Master Participation Agreement but not the SAA, which should be read with it. The defendant, therefore, holds the firm view that it is entitled to receive the SAA.

[28] The last item on the Notice of Motion is sub-para 3.5 or item 26 as per the second notice to request for further discovery. The document the defendant seeks in

this instance is the Helios Oryx Limited independent valuation report on Elisenheim Property Development Company of 2016.

[29] Mr Cunningham's response in this regard was that, to his knowledge and belief, the plaintiff has neither had this valuation report in its possession.

[30] The defendant does not accept this response by Mr Cunningham as truthful either. In this regard, the defendant refers to an exchange of emails between Mr Oukhay and one Mr McDougall, an employee of Trustco, wherein they had an extensive discussion regarding the drafting of a real estate report by JLL and that same would be made available to Trustco. The defendant submits that the valuation report was central to the plaintiff's decision to accept the property presented to it as security for Trustco's commitments to the plaintiff.

[31] Mr Floors Abrahams, who deposed to the founding affidavit herein, expressed the view that all the documents set out in the Notice of Motion are relevant to reasonably anticipate the issues pleaded for the purposes of trial.

Litigation in the United Kingdom

[32] In the defendant's founding affidavit, Mr Abrahams discloses that consequent to the alleged breach by Trustco, the plaintiff instituted action proceedings against Trustco (based on the Facilities Agreement) in the High Court of Justice, Business and Property Courts of English and Wales. On 20 January 2021, that court granted summary judgment against Trustco and simultaneously dismissed Trustco's counterclaim against the plaintiff. During the application for leave to appeal on 15 July 2021, Trustco became aware of the involvement of Trilinc in the Facilities Agreement.

[33] According to Mr Abrahams, the defendant and Trustco were unaware of Trilinc's involvement in the matter, vis-à-vis the security provided by the defendant to the plaintiff, i.e. the mortgage bond. The participation of Trilinc apparently goes to the extent that the plaintiff's counsel at the time had to seek instructions from Trilinct regarding the suggested condition proposed by Trustco's counsel that the plaintiff

release the mortgage bond held over the defendant's property in exchange for cash security in England for the judgment amount.

[34] Mr Abrahams contended that the plaintiff’s counsel during the said proceedings suggested that Trilinc acquired an undisclosed but direct interest in the mortgage bond, which serves as security in favour of the plaintiff.

[35] Mr Abrahams submits that it appears from the Master Participation Agreement and Participation Certification that on 22 December 2016, the plaintiff sold a participation interest in the Facilities agreement between the plaintiff and Trustco to Trilinc in the sum of USD14,850,000.

[36] Mr Abrahams suggested that the relevance of the participation agreement in the pleadings lies in the fact that the defendant denies the plaintiff's locus standi. Therefore in light of the plaintiff's disputed *locus standi* and Trilinc's purchase of a participation interest in the plaintiff's claim against Trustco and the security embodied in the mortgage bond registered over the defendant's property is of relevance, and therefore, causes the documents as requested in the Notice of Motion to be relevant.

<u>Arguments advanced on behalf of the parties</u>

[37] The respective counsel submitted written heads of arguments and further advanced detailed oral arguments in amplification of their written heads of argument. I do not intend to repeat these arguments but will refer to them during my discussion hereunder where necessary.

<u>Legal principles relating to discovery</u>

[38] Rules 28(1) and 28(8) make provision for discovery and further discovery, respectively, which provide that:

‘28(1) A party must, without the necessity of being requested by any other party to make discovery, identify and describe all documents, analogues or digital recordings that are

relevant to the matter in question and are proportionate to the needs of the case and in respect of which no privilege may be claimed and further identify and describe all documents that the party intends or expects to introduce at the trial.

28(2) – 28(7)………

28(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.' (Own emphasis)

[39] The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale Du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 referred to in *Kanyama v Cupido*[2] by Silungwe J, has been widely accepted and applied by our courts.

[40] In the case of *Rellams (Pty) Ltd v James Brown & Hamer Ltd*[3], also referred to by Silungwe J, it was held that:

'After remarking that it was desirable to give a wide interpretation to the words a document relating to any matter in question in the action, Brett LJ stated the principle as follows:

It seems to me that every document relates to the matter in question in the action in which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to

[2] *Kanyama v Cupido* 2007 (1) NR 216 (HC) para 14.
[3] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.’

