

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON SPECIFIC DISCOVERY APPLICATION

Case Title: ERICH OTTO HEIMSTADT and PRONTO GLOBAL AIR AND OCEAN FREIGHT CC PETER ANDRE DE VILLIERS SIMONE ISABELLA DE VILLIERS 3rd DEFENDANT	Case No: HC-MD-CIV-ACT- CON-2022/02528
Heard before: Honourable Justice Sibeya	Division of Court: High Court (Main Division)
	Heard: 15 May 2023 Delivered: 6 June 2023
Neutral citation: <i>Heimstadt v Pronto Global Air and Ocean Freight CC</i> (HC-MD-CIV- ACT- CON-2022/02528) [2023] NAHCMD 294 (6 June 2023)	
The order: <ol style="list-style-type: none">1. The application for specific discovery is refused.2. The plaintiff must pay the costs of the application subject to rule 32(11).3. The parties must file a joint case management report for the further conduct of the	

matter on or before 19 June 2023.

4. The matter is postponed to 22 June 2023 at 08:30 for a Case Management Conference hearing.

SIBEYA J

Introduction

[1] The sole question for determination is the sustainability of an application for specific discovery of complete bank statements and other financial documents in an action between the parties.

The parties and their representation

[2] The plaintiff is Mr Erich Otto Heimstadt, an adult businessman, residing in Walvis Bay, Republic of Namibia

[3] The first defendant is Pronto Global Air and Ocean Freight CC, a close corporation duly registered according to the laws of the Republic of Namibia with its main place of business situated at 3 Diesel Street, Southern Industrial Area, Windhoek, Republic of Namibia.

[4] The second defendant is Mr Peter Andre De Villiers, an adult businessman and member of the first defendant residing in Swakopmund, Republic of Namibia.

[5] The third defendant is Ms Simone Isabella De Villiers, an adult businesswoman residing in Swakopmund, Republic of Namibia.

[6] Mr Olivier appears on behalf of the plaintiff, whereas Mr Mouton appears for the defendants. The court records its indebtedness to both counsel for the assistance they

dutifully rendered to the court.

The background

[7] According to the parties, the plaintiff was to manage a business in Walvis Bay for the first defendant. The business included conducting clearing, forwarding and logistics services. The idea was that the business be similar to the business conducted by the first defendant in Windhoek, but with a distinct target market from that of first defendant and limited to mostly the clearing, forwarding and logistics services of hunting trophies.

[8] Furthermore, the defendants would be obliged to keep separate books of account of the first defendant and would also open and maintain separate bank accounts of the first defendant, relating to the Walvis Bay business to be so established in terms of the agreement.

[9] The court in the case plan order dated 28 July 2022 ordered the parties to file their discovery affidavits and exchange bundles of discovered documents on or before 29 September 2022. The parties complied. Dissatisfied with the documents discovered by the defendants, the plaintiff filed a notice in terms of rule 28(8)(a) of this court's rules to request the defendants to discover additional documents. It is on that basis that the plaintiff instituted the present application against the defendants. The application is opposed on the basis that it is premature and prejudicial to the defendants.

The plaintiff's case

[10] It is the plaintiff's case that the parties entered into different agreements wherein they agreed that the plaintiff will establish and maintain a business for the first defendant. According to the plaintiff, the defendants breached their agreements and therefor brought the main action against the defendants. In the course of the matter the court ordered the parties to file their discovery affidavits, and the plaintiff alleges that the defendants failed to discover all the necessary documents.

[11] The plaintiff further contended that one of the agreements entered into (the agreement of 28 October 2021) gave rise to the fact that the plaintiff would acquire 33.3 percent of member's interest in the first defendant. This was vehemently denied by the defendants.

[12] The plaintiff seeks proper and full discovery from the defendants because the defendants, according to the plaintiff, did not comply with their obligations to discover as per the court order dated 28 July 2022.

[13] The plaintiff, in his plight for specific discovery, wants the defendants to discover the following documentation:

- '1. The annual financial statements of the first defendant from 01 November 2018 until 2022.
2. All financial statements in respect of first defendant's Walvis Bay and Swakopmund businesses.
3. The asset register of first defendant.
4. Employment agreements between first defendant and its employees as well as payslips and P.A.Y.E. returns in respect of first defendant's employees.
5. Lease agreements between the first defendant as lessee, and lessors:-
 - 5.1 in respect of Swakopmund and Walvis Bay business premises of first defendant, and;
 - 5.2 all residential properties leased by first defendant.
6. Internet, Telecom, water, electricity connection applications and accounts in respect of first defendant's business premises in Walvis Bay and Swakopmund as well as fitness certificate applications and fitness certificates in respect of the Walvis Bay and Swakopmund of first defendant's business premises.
7. Namport account application and account statement history of first defendant from November

2018 until present.

