REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON DISCOVERY

Case No: HC-MD-CIV-ACT-DEL-2020/04201

In the matter between:

HENNER DIEKMANN	**PLAINTIFF**

and

FREE PRESS OF NAMIBIA (PTY) LTD	**FIRST DEFENDANT**
TANGENI AMUPADHI	**SECOND DEFENDANT**
SHINOVENE IMMANUEL	**THIRD DEFENDANT**
TILENI MONGUDHI	**FOURTH DEFENDANT**
NDANKI KAHIURIKA	**FIFTH DEFENDANT**

Neutral Citation: *Diekmann v Free Press Namibia (Pty) Ltd and Others* (HC-MD-CIV-ACT-DEL-2020/04201) [2023] NAHCMD 348 (22 June 2023)

Coram: SIBEYA J
Heard: **7 June 2023**
Delivered: **22 June 2023**

Flynote: Civil procedure – Specific discovery – Rule 28(8) – Discovery where the documents are stated to be lost or discarded – Acting on the instructions of one's legal representative – Inadmissible hearsay evidence – Going behind the oath.

Summary: In the main action, the plaintiff issued summons against the defendants where he seeks declaratory relief that the defendants are in contempt of court for failure to comply with a court order of 31 October 2019 delivered in a defamation claim. The defendants, in the main action, rely on, *inter alia*, the legal advice received for their impugned action or inaction.

During pre-trial process, the defendants discovered documents on oath as required by law. Dissatisfied with the adequacy of the discovery made, the plaintiff, on 16 June 2022, filed a notice in terms of rule 28(8)*(a)* of the rules of court, calling on the defendants to make further discovery.

The second defendant, on 15 September 2022, deposed to a supplementary discovery affidavit on behalf of the defendants, and discovered the Memorandum from counsel to ENSAfrica Namibia constituting legal advice dated 5 December 2019, together with the apology and retraction of the articles. Still not satisfied, the plaintiff on 28 October 2022 filed another notice for additional discovery in terms of rule 28(8)*(a)* to compel the defendants to discover.

The defendants, in the opposing affidavit deposed to by the second defendant dated 17 March 2023 stated, amongst others, that they are not in possession of any further documents apart from that filed of record.

Held: that discovery is a critical tool to uncover the truth or at the very least to advance a party's own case or to poke holes in the adversary's case. It is a tool whose purpose is so crucial to get to the truth of the matter that it is equated to that of cross-examination.

Held that: the relevance of the requested documents, on the other hand, includes all documents and materials relevant to the matter, irrespective whether such documents benefits the requested or the requesting party.

Held further that: where reliance is placed on a legal advice for an action, the exchanges, inclusive of the notes, emails and any other documents between the clients,

the instructing and the instructed legal practitioners are relevant to the determination of the matter and should be discovered unless there is justification to withhold such documents.

Held: where there is a specific request for discovery, a specific answer must be provided with sufficient clarity on the status of the requested document.

Held further: the oath taken by the deponents to discovery affidavits must be taken to be binding on their conscience and, therefore, genuinely made with all its consequential effect in mind.

Held further that: The response by the defendants regarding the requested notes is insufficient to the extent that it is incapable of warding off the application to compel the requested discovery.

The application succeeds and the defendants shall, therefore, be compelled to discover.

ORDER

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1. The defendants are compelled to discover the documents, analogues or digital recording requested by the plaintiff in the plaintiff's notice in terms of rule 28(8)*(a)* dated 28 October 2022 (Notice A) thereto, and deliver same to the plaintiff within 15 days from date of this order.
2. The defendants must, in respect of requested documents that are not in their possession, state on oath or affirmation within 10 days of the order of this court that such documents, analogues or digital recording are not in their possession, in which case they must state their whereabouts, if known to them.

3. The plaintiff is granted leave to approach this court on the same papers, duly amplified if necessary, to apply for the striking out of the defendants' defence to the main proceedings should the defendants fail to comply with order 1 above.
4. The defendants must, jointly and severally, the one paying the other to be absolved, pay the costs of the plaintiff, including costs of one instructing and two instructed legal practitioners, subject to rule 32(11).
5. Parties must file a joint status report on or before 17 July 2023.
6. The matter is postponed to 20 July 2023 at 08h30 for status hearing.

