HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

IN THE HIGH COURT OF NAMIBIA

Case Title: **UNIVERSITY OF NAMIBIA** and **RIXI INVESTMENTS CC**	**Case No:** HC-MD-CIV-ACT-CON-2018/04785
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	**Date of hearing:** 26 January 2022
	Date of order:15 February 2022 **Date of reasons**: 18 February 2022

Neutral citation: *University of Namibia v Rixi Investments CC* (HC-MD-CIV-ACT- CON-2018/04785) [2022] NAHCMD 65 (15 February 2022)

Results on merits:

Application in terms of Rule 61(1) of Rules of Court. Merits not considered.

The order:

Having heard **MS ISAACKS**, for the Plaintiff and **MR NAUDE**, for the Defendant, and having read the documents filed of record:

IT IS HEREBY ORDERED:

1. The defendant's point *in limine* is dismissed.
2. Prayers 1 and 2 of the Notice of Motion dated 19 April 2021 are dismissed with costs. Such cost to be taxed outside the scale as provided for in rule 32(11) and to include the costs of one instructed and one instructing counsel.
3. Reasons will be made available on 18 February 2022.

Further conduct of the matter:

4. The case is postponed to **10 March 2022** at **15h00** for Status hearing (Reason:

Interlocutory to bring)

5. The Parties must file a joint status report on or before 7 March 2022 setting out the further conduct of the matter.

Reasons for orders:

Introduction

[1] The parties before me are University of Namibia ('UNAM'), a public institution of higher learning, established by an Act of the National Assembly on 31 August 1992 and Rixi Investments CC ('Rixi'), a close corporation duly registered and incorporated in terms of the laws applicable in the Republic of Namibia. I will refer to the parties as they are in the main action.

Background

[2] The plaintiff, UNAM, instituted action against Rixi on 22 August 2018, claiming breach of a lease agreement in terms of which it is alleged that Rixi failed to settle rentals, utilities and other commitments amounting to N$ 305 658.80. Rixi defended the matter and filed a conditional counterclaim against the plaintiffs claiming the amount of N$ 4 812 000.00 for breach of contract and damages suffered due to the said breach. The matter was extensively case managed up to the point when the matter was scheduled for trial on 19 to 21 April 2021.

[3] On 18 February 2021, during a pre-trial status hearing, the parties confirmed their readiness to proceed to trial on the date as scheduled.

[4] On Thursday, 14 April 2021, at approximately 16h31, the defendant's legal practitioner uploaded a file under the heading 'the defendant's supplementary bundle of discovered documents' on the E-Justice system. The supplementary discovery consisted of a) a letter from Advanced Accounting Services dated 16 September 2020 and b) a bundle of bank statements (Bank Windhoek) of Rixi Investments CC for the period of 1 January 2015 to 2 May 2018, consisting of 30 pages.

[5] In addition thereto, the defendant filed a subpoena *decus tecum* in terms of rule 37(3) of the Rules of Court for one Johannes Neputa.

[6] On the morning of 19 April 2021, the plaintiff's legal representative filed a notice of motion in the following terms:

> '1. That the supplementary discovery affidavit filed by the defendant on 14 April 2021 is set aside as an irregular step.
> 2. That the defendant is disallowed to call its witness, Johannes Neputa, an adult male practicing as Advanced Accounting Services, Windhoek, for whom a subpoena *decus tecum* was issued by the Registrar of the High Court on 14 April 2021 without having timeously filed an expert witness statement, summary and report.
> 3. That the matter be postponed to a date suitable to all the parties.
> 4. Costs of suit on an attorney and client scale outside the parameters of rule 32(10) (*sic*).
> 5. Further and/or alternative relief.'