8. All first defendant's monthly management accounts from November 2018 until 2022.
9. All bank statements of bank accounts including bond accounts and vehicle finance accounts for the period 01 November 2018 until present of:-
 - 9.1 the defendants, and;
 - 9.2 the juristic entities controlled by second and third defendants inclusive of, but not limited to:-
 - 9.2.1. FYYS Properties CC;
 - 9.2.2. GVDM Investments Thirty Eight CC;
 - 9.2.3. Gui-Gam Investments Eighteen CC, and;
 - 9.2.4. HGK Investments Thirty Eight CC.'

[14] The plaintiff further raised an objection that the defendants' legal practitioner deposed to the statement in response to the notice in terms of rule 28(8)(a) and did not state whether the contents of such affidavit were true and correct. The plaintiff also took issue that the defendants' legal practitioner deposed to the statement while it was not the defendants themselves who authored the statement.

[15] The mistake that the plaintiff made when he raised the issue of the legal practitioner authoring the statement was that he implied that the statement was an affidavit, which it was not the case. There was no requirement for the deposing party to state that the facts were true and correct, and that it had to be the defendants themselves who should have deposed to the statement. The legal practitioner did not depose to the discovery affidavit, however, he authored a statement in opposition of the rule 28 application. The defendants deposed to their own discovery affidavits.

[16] The court, after hearing arguments, ordered the parties to file additional notes on whether or not a legal practitioner may depose to the discovery affidavit, upon which the defendants successfully convinced the court by making it clear that the discovery affidavits filed were deposed to by the defendants themselves. It was the statement in response to

the plaintiff's notice that the defendants' legal practitioner authored. Therefore, it is not necessary for me to make any further finding in that regard. It is clear that the defendants' legal practitioner did not depose to an affidavit but rather a statement, which he was, in my considered view, entitled to do.

The defendants' case

[17] It is the defendants' case that the parties agreed that the plaintiff would have received 50 percent of the net profit of the Walvis Bay Branch, but that it was, however, specifically agreed to, between the parties, that the parties would first assess the situation in order to establish whether the relationship between the parties was amicable and whether the relationship was sustainable before such agreement would be reduced to writing. It was further the defendants' case that the agreement was never reduced to writing and that it did not come into force and had no legal effect for that matter.

[18] It is further the defendants' case that, the plaintiff has not yet proven the existence of the alleged agreement to the court and/or, that he is entitled to the member's interest in the first defendant. The defendants contend that the plaintiff should first prove the element of liability before they will make the discovery sought. The defendants contend further that the plaintiff failed to prove the relevance of the documents that he seeks to be discovered. According to the defendants, the plaintiff has failed to discharge the onus to prove entitlement to the specific discovery sought and called on the court to dismiss the application on the basis that the documents requested are not relevant to the cause and/or proportionate to the needs of the case.

[19] The defendants further made an interesting submission that the plaintiff has established a business that is similar to that of the first defendant and that the said two businesses are in direct competition. For obvious reasons, discovery of the documents sought above will do a grave injustice and it will be highly prejudicial to the business of the first defendant if the court so allows, contended the defendants.

[20] The defendants also submitted that the plaintiff is not a member of the first defendant and that is evident from the Founding Statement of the first defendant. It was further submitted by the defendants that the documents so requested are neither proportionate to the needs of the case, nor necessary to prove the plaintiff's case. The defendants contend that the plaintiff first needs to prove that he is, or ought to be, a member of the first defendant before being entitled to the requested specific discovery.

Analysis

[21] Applications for specific discovery are governed by rule 28 of the rules of this court. The relevant subrules, are quoted below as follows:

'(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 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.

...

(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-

(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.

(9) If a party believes that the reason given by the other party as to why any document, analogue or digital recording is protected from discovery is not sufficient, that party may apply in terms of rule 32(4) to the managing judge for an order that such a document must be discovered.

(10) The managing judge may inspect the document, analogue or digital recording referred in subrule (9) to determine whether the party claiming the document to be protected from discovery has a valid objection and may make any order the managing judge considers fair and just in the circumstances....'

[22] It is evident from rule 28 quoted above, that the parties to a matter must, without being requested to, make discovery, identify and describe all documents, analogues or digital recordings that are relevant to the matter and in respect of which no privilege may be claimed.

[23] In the matter before court for determination, the plaintiff has not established the relevance of the documents he seeks to have discovered. The plaintiff has, during argument, made it clear that part of the reasons for seeking discovery of the said documents is to establish the quantum that he will be entitled to claim from the defendants. When the Court questioned both counsel on whether if the discovery sought is intended to prove the quantum, Mr Olivier submitted that the specific discovery sought is further necessary for the plaintiff to examine his case against the defendants and to decide whether there is a case to pursue as the discovery sought may just establish that it may not be worthy to pursue this matter. This is a wrong approach to seek discovery.