RULING

SIBEYA J:

Introduction

[1] Silungwe AJ (as he then was) in *Polzin v Weder*[1] remarked as follows at paragraph 20 regarding the significance of discovery:

'I pose here to underscore the fact that discovery affidavits are indeed very important documents in any trial (*Ferreira v Endley* **1966 (3) SA 618** at 621C). Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed, where its use is called, it can be, and often is, a devastating tool.'

[2] Before court is an interlocutory application brought by the plaintiff to compel the defendants to discover specific documents, analogues or digital recordings. The application is opposed by the defendants.

[1] *Polzin v Peter Weder t/a Weder Weder Associates* (997 of 2009) NAHC 3 (14 January 2009) para 20.

The parties and representation

[3] The plaintiff is Mr Henner Diekmann, an adult male legal practitioner practicing under the name of Diekmann Associates, situated at Lilliecron Street, Windhoek.

[4] The first defendant is Free Press of Namibia (Pty) Ltd, a company duly registered according to the laws of the Republic of Namibia with its principal place of business at 42 John Meinert Street, Windhoek-West, Windhoek and the owner and publisher of The Namibian Newspaper.

[5] The second defendant is Mr Tangeni Amupadhi, an adult male employed by the first defendant as an editor-in-chief of The Namibian Newspaper, at the address of the first defendant.

[6] The third defendant is Mr Shinovene Immanuel, an adult male employed by the first defendant as a journalist of The Namibian Newspaper, at the address of the first defendant.

[7] The fourth defendant is Mr Tileni Mongudhi, an adult male employed by the first defendant as a freelance journalist for The Namibian Newspaper and as editor-in-chief for the Southern Times, whose place of employment is at the corner of Schönlein and Jenner Streets, Windhoek-West, Windhoek.

[8] The fifth defendant is Ms Ndanki Kahiurika, an adult female employed by the first defendant as a journalist for The Namibian Newspaper, at the address of the first defendant.

[9] The plaintiff is represented by Mr Heathcote while the defendants are represented by Mr Boesak.

Background

[10] In the main action, the plaintiff issued summons against the defendants where he seeks declaratory relief that the defendants are in contempt of court for failure to comply with a court order of 31 October 2019, delivered in a defamation claim. The defendants, in the main action, rely on, *inter alia*, the legal advice received for their impugned action or inaction.

[11] In attempt to comply with an entrenched pre-trial process, the defendants discovered documents on oath as required by law. Dissatisfied with the adequacy of the discovery made, the plaintiff, on 16 June 2022, filed a notice in terms of rule 28(8)(*a*) of the rules of this court, calling on the defendants to make further discovery. It may appear to the reader that the court is laboring the discovery requested but it is necessary to map out the origin and development of the requested discovery by the plaintiff. The said notice for additional discovery referred to above is annexed to the applicant's affidavit filed in support of this application as 'HD1' and I shall refer to it as such. HD1 provides, *inter alia*, that:

'BE PLEASED TO TAKE NOTICE FURTHER that the abovenamed plaintiff calls upon and requires the defendants, within 15 days from date of delivery of this notice to deliver the following documents or copies thereof or analogies or digital recordings to the plaintiff, alternatively to deliver a statement on oath stating that the following documents or copies thereof or analogies or digital recordings are not in the defendants' possession in which case the defendants must state their whereabouts, if known to the defendants:

1. In respect of the advice referenced in paragraphs 9.2, 9.3 and 9.4 of the defendants' plea:

    1.1 copies of any and all such advice rendered to the defendants;

    1.2 copies of all consultation notes created during all consultations with any of their legal representatives (including 'counsel') where (i) instructions were taken for the rendering of such advice to the defendants and (ii) such advice was rendered to the defendants; and

1.3 all correspondence (including emails and text messages) exchanged between the defendants and any of their legal practitioner/s (including 'counsel') relating to such advice.

2. All correspondence with 'various websites' during January 2020 as referred to in paragraph 19 of the third defendant's witness statement.

3. All correspondence with AllAfrica.com and 'a certain Chris' as referred to in paragraph 22 of the third defendant's witness statement.

4. All correspondence with Google during January 2020 as referred to in paragraph 23 of the third defendant's witness statement.

5. 'Electronic mail request to Google Legal on 29 November 2021' as referred to in paragraph 33 of the third defendant's witness statement.