[7] At the commencement of the hearing, Ms Garbers-Kirsten, counsel for the plaintiff, requested vacation of the trial dates and for the cost issue to stand over until the finalisation of the interlocutory proceeding and further that dates be allocated for the exchange of papers in respect of the interlocutory application. Mr Barnard, counsel for the defendant, indicated that the defendant would oppose the interlocutory application but agreed to vacate the trial date. The matter was accordingly postponed to 11 June 2021, and the court gave directions regarding the exchange of papers. This court further ordered that the issue of costs stand over for later determination until after the finalisation of the interlocutory application, alternatively to be determined at the end of the trial.

[8] On 11 June 2021, the matter was postponed for hearing of the interlocutory application on 16 July 2021, which would be conducted via Zoom due to the prevailing Covid restrictions and regulations. The hearing could not proceed due to technical issues on the Zoom/Star Leave Platforms. After a further postponement to September 2021, the matter was set down for and argued on 26 January 2022.

[9] Prior to the hearing date plaintiff's counsel filed a unilateral status report, dated 24 January 2022, wherein she took the view that the issues relating to the application scheduled

for hearing on 26 January 2022 became moot because:

a) The postponement/vacation of the trial dates was granted;

b) The issue of the belated discovery made by the defendant was cured by the effluxion of time;

c) The defendant already indicated that it will no longer rely on the evidence to be presented by Mr Neputa in his capacity as an expert witness, and

d) Cost of the postponement was already ordered to stand over.

[10] Opposing counsel did not share the view of the plaintiff's counsel. Mr Barnard held the view that if the plaintiff no longer wanted to pursue the application, it should have withdrawn the application, with leave of court where applicable and tender costs. As the application remained alive between the parties, counsel argued the matter accordingly.

Arguments advanced

[11] From the onset, it should be pointed out that it is common cause that the defendant filed the supplementary discovery without seeking leave from this court to do so. There was also no engagement between the parties before uploading the documentation.

[12] Ms Garbers-Kirsten argued that the supplementary discovery of the defendant's bank statements changed the litigation landscape of the matter as the defendant instituted a counterclaim. Before 14 April 2021, there were no documents to substantiate the counterclaim. When the belated discovery was considered, the plaintiff realised that it needed to call its expert as the bank statement discovered were contrary to the financial statements filed by the defendant. In addition thereto, the plaintiff realised that it should bring an application for the joinder of the sole member of the defendant as a party to the proceedings. According to Ms Garbers-Kirsten, the plaintiff further realised that the defendant might not be able to pay the plaintiff's legal costs and will be obliged to approach the court for an application for security for costs.

[13] I must also interpose to indicate at this point that the plaintiff already engaged the defendant regarding a further intended interlocutory application to a) affect an amendment to

the plaintiff's particulars of claim; b) to join Mr Wellman as a party to the proceedings and c) seek security for costs.

[14] Ms Garbers-Kirsten argued that the trial date would have to be vacated regardless of whether the plaintiff filed its application on 19 April 2021.

[15] In respect of the subpoena *decus tecum* for Mr Neputa, Ms Garbers-Kirsten argued that up to the date of filing its answering affidavit, the defendant created the impression that it will call Mr Neputa and by admitting that the defendant will no longer call Mr Neputa, the defendant admitted to being the cause of the postponement.

[16] Mr Barnard argued that the supplementary discovery was made as a gesture of courtesy. The documents in question were in possession of a recalcitrant witness who was unwilling to cooperate, resulting in the subpoena *decus tecum*. Mr Barnard argued that in terms of rule 37(3), a witness so subpoenaed is obliged to produce documents (i.e. bring with him)… to the court at the trial. This meant that the documents would only be presented to the court on Monday morning, at the commencement of the trial. Therefore, Mr Barnard submitted that there was no obligation upon the defendant to discover the documents in possession of Mr Neputa and that the gesture of courtesy could not in law trigger the adverse consequences propagated by the plaintiff.

[17] Mr Barnard further argued that the belated discovery could not have any prejudice or unfair effect on the plaintiff. Counsel submitted that the discovered bank statements demonstrated the payments made by the plaintiff to the defendant, and the plaintiff undoubtedly would have documentary evidence of such payments from its records.