[41] The basis on which the plaintiff opposes the application to compel appears to be one or more of the following reasons:

a) The documents sought do not belong to the plaintiff, nor are those documents under the plaintiff’s control or possession;
b) The documents sought, as described, do not exist;
c) To the extent that the defendant mistook the documents to be those of the plaintiff, the defendant seeks, impermissibly so, documents of a third party; and
d) The documents sought are not relevant.

[42] On various occasions, it was indicated on behalf of the defendant that it is not content with the replies given by the plaintiff in respect of the documents insisted upon by the defendant. Mr Abrahams, deposing to the founding affidavit, submitted that the plaintiff did not reply truthfully in respect of certain documents. Mr van der Bergh also echoed this stance during his oral argument. I will return to this issue shortly.

[43] Given the defendant’s misgivings regarding the truthfulness of the plaintiff’s discovery affidavit it is then also necessary to consider the approach by our courts in these instances.

[44] I am of the view that there will be no argument if I say that in the context of discovery, courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown that there are reasonable grounds for supposing that the party has other relevant documents in his possession.

[45] In *Waltraut Fritzche t/a Reit Safari v Telecom Namibia Ltd*[4], the court held as follows:

'Secondly, the rules make it clear that discovery must be made of all documents which may (not must) be relevant to any matter in question. The principle is enunciated in *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) as follows:
"An affidavit of discovery is conclusive, save where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made.'

[46] An applicant applying for additional discovery cannot be heard to bemoan the reply of a respondent on the basis that the answers are inadequate.

[47] In *Makate v Vodacom (Pty) Ltd*[5] *2014 (1) SA 191 (GSJ)* Spilg J stated as follows:

'[16] The contents of a discovery affidavit are regarded prima facie to be conclusive with regard to the existence of documents and accordingly a court will be reluctant to go behind the affidavit. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 317E – G. The courts require a sufficient degree of certainty that the documents exist (see *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd*1971 (4) SA 589 (W); and *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749A – B ('a degree of conviction approaching practical certainty'). This is hardly surprising. The consequence of a court order being de facto impossible to implement exposes the offending party to contempt proceedings for not procuring something he did not have in the first place, and exposes the order to ridicule. Accordingly it is necessary to be circumspect before directing production in the face of a denial of a document's existence.

[17] Nonetheless it is also recognised that a party cannot rely on his denial under oath of a document's existence if, for instance, mala fides can be shown (*Swissborough* at 321E), or

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[4] *Waltraut Fritzche t/a Reit Safari v Telecom Namibia Ltd* 2000 NR 201 (HC) at 205I.
[5] *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197 D-H.

the discovery affidavit itself, a document referred to in discovery, the pleadings or an admission evidences the document's existence to the requisite degree (Federal Wine at 749G – H). Similarly, statutory or professional obligations, such as tax legislation or basic accounting requirements, regarding the retention of the records may also suffice if no acceptable explanation is provided for their non-production.

[18] Where mala fides is raised then the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G apply. It remains open for an applicant 'to seek a referral of the disputes of fact for oral evidence or even trial'. For both propositions see Swissborough at 321E.'

<u>Documents sought by the defendant</u>

[48] In considering the application before this court it is important to consider what relief is sought by the defendant therein.

a) Ad sub-para 3.1-3.3 of the Notice of Motion- The minutes of meetings and resolutions taken by the <u>credit committee of Helios Oryx Ltd</u>

[49] As indicated earlier the response in respect of these document on behalf the plaintiff repeatedly indicated that the plaintiff never had a credit committee at any point in time. Mr Cunningham throughout persisted with this response and further submitted, and correctly so, that the plaintiff cannot be compelled to produce documents that are not in the plaintiff's possession <u>or does not exist</u>. Mr Cunningham further stated that the plaintiff is a Special Purpose Vehicle brought into existence because of the transaction involving Helios Investments and Trustco under the Facilities Agreement and as a result never had a credit committee.

[50] Mr Cunningham stated under oath that the credit committee that oversaw and managed the agreement with the defendant was that of Helios Investment Partners LLP, being a distinct legal entity domiciled in the United Kingdom, which is not a party to the current proceedings.

[51] Mr van den Bergh argued on behalf of the defendant that there exist such a close relationship between the plaintiff and Helios Investment that it can almost be described as an agency/agent relationship. Mr van den Bergh was, however, quick to point out that this court need not make that finding now. All I wish to say on this score, without making any findings in that regard, is that if the plaintiff is the agent of Helios Investment it cannot demand documents for its principal and in any event not be compelled to discover documents of its principal.