6. 'Email to the International Consortium of Investigative Journalists (ICIJ)' as referred to in paragraph 34 of the third defendant's witness statement.

7. All correspondence and text messages exchanged between 'ICIJ's Africa and Middle East partnership coordinator, Will Fitzgibbon' and the defendants relating to the articles of 6 May 2016 and 25 August 2017 and all references thereto including but not limited to the article titled 'Lawyer sues The Namibian over Panorama Papers' published by the first defendant on 24 September 2018, their publication and any retraction or removal thereof, including, but not limited to the text messages as referred to in paragraph 37 of the third defendant's witness statement.'

[12] The defendants, in the affidavit deposed to by the second respondent on 7 July 2022, replied to the plaintiff's rule 28(8)(*a*) notice, *inter alia*, as follows:

'2.1 <u>Ad paragraph 1.1, 1.2 and 1.3 thereof:</u>

I am advised that the advice referenced in paragraphs 9.2, 9.3 and 9.4 of our plea is privileged. I object to deliver the requested documentation referenced by the Plaintiff on the ground that

such advice was rendered to us prior to, in contemplation of and during the continuance of the above proceedings solely for the purpose of obtaining legal advice in relation to these proceedings.

2.2 Ad paragraph 2 thereof:

I have in my possession the correspondence sought by the Plaintiff, annexed hereto and marked ‘TA1’, ‘TA2, ‘TA3, and ‘TA4’, respectively.

2.3 Ad paragraph 3 thereof:

This correspondence was made available to the Plaintiff in the discovery filed on 31 March 2022, under items 2 and 3 of the discovery affidavit schedule.

2.4 Ad paragraph 4 thereof:

I have in my possession the correspondence sought by the Plaintiff, annexed hereto and marked ‘TA4’ and ‘TA5’.

2.5 Ad paragraph 5 thereof:

This correspondence was made available to the Plaintiff in the discovery filed on 31 March 2022, under item 4 of the discovery affidavit schedule, and further in the supplementary discovery filed on 25 April 2022, under item 1 of the supplementary discovery affidavit schedule.

2.6 Ad paragraph 6 thereof:

This correspondence was made available to the Plaintiff in the discovery affidavit filed on 31 March 2022, under item 4 of the discovery affidavit schedule.

2.7 Ad paragraph 7 thereof:

I have in my possession the correspondence sought by the Plaintiff, annexed hereto and marked ‘TA5’. I am no longer in possession of the text messages sought. The test messages sought were deleted.’

[13] The second defendant, on 15 September 2022, deposed to a supplementary discovery affidavit on behalf of the defendants, and discovered the Memorandum from Mr A Corbett SC and Mr T Muhongo to ENSAfrica Namibia constituting the legal advice dated 5 December 2019. In the same affidavit, the defendants further discovered the apology and retraction of the articles.

[14] Still unmoved by the discovery made by the defendants, the plaintiff on 28 October 2022 filed another notice for additional discovery in terms of rule 28(8)(a). The said notice is annexed to the plaintiff application to compel discovery marked "A". In the said application to compel, the plaintiff seeks the following relief:

'With reference and in response to the plaintiff's notice in terms of rule 28(8)(a) dated 28 October 2022 (annexure 'A' hereto), an order compelling the defendants to:

1.2 deliver the documents, analogues or digital recording to the party requesting them with a specified time; or

1.3 state on oath or 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.

2. Granting leave to the plaintiff to approach this Honourable Court on the same papers, duly amplified if necessary, to apply for striking out of the defendants' defence to the main proceedings should the defendants fail to comply with paragraph 1 *supra*.

3. Costs of suit.'

[15] Annexure A referred to in the plaintiff's application to compel is referred to in this judgment as Notice 'A'. Notice 'A' sets out the following discovery required by the plaintiff from the defendants:

'1. In respect of the defendants' instructed counsel's memorandum of 5 December 2019:

1.1 copies of all documents provided to any or both of the instructed counsel who rendered the advice for purposes of rendering the advice and which were taken into account by such instructed counsel in rendering the advice;

1.2 copies of all consultation notes created during all consultations with any of their legal representatives (including any or both of the instructed counsel who rendered the advice) where (i) instructions were taken for the rendering of such advice to the defendants and (ii) such advice was rendered to the defendants; and

1.3 all correspondence (including emails and text messages) exchanged between the defendants and any of their legal practitioner/s (including 'counsel') relating to such advice.