[24] Parties bringing matters to court should not, through discovery, want to establish whether they stand a good chance or not. The parties should use the documents sought to be discovered to aid themselves to prove their case and not to establish whether they indeed do have a case.

[25] From reading the authorities relevant to this issue, it would appear that the relevance of the material sought to be discovered is decisive in determining whether or not

the application for specific discovery should be granted.

[26] In the matter of *Walvis Bay Salt Refiners (Pty) Ltd v Blaauw's Transport (Pty) Ltd and 4 Others*¹, Usiku, J with reference to *Santam v Segal*², remarked as follows on the issue of relevance of the documents sought to be discovered:

[17] (10) *Apropos* relevance, the important point to note is that assessment of relevance is objective and not subjective. It is not for a party's legal representative to decide what he thinks the issues are and what documents are relevant to them. He has to provide access to documents which could be part of the issues and what documents could be relevant to them. The question of relevance is normally answered by reference to the pleadings. The basic principle was formulated in *Compagnie Financiere et Commerciale Du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 at 63; and restated in *Thorpe v Chief Constable of Greater Manchester Police* [1989] 1 WLR 665 at 668:

“ . . . any document must be disclosed which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences. Discovery is thus not necessarily limited to documents which would be admissible in evidence.”

. . .

Accordingly, the test is wider than direct relevance to the pleaded issues.’

[27] From the above excerpt, it is clear that relevance should not be interpreted as referring to issues and material that are relevant for the parties or their legal practitioners. Relevance encompasses all documents and material that are relevant to the matter at hand, whether or not such documents or material are in favour or adverse to the interests of the party discovering the information.

[28] In this case before me, relevance was not established. In fact, the plaintiff's main concern was a non-issue of the legal practitioner deposing to the statement and not the

¹ *Walvis Bay Salt Refiners (Pty) Ltd v Blaauw's Transport (Pty) Ltd and 4 Others* (I 3668/2014) [2019] NACHMD 23 (15 February 2019).

² *Santam v Segal* 2010 (2) SA 160 (N) at 165 D-G.

defendants themselves.

[29] The plaintiff has accordingly further failed to establish that it is entitled to have access to the financial statements and accounts of the first defendant, as he did not establish his relationship with the first defendant. The best way for the parties to go about this case was to establish liability first before the quantum is dealt with. If the issue of liability is disposed of it will curtail the proceedings and it may bring the whole matter to a finality, if the plaintiff fails to prove liability.

[30] The parties should use the judicial case management route for their own benefit as well, in order to dispose of matters faster and establish clear points of disagreement. In the process, parties should engage in communication to attain the quickest way to resolve the dispute.

[31] The learned authors, Herbstein & Van Winsen, in their work Civil Practice of the High Courts of South Africa, state the following regarding discovery:

‘The function of discovery is to provide the parties with the relevant documents or recorded material before the hearing so as to assist them in appraising the strength or weaknesses of their respective cases, and thus to provide the basis for a fair disposal of the proceedings before or at the hearing. Each party is therefore enabled to use before the hearing or to adduce in evidence at the hearing documents or recorded material to support or rebut the case made by or against him or her to eliminate surprise at or before the hearing relating to documents or recorded evidence and to reduce the costs of litigation.’

[32] What is evident from the above is that discovery is an important step in any proceeding, in that it curtails the proceedings by the parties already being aware of the relevant documents before the hearing and for determination of the strength or weakness of each party’s case. It also assists the parties and the court in avoiding surprises that will sidetrack the proceedings and in turn it reduces the costs of litigation. However, in the matter before me, allowing the discovery so sought may cause irreparable harm to the business of the defendants, especially in light of the fact that liability is not yet proven and

access to such sensitive information by a direct competitor is prejudicial. The parties must first deal with the liability and then depending on what happens, the quantum may be considered.

Conclusion

[33] In the matter before me, it is not an appropriate case in which to order a party to comply with discovering documents. The discovery poses the risk of the defendants losing out financially, because of the parties being in direct competition with one another. The plaintiff also failed to prove the relevance of the documents that he seeks to be discovered, therefor, there is no duty on the defendants to discover any further documents.

Costs

[34] The ordinary rule applicable to costs is that they follow the event. There is nothing said or apparent in this matter that would justify a departure from that well-trodden path. The respondent is accordingly ordered to pay the costs of the application, subject to rule 32(11).

Order

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

1. The application for specific discovery is dismissed.
2. The plaintiff must pay the costs of the application subject to rule 32(11).
3. The parties must file a joint case management report for the further conduct of the matter on or before 19 June 2023.
4. The matter is postponed to 22 June 2023 at 08h30 for a Case Management Conference hearing.

Judge's signature:	Note to parties:
O S SIBEYA JUDGE	
For the plaintiff: J Olivier Instructed by Ellis Shilengudwa Inc., Windhoek	For the defendants: C Mouton Instructed by Neves Legal Practitioners, Windhoek