[52] It is further suggested on behalf of the defendant that the plaintiff chooses when to rely on the Helios group or organizational structure and when to hide behind separate legal entities and special purpose vehicles forming part of the group, the holding company and its subsidiaries. Counsel submits that Mr Cunningham, who has been acting on behalf of Helios (as a collective name for the affiliates, holding companies and subsidiaries) as director (of the plaintiff), chief financial officer (of Helios Investments), director (of Helios Oryx Gempar Limited), ect. is in possession of the relevant documents sought by the defendant. However, Mr Cunningham is making use of the plaintiff's juristic nature to evade providing documents to the defendant, which are relevant to the proceedings before court.

[53] The plaintiff's response is clear in that respect, i.e. if there was reference to a credit committee in any communication it had to be the Helios Investment credit committee and not that of the plaintiff. The court was referred to email correspondence of Mr Oukhay wherein he makes reference to a credit committee but there is nowhere mentioned that it is the credit committee of the plaintiff. Despite the fact that the defendants did not accept Mr Cunningham's response with regards to the non-existence of a credit committee of the plaintiff it would appear to me that the parties are actually in agreement that the plaintiff did not have a credit committee and consequently cannot have such minutes.

[54] This in my view, it is clear from the replying affidavit and the defendant's head of argument, wherein the defendant changed tact and now seems to insist to be provided with the minutes and resolutions of the credit committee, but no longer that of the plaintiff but rather that of Helios Investments.

[55] The Notice of Motion is clear as to the entity whose credit meeting minutes and resolutions are sought and it is not Helios Investment Partners LLP. It is necessary to interpose at this point and indicate that Helios Investment Partners LLP is a distinct separate corporate personality registered in the United Kingdom as a Limited Liability Partnership whereas the plaintiff is Mauritian registered company.

[56] I have difficulty in understanding how the court is supposed to overcome this hurdle of separate legal entities and to grant the prayer by the defendants regarding the minutes and resolutions of an entity that is not a party to these proceedings. Apart from that it is not clear why these minutes and resolutions are relevant to the current proceedings as it is not clearly set out in the founding affidavit by Mr Abrahams.

[57] In *J & M Casino Consulting CC v United Africa Group (Pty) Ltd*[6], I held that 'it would be contrary to the rules and practice to make a ruling that rule 28(8) refers to third parties that are not part of the proceedings. That is clearly not the intention of the rules and such an interpretation of the rules is not correct.' I still hold this position.

[58] The defendant further insists that Mr Cunningham in his many different capacities in the Helios Group would be in possession of the documents. I agree with Mr Babamia, it is not a question of what the director has in his possession, but rather what documents are held by the director <u>for the company litigant</u>. Mr Cunningham can surely not release the documents of Helios Investments merely because he is a director of the said entity, regardless of the fact that Helios Investment is not a party to these proceedings. This flies in the face of the principle of piercing the corporate veil.

[59] What is clear to me from defendant's replying affidavit and heads of argument is that it is no longer in line with the defendant's Notice of Motion and the relief sought therein in respect of sub-para 3.1 to 3.3.

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[6] *J & M Casino Consulting CC v United Africa Group (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/01344) [2019] NAHCMD 289 (07 August 2019) para 24.

[60] What is further noticeable is that the defendant did not file and amended notice of motion and neither did it file a supplementary founding affidavit.

[61] I do not intent to be overly technical, but it is not acceptable that the defendant seeks a different relief in its replying papers than in the notice of motion on which this application is based on and it is trite that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in a replying affidavit.

b) Ad sub-para 3.1-3.3 of the Notice of Motion: Signed copy together with annexures of the Sub-Advisory Agreement as referred to in the Master Participation Agreement.

[62] The plaintiff's answer in respect of this document is that the plaintiff was not a party to the agreement and the plaintiff does not have same in its possession. The defendant is of the view that when the Recitals to the Master Participation Agreement is read and considered together with Recital E thereof, it becomes clear that the Sub-Advisory Agreement must be read together with the Master Participation Agreement.

[63] Mr Cunningham in the answering papers states that the plaintiff is not a party to the Sub-Advisory Agreement and the plaintiff does not have it in its possession. The defendant insists that it does not accept this response of Mr Cunningham and speculates that the plaintiff has to be a party to the Sub-Advisory Agreement but yet again does not show in the founding affidavit the relevance of this document.

[64] This can however not be because if the plaintiff is not a party to the agreement and never had it in its possession how can it be made available to the defendant? An order to this effect would be unenforceable. The fact that Mr Abrahams finds it difficult to believe that the plaintiff would not be party to the Sub-Advisory Agreement is neither here nor there.