2. All documents relating to and evidencing any assistance given by the defendants' instructed counsel with "new phraseology" as proposed offered *(sic)* by the defendants' instructed counsel in their memorandum of 5 December 2019.

3. All correspondence (including emails and text messages) exchanged between "ICIJ's Africa and Middle East partnership coordinator, Will Fitzgibbon" and the defendants relating to the article of 6 May 2016 and the article referring thereto with the heading "Defamation Case Could Be A Killer for Namibia's Largest Daily Paper", published on 24 September 2018 as well as the further article referring to the article of 6 May 2016 with the heading "Lawyer Sues the Namibian Over Panama Papers Reporting" published on 24 September 2018.

4. The document referred to by the third defendant in annexure TA 1 of the defendants' Rule 28(8) notice reply *(sic)* as "the document I sent you last month".'

[16] The defendants, in the opposing affidavit deposed to by the second defendant dated 17 March 2023, responded to Notice 'A' as follows:

'4.1 Ad paragraph 1.1 thereof

The Defendants are not in possession of any further documents apart from the proceedings filed

of record in the above matter and the documents disclosed to date in terms of discovery.

4.2 Ad paragraph 1.2 thereof

The Defendants have disclosed the memorandum of instructed counsel of 05 December 2019, and are not in possession of any consultation notes taken in pursuance of the said advice that was provided. I am advised that since the relevant legal advice was provided, any notes in relation thereto had been destroyed and/or discarded.

4.3 Ad paragraph 1.3 thereof

The Defendants are not in possession of any further documents or correspondence apart from the pleadings filed of record in the above matter and the documents disclosed to date in terms of discovery. In any event, there was no correspondence exchanged from the 03 December 2019 consultation and the memorandum of 05 December 2019.

4.4 Ad paragraph 2 thereof

The Defendants are not in possession of any further documents apart from the pleadings filed of record in the above matter and the documents disclosed to date in terms of the discovery.

4.5 Ad paragraph 3 and 4 thereof

The Defendants are not in possession of any further documents apart from the pleadings filed of record in the above matter and the documents disclosed to date in terms of the discovery.'

[17] In the same affidavit, the defendants further state that:

'5.1 …all the relevant information had already been produced, and where the Plaintiff is seeking further relevant information, such information is not in the Defendants' possession any longer.

…

5.3.2 …we maintain that inasmuch as the privileged legal advice had been disclosed and the Defendants having waived such privilege in relation to documentation leading to such advice, which we add (again) we are not in possession of as *(sic)* explained hereinabove, the information sought is not relevant for the pleaded case in this matter, and the Plaintiff cannot be

allowed to persist along these lines to the detriment and prejudice of the Defendants and the administration of justice.'

Plaintiff's arguments

[18] The plaintiff insists with the application to compel the defendants to discover as requested in Notice 'A' dated 28 October 2022, and as set out above. The defendants did not reply to Notice 'A' but only responded thereto in the opposing affidavit filed on 17 March 2023.

[19] The plaintiff contends that the defendants do not challenge the relevancy of the specific requested documents, but only make a sweeping statement across the board that the documents are not relevant. The plaintiff further contends that the defendants' answer to the requested documents is that such documents are not in their possession and say nothing more. Mr Heathcote argued that the defendants' response to Notice 'A' falls short of the requirements of rule 28(8) as they simply state that the requested documents are not in their possession.

[20] Mr Heathcote argued further that the response by the defendants that they are not in possession of the requested documents could mean that:

(a) They admit that the documents exist;

(b) They admit that the documents so existing are not in their possession;

(c) The defendants were previously in possession of the requested documents but not anymore.

[21] Mr Heathcote argued further that the responses of the defendants of not being in possession of the requested documents do not rule out the possibility that the requested documents may be in the archives or electronic servers or backups of their legal practitioners. A message deleted from a computer may still be retrieved from the hard

drive, and therefore, they may still be in possession of such document, so he argued. Mr Heathcote argued further that since it can be deduced from the defendants' response that at a certain point in time they were in possession of the requested documents, they do not explain the whereabouts of the said documents. Mr Heathcote argued that the defendants also rendered hearsay evidence when they referred to an undisclosed source who provided advice that "any notes in relation to the memorandum had been destroyed and/or discarded". He argued further that the said answer is vague and demonstrates that the defendants are not being frank and forthright. He, as a result, invited the court to go beyond the oath of the defendants.