[18] Mr Barnard further argued that the plaintiff wants the supplementary discovery to be set aside, however, the plaintiff seeks to pursue a brand new claim against Mr Wellman, the sole member of the defendant, and the new claim is based exclusively upon what is reflected in the bank statements.

[19] Mr Barnard argued that if the supplementary discovery affidavit is disallowed, the documents covered by the additional discovery could not be placed before the court. It will thus serve no purpose to seek the exclusion of the said documents, which would essentially be

the evidence upon which the plaintiff's new cause of action would be based.

[20] Regarding the defendant's failure to file a witness statement for Mr Neputa, Mr Barnard argued that throughout the case management proceedings, it was clear that Mr Neputa was unwilling to cooperate. There were no prospects of obtaining a witness statement from Mr Neputa, which necessitated the subpoena *decus tecum.*

Point *in limine* raise

[21] The arguments by the respective counsel discussed above are in brief strokes the issues raised in the Notice of Motion and the response thereto. However, the issue that took up the majority of the parties' arguments relates to the point *in limine* raised by the defendant, more specifically the lack of authority of Ms Delport, the plaintiff's legal practitioner, to launch the application dated 19 April 2021. Ms Delport also deposed to the only affidavit filed supporting the application.

[22] Mr Barnard argued as a point of departure that the plaintiff failed to make out a case of authority in its founding affidavit. In support of his argument, Mr Barnard relies on *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd*[1] wherein this court found as follows:

'[37] It is trite that an applicant must make out his case in the founding affidavit and explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. The deponent must state that he or she had been authorised to bring the application in that representative capacity and if possible produce his source or proof of such authority. Alternatively the principal must file a confirmatory affidavit confirming such authorisation.[2]'

[23] Mr Barnard submitted that Ms Delport simply stated in para 2 of her founding affidavit, 'I am duly authorised to depose to this affidavit' without attempting to allege her authority to launch the application. Counsel submitted that an allegation of this nature is not sufficient to

[1] (HC-MD-CIV-ACT-CON-2019/02613) [2020] NAMDHC 290 (10 July 2020)

[2] *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020) referring to *Naholo v National Union of Namibia Workers* 2006 (2) NR (659) (HC); *South West Africa National Union v Tjozongoro and Other* 1985 (1) SA 376 (SWA); *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799; *JB Cooling and Refrigeration CC v Dean Jacques Willems t/a Armature Winding and Other* (A 76/2015 [2016] HAHCMD 8 (20 January 2016); and *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

launch the application in the case of a juristic person. Regarding the question about what would constitute the minimum evidence to prove authority, the court was referred to *Christian t/a Hope Financial Institutions Supervisory Authority*.[3]

[24] Mr Barnard submitted that the supporting affidavit in the application did not contain any minimum evidence to demonstrate the authority of Ms Delport to launch the application. In addition thereto, no confirmatory affidavit by any member, employee or official of the plaintiff was filed in support of the application or confirming that Ms Delport had the necessary authority to launch the application.

[25] Counsel contended that at the time of launching the application, Ms Delport was not authorised to either launch the application or depose to an affidavit on behalf of the plaintiff. In support of this contention, Mr Barnard argued that the actions of Ms Delport were only authorised three weeks after the application was launched when a resolution was passed by the council of the plaintiff, which authorised the Vice-Chancellor of the plaintiff to institute proceedings.

[26] Ms Garbers-Kirsten argues that the current matter is distinguishable from the Baobab matter, and I agree with Ms Garbers-Kirsten in this regard. In the *Boabab* matter, no averments were made by the legal practitioner to vest in him the authority to depose to the affidavit or launch the application. In the current instance, after Ms Delport's authority to adduce to the affidavit and launch the application on behalf of the plaintiff was disputed, a council resolution and special power of attorney was attached in reply, thereby removing the complaint regarding her lack of authority.