[65] I belief that the defendant attempts to make out a case for relevance in respect of the Sub-Advisory Agreement relevant to the plaintiff's *locus standi*. On behalf of the plaintiff it was argued that there is no issue regarding the *locus standi* of the plaintiff whereas it was submitted on behalf of the defendant that the *locus standi* of the plaintiff is a real issue between the parties. However, I have had regard to para 8.4 of the defendant's plea and I need to agree with Mr Babamia that the purported *locus standi* challenge, if at all, is poorly pleaded.

[66] The *locus standi* issue was raised by Mr Cunningham in the answering affidavit and in reply thereto Mr Abraham, on behalf of the defendant, merely indicates that the defendant intends to 'amend its particulars of claim' (sic).

[67] I am therefore of the considered view that as in the case of sub-paras 3.1-3.3, the defendant also did not make out a case for the granting of the relief sought in sub-para 3.4.

c) Ad sub-para 3.5: Helios Oryx Limited independent valuation report on Elisenheim Property Development Company in 2016.

[68] The last document sought by the defendant is the independent valuation report on Elisenheim Development Company. Mr Cunningham pleaded that such a document does not exists. In spite of the email correspondence that the defendant alerted the court to in respect of the real estate report by JLL the defendant persisted in seeking the Helios Oryx Limited independent valuation report.

[69] As in the case of the credit commission minutes and resolutions sought the defendant does not amend its Notice of Motion to reflect the correct document it sought to have discovered.

[70] In this instance yet again the defendant does not set out the relevance of this document, even if it existed, which it appears not to exist.

Going behind the discovery affidavit

[71] The defendant repeatedly indicated that it does not accept the plaintiff's response to the documents sought as being truthful but it does not take it any further. In the replying affidavit Mr Abraham states, on behalf of the defendant that the defendant will demonstrate that the plaintiff acted *mala fide*.

[72] I am afraid that the defendant failed to accomplish what it promised to deliver in this regard. The mere fact that Mr Abrahams made statements like 'I find it difficult to believe that…' does not show any untruthfulness on the part of the plaintiff when Mr Cunningham in no uncertain terms and under oath states that the documents do no exists or that the plaintiff is not a party to an agreement.

[73] The plaintiff, through its director Mr Cunningham fully complies with what is required of it in *Richardson's Woolwasheries Ltd v Minister of Agriculture,*[7] wherein the court states the following[8]:

> '[36] In this regard, the court in the *Richardson* case (*supra*), the following was said regarding the contents of affidavits filed on behalf of companies:
> "Where an affidavit is made by a director or officer of the company the affidavit must state in terms that the company has not in the possession, custody or power of its attorney or other agent or any other person on the company's behalf, any document, etc. This is not an insignificant detail, it is a matter of substance. Great weight is given to these affidavits and they should not be drawn in so loose a manner as to leave an avenue of escape to the document if it should turn out that the relevant documents were in the possession of some other officer of the company."- (my underlining).

Conclusion

[74] I am of the view that nothing was presented to this court to go behind the discovery affidavit of the plaintiff. I am further of the view that the defendant failed to make out a case for the relief sought in its Notice of Motion and the application stands to be dismissed with costs. Such costs to include the costs of one instructing and two instructed counsel.

[7] *Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at 65.
[8] Applied in G*amikaub (Pty) Ltd v Schweiger* [2015] NAHCMD 88 para 36.

[75] This matter is interlocutory in nature and I am of the view that the costs should accordingly be limited to rule 32(11) of the Rules of Court.

Condonation

[76] The very last issue I need to address is the issue of condonation sought by the applicant for the late filing of the application.

[77] Having consider the arguments before me I am of the view that condonation should be granted. No prejudice was suffered by either party in this matter and the parties were able to fully ventilate the matter at hand.

[78] My order is therefore as follows:

1. The late filing of the defendant's application is hereby condoned.
2. The relief sought in the Notice of Motion dated 24 June 2022 is hereby dismissed with costs. Such cost to be limited to rule 32(11).
3. Such costs to include the costs of one instructing and two instructed counsel, where so engaged.
4. The case is postponed to **13/10/2022** at 15:00 for a Status hearing.
5. Joint status report must be filed on or before 10 October 2022.

JS Prinsloo

Judge

APPEARANCES

PLAINTIFF:	J Babamia SC (with him Y Alli) Instructed by HD Bossau & Co, Windhoek.
DEFENDANTS:	JP van der Berg SC (with him DH Hinrichsen) Instructed by Van der Merwe-Greef Andima Inc, Windhoek.