[22] On the issues of the relevance of the documents requested, Mr Heathcote argued that the said requested documents relate to the legal advice received by the defendants and the circumstance in which such advice was rendered, therefore, making the related requested documents relevant.

[23] It was contended for the plaintiff that while Notice "A" requested for all correspondence, including emails and text messages exchanged between the defendants and any legal practitioners, the defendants' in their response narrowed the period for the requested documents to the period between 3 and 5 December 2019, and that this does not address Notice "A". Mr Heathcote invited the court to uphold the plaintiff's application with costs beyond the threshold provided for in rule 32(11).

Defendants' arguments

[24] The defendants, did not take the arguments raised by the plaintiff hands down. To the contrary, they engaged the plaintiff's arguments pound for pound as it were.

[25] Mr Boesak reminded the court that there were several requests for discovery by the plaintiff which were replied to through the supplementary affidavits of 25 April 2022 and 15 September 2022, over and above the discovery affidavit of 31 March 2022. Still disgruntled by the discovery made, the plaintiff launched the request in Notice "A" on 28

October 2022. Mr Boesak argued that, regarding the documents sought in respect of counsels' advice and memorandum, the defendants are not in possession of the notes taken in pursuance of the said advice and further that since the legal advice was provided, any related notes were destroyed or discarded. He also questioned the relevancy of the said notes.

[26] In the written heads of argument, Mr Boesak states that:

'A vigorous argument is made on behalf of the plaintiff that … which … is unnecessary since it does not make any sense whatsoever that apart from the pleadings exchanged in the matter before Mr. Justice Usiku and the order of 31 October 2019 that there could possibly have been an exchange of correspondence and the like with the instructed counsel who ultimately rendered advice.'

[27] Mr Boesak further argued that in respect of the plaintiff's complaint that the source of the advice is not disclosed and therefore constitutes hearsay evidence, the concerned affidavit deposed to by the second defendant on behalf of the defendants provides that legal submissions contained therein are made on the advice of the defendants' legal advisors (in plural), and, this should settle the plaintiff's concern.

[28] Mr Boesak further emphasised the principle that the request for discovery must be considered together with the pleadings already filed of record. He referred to paragraphs 9.2 to 9.4 of defendants' plea where it is record that:

'9.2 on or about 13 November 2019, the defendants engaged their legal practitioners of record for advice in respect of this court's order dated 31 October 2019;

9.3 on 5 December 2019, the defendants' legal practitioners engaged counsel to render advice on the matters in paragraph 9.1 hereof [the alleged non-compliance with the order of 31 October 2019, which according to the defendants, upon being served, were surprised by the grant of the order of 31 October 2019 as their erstwhile legal practitioner had not alerted them that they were barred from participating in the action which gave rise to the court order of 31 October 2019];

9.4 on or about 15 November 2019, and 05 December 2019, counsel considered the matters in paragraph 9.1 hereof and rendered advice thereof'

[29] In respect of the discovery sought regarding the correspondences exchanged between ICIJ's Africa and Middle East partnership Coordinator, Will Fitzgibbon and the defendants, Mr Boesak argued that the defendants were not in possession of any further documents other than what they already discovered.

[30] In respect of the request for discovery of a document referred to in Annexure TA1, "the document I sent you last month", Mr Boesak argued that such request was unnecessary as same was disclosed to the plaintiff already on 15 September 2020.

[31] Mr Boesak called for the dismissal of the plaintiff's application with costs subject to rule 32(11).

Analysis

[32] Rule 28 which regulates discovery provides 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.

…

(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, analoque 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.

(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.

(11) A party may at any time on Form 12 request a party who has made discovery in terms of this rule to make available any document, analogue or digital recording for inspection and the requesting party is entitled to make a copy of such document, analogue or digital recording at his or her own cost.

(12) If the party who has been requested to make available the document, analogue or digital recording referred to in subrule (11) fails or refuses to do so, the managing judge may make an order to compel that party to comply with the request.

(13) If the party ordered by the managing judge to comply in terms of subrule (12) fails to do so, the managing judge may dismiss that party’s claim or strike out his or her defence.