[27] In para 51 of the Baobab judgment, a clear distinction is drawn between the scenario where the deponent avers that he or she has authority to launch the application and those where no such averments were made:

'[51] A distinction must be drawn between matters where authority to launch the application is averred in the founding affidavit and objected to by the opposing party and those matters where absolutely no averments are made regarding authority. In the former instance the principles as set out

[3] 2019 (4) NR 1109 (SC) at para 45: '…the minimum evidence require whenever someone acts on behalf of a corporate entity is a resolution of hat entity and that there can be no authorisation in the absence of such a resolution.'

in *Otjozondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*[4] applies. In the *Otjozondjupa Regional Council* matter Muller J (as he then was) sets out the principles as follows:

> '(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorisation has been placed before Court;
> (b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;
> (c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;
> (d) Each case will in any event be considered in respect of its own circumstances; and
> (e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that it is the applicant who is litigating and not some unauthorised person on its behalf.''

[28] On the issue of the legal practitioner deposing to a founding affidavit, I do agree that our courts have on various occasions indicated their displeasure regarding legal practitioners that depose to founding affidavits and has repeatedly stated that legal practitioners should refrain from doing so.

[29] It is, however, so that for every rule, there will be an exception to the rule. This much is clear from *Prosecutor-General v Paulo and Another*[5] wherein it is clear that there may be exceptional circumstances wherein a legal practitioner will be obliged to make a statement. In the *Paulo* matter, Angula DJP expressed strong views against legal practitioners who deposed to affidavits in their names and discouraged the filing of affidavits on behalf of a client and stated that this practice should only be resorted to in exceptional circumstances where the party to the proceedings is, for compelling reasons, unable to depose to an affidavit.

[30] I previously associated myself with this view and still do. In the current instance, the legal practitioner deposed to facts related to the judicial case management process and the non-compliances of case management orders and contentions made on behalf of the defendant where Ms Delport was either in court or the author of the status reports concerned.

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[4] *Otjozondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others* (LC 7/2010) [2010] NAHC 29 (26 March 2010).
[5] *Prosecutor-General v Paulo and Another* 2017 (1) NR 178 (HC) at 184 para 16.

Ms Delport, therefore, has personal knowledge regarding the extended judicial case management process to date. This, in my view, would qualify as an exception and is limited to the current matter, given the unique circumstances of this matter.

[31] One should also not lose sight of the fact that the application had to be launched on short notice, given the belated filing of the supplementary discovery.

[32] I am of the view that the client, under any other circumstances, should have deposed to the affidavit. However, as discussed, I do not believe that the affidavit should be treated *pro non scripto* or be disregarded by this court.

[33] The point in lime raised is thus dismissed.

Discussion

[34] From the onset, I must say that I am as perplexed by the necessity to hear this matter as Mr Barnard was to argue it. Despite the apparent mootness of the application, the plaintiff persisted in not withdrawing the application. It should also be pointed out that seven months passed from filing the respective heads of arguments, wherein the defendant's position regarding prayers 1 and 2 was clearly set out.

[35] The only two prayers relevant for purposes of this ruling are the first prayer, ie striking of the supplementary discovery as being irregular and the second prayer, that the defendant is disallowed to call Mr Neputa for failure to file his expert witness statement.

[36] I am of the view that prayer 3 of the notice of motion need no discussion. The postponement was granted at the plaintiff's request, which was unopposed by the defendant. The court further directed that the cost issue in respect of the postponement stand over to the trial and therefore requires no discussion.

Supplementary discovery

[37] The bank statements filed under the heading of supplementary discovery were documents that were in possession of a hostile or unwilling third party. A subpoena *decus*

tecum was issued to secure Mr Neputa's attendance at court during the trial and to direct him to present certain documents to court at the time.

[38] The fact that the bank statements were in possession of Mr Neputa appears to be undisputed. However, the plaintiff made the averment that the defendant would have had access to its bank statements without the intervention of Mr Neputa. This appears to be a correct assessment; however, what is relevant to the present matter was the payments made by the plaintiff to the defendant and the plaintiff obviously have records of these payments. The plaintiff was at all material times at liberty to request the defendant's bank statements or even bring an application to compel discovery should it be necessary but would appear not have deemed it essential for the prosecution of its claim.

[39] I agree with Mr Barnard that there was no obligation on the defendant to discover the documents in possession of Mr Neputa, who brought the documents to court as a result of a subpoena decus tecum. I am further of the view that given the circumstance of filing the bank statements does not call for any penalties against the defendant. There is thus no merits in the complaint set out in prayer 1 of the notice of motion.

[40] Interestingly, the plaintiff wishes to embark on an application for joinder and amendment of particulars of claim, which is exclusively based on the bank statements. Yet, it wishes to have these documents disallowed, which would be essential evidence upon which the plaintiff's new cause of action and claims would be based.

Disallowing the evidence of Mr Neputa

[41] Regarding the different status reports filed during the judicial case management process, it was clear that Mr Naude, the defendant's legal practitioner, had difficulty securing a consultation with Mr Neputa to prepare an expert witness statement. During pre-trial conference held on 7 May 2020, it was recorded on behalf of the defendant that Mr Neputa would possibly be subpoenaed to testify during the trial.

[42] I do agree with Mr Barnard's argument that rule 37 is designed to, among other things, deal with recalcitrant witnesses who are not prepared to, before the trial of a matter, impart to the party intending to call him or her the facts/knowledge /evidence to which such witness is

privy and a witness statement for a witness who is subpoena *duces tecum* can therefore by necessary implication never be obtained.

[43] There is no authority or precedent covering this issue in our jurisdiction, but I agree with the view that a subpoenaed witness can competently testify without the filing of a witness statement.[6]

[44] Prayer 2 of the plaintiff's notice of motion is therefore also dismissed.

Costs

[45] The only remaining issue to consider is the issue of costs.

[46] I believe that issues raised in the notice of motion are without merit, and the cost must follow the result. The next question to consider is on which scale the cost should be taxed. Both counsel essentially argued that rule 32(11) should apply if the court agrees with their respective arguments.

[47] As pointed out in my earlier discussion of the background of the matter, the plaintiff had seven months to reconsider its application and pursue their further interlocutory applications, which now appears to be inevitable, but did not do so. This is neither in the spirit of overriding objective of the court rules nor in the interest of justice. Rule 3 of the Rules of Court directs as follows:

> '(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and **timely disposal of a cause or matter**;' (My

[6] Nigerian High Court SUIT NO. FCT/HC/CV/2074/18 delivered by Justice D. Z. Senchi on 29/01/2019 in the matter *Dawari v Alhaji Mohammed* the court held that:

> 'In sum, it is my considered view that the Rules of this Court do not require the filing of a witness statement or deposition before a subpoenaed witness can testify at the trial of a matter. PW2 can competently testify as a subpoenaed witness without filing his witness statement on oath or deposition.'

underlining)

[48] The delay in this matter is inexcusable. The plaintiff had more than one occasion to reconsider its position as the matter was enrolled for hearing twice but postponed for reasons discussed earlier. I must clarify that those postponements were not at the plaintiff's instance; however, it allowed the plaintiff to reconsider the further conduct of the matter.

[49] To file a one-sided status report on the eve of the hearing wherein the mootness of the application is pertinently pointed out is not helpful. The defendant had counsel that flew in from South Africa, and the plaintiff was well aware of this fact. I am of the view that this court must show its displeasure in respect of how the applicant conducted this matter by granting an appropriate cost order.

[50] As a result, I am of the view that under the circumstances, it would be appropriate not to limit the costs in terms of rule 32(11).

[51] My order is, therefore as set out above.

Judge's signature	**Note to the parties:**
Prinsloo J	Not applicable

Counsel:

Plaintiff	**Defendants**
Ms Garbers-Kirsten Instructed by Delport Legal Practitioners.	Mr T Barnard SC Instructed by Dr. Weder, Kauta and Hoveka