(14) On application by a party the managing judge may, at any case management conference or pre-trial conference or during the course of any proceeding, order on Form 13 the production by another party thereto under oath or affirmation of any document or tape recording in his or her possession or under his or her control relating to any matter in question in that proceeding and the managing judge may deal with the document or tape recording that is produced in any manner he or she considers proper.'

[33] At the outset I opt to address the plaintiff's complaint that his Notice "A" of 28 October 2022 was not replied to by the defendants. It is apparent from the record that, as per the parties' joint status report dated 15 August 2022, the plaintiff was ordered to file his application to compel discovery in terms of rule 28(8) on or before 30 August 2022, which the plaintiff failed to do. On 31 August 2022, the court, as per the joint status report dated 30 August 2022, ordered the plaintiff to file his rule 28(8) application on or before 23 September 2022. The plaintiff did not comply with this order, but filed his rule 28(8) application on 28 October 2022. The defendants took the position that the plaintiff was barred from filing the application to compel discovery on account of failure to comply with the said court orders as provided for in the parties' joint status report of 4 November 2022.

[34] What is clear from the record is that the parties were engaged in continuous discovery of documents and requests for further discovery. It appears that the defendants would discover, and from the documents discovered further discovery was sought by the plaintiff culminating in the final request for discovery in the form of Notice "A". In view of the ongoing back and forth discovery and requests for further discovery between the parties, and although ideally the defendants should have replied to Notice "A" or file a notice of irregular proceedings or seek to struck out the plaintiff's application to compel for not complying with court orders, I make no finding on the position that Notice "A" was only responded to in the defendants' opposing affidavit, and say no further.

[35] Usiku J in *Walvis Bay Salt Refiners (Pty) Ltd v Blaauw's Transport (Pty) Ltd*[2] said the following regarding requests for discovery:

'[11] I am of the opinion that a litigant who has been requested to discover documents under Rule 28(8) cannot acquit himself of that duty by merely saying: the requested documents "do not exist" or "are no longer in existence". To accept, as sufficient an affidavit to that effect, would be to open widely the door to evasion.

…

[12] A litigant requested to discover documents under Rule 28 (8) must clearly indicate:

(a) the documents he/she presently has in his/her possession, and,

(b) the documents he/she previously had in his/her possession, and if no longer in possession of such documents he/she must state in whose possession they are now, if known to him/her.

[13] In the event of a document that is lost, the recipient of a Rule 28(8) notice must show that a thorough and exhaustive search has been conducted as a result of which the document in question was not found and that it is not possible for the defendant to do anything further in compliance with the plaintiff's request.

…

[16] Rule 28(8) (read in the context of the whole of Rule 28), requires discovery of all documents "which may be relevant to any matter in question" in the action. The onus is on the plaintiff to satisfy the court that documents in question are relevant to the action. The test of discoverability, (where no privilege or like protection is claimed) is that of relevance. The oath of the party alleging non-relevance is *prima facie* conclusive, unless it is shown on one or other bases that the court ought to go behind that oath.[3]

[17] In *Santam v Segal* 2010 (2) SA 160 (N) at 165 D-G, Patel, J made the following lapidary remarks on the issue of relevance:

'(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 Finan-ciere et Commerciale Du Pacifique v Peruvian Guano Company*

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[2] *Walvis Bay Salt Refiners (Pty) Ltd v Blaauw's Transport (Pty) Ltd* (I 36682014) [2019] NAHCMD 23 (15 February 2019) paras 11-13 and 16-17.

[3] *Continental Ore v Highveld Steel & Vanadium Ltd* 1971 (4) SA 589 at 598 E.

(1882) 11 QBD 55 at 63; and restated in *Thorpe v Chief Constable of Greater Manchester Police* [1989] I 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."

See also *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

Accordingly, the test is wider than direct relevance to the pleaded issues.' (Own emphasis)

[36] The above passage lays bare the principle that discovery is a critical tool to uncover the truth or at the very least to advance a party's own case or to poke holes in the adversary's case. It is a tool whose purpose is so crucial to get to the truth of the matter that it is equated to that of cross-examination. The relevance of the requested documents, on the other hand, include all documents and materials relevant to the matter, irrespective whether such documents benefit the requested or the requesting party.

[37] Spilg J in *Makate v Vodacom (Pty) Ltd*,[4] in the South African Gauteng High Court remarked as follows on discovery:

'[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.

[4] *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) paras 16-19.

[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 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).

…

[19] The relevancy of a document may also involve determining whether the ambit of the issues in dispute (including the legitimate testing of credibility on a non-collateral issue, or the existence of other pertinent documents) is misconceived by the respondent. In such a case the existence of the document is already established and the enquiry is more concerned with a legal determination of whether the extent of the issues in dispute has been properly comprehended. The consequence is that the respondent's say-so under oath does not necessarily play as dominant a role. (However, compare *Marais v Lombard* 1958 (4) SA 224 (E) at 227A which holds that the respondent's affidavit remains *prima facie* conclusive. Marais was mentioned by Joffe J in *Swissborough* at 317E – F to support the general proposition regarding the conclusive nature of a discovery affidavit.) In any event, it is open for the court to scrutinise the document in order to determine relevance and impose suitable safeguards against unnecessary public disclosure where issues of confidentiality arise.'

[38] This court is in agreement with the above remarks as indicative of our legal position.

[39] Does the mere say so of the defendants, albeit under oath, that their counsels' consultation notes including emails and texts are irrelevant to the matter have merit? This position can, in my view, be disposed of without breaking a sweat. By their plea in the main action where they are alleged to have acted in contempt of court for failure to comply with a court order, the defendants state that they sought and obtained legal advice, on the basis of which they acted. The defendants further waived their right to claim legal professional privilege regarding the said legal advice.

[40] I, therefore, find that where reliance is placed on a legal advice for an action, the exchanges, inclusive of the notes, emails and any other documents between the clients (the defendants), the instructing and the instructed legal practitioners are, unless proven otherwise, relevant to the determination of the matter. After all, it is the consideration of

such documents that culminates into a legal advice. Put differently, it is such documents that informs of the legal advice. I find that legal advice cannot be made in a vacuum and without documentary foundation lest it becomes detached from the founding facts and be rendered useless to say the least.

[41] In *casu*, although the relevance of the notes was raised by the defendants, there was no insistency of this issue by the defendants. To the contrary, Mr Boesak argued that the defendants are not in possession of any further documents other than the pleadings filed and the documents disclosed already. As stated hereinabove the defendants contended that the second defendant was advised that since the relevant legal advice was provided, any notes related thereto were destroyed and/or descarded. On a question by the court as to who provided the said legal advice about the documents being destroyed and/or discarded to the defendants, Mr Boesak responded that it is only Mr Charles Visser as he is the legal practitioner of the defendants of record. This, he argued, is premised on the fact that the second defendant deposed in the opposing affidavit that where he makes legal submissions, he does so on the advice of the legal advisor of the defendants. I shall return to this subject as the judgment unfolds.

[42] The responses by the defendants fall short of the requirements of rule 28(8). The defendants' responses to the request for discovery are, in my view, half-baked. The defendants responded that save for pleadings filed and the documents already disclosed they are not in possession of any consultation notes or any further documents.

[43] The responses by the defendants do not comply with rule 28(8)(b)(ii) which requires that if the requested documents are not in possession of the requested party then he or she must so state on oath and further state the whereabouts of such documents, if known to him or her. The defendants' response contains no averment of the whereabouts of the requested documents. Guided by *Walvis Bay Salt Refiners (supra)*, where the requested documents have been lost, the requested party must show that after a thorough search, the requested documents could not be found. No

attempt is made by the defendants in the affidavit of any effort made to retrieve or locate the requested documents which are said not to be in their possession. On this basis alone, the application of the plaintiff could succeed.

[44] The response by the defendants that the requested notes were destroyed and/or discarded is vague. I find as much that it is either a document is destroyed or it is discarded, which are two distinct processes. Where there is a specific request for discovery, a specific answer must be provided with sufficient clarity on the status of the requested document. The response by the defendants regarding the requested notes is insufficient to the extent that it is incapable of warding off the application to compel the requested discovery.

[45] Returning to the argument that, where the second defendant makes legal submission in the opposing affidavit, he does so on the advice of Mr Visser, I find this argument by Mr Boesak to be ingenious. Ingenious as the argument may be, it is however not supported by the facts of the matter. Mr Boesak presented able arguments and nothing should be subtracted from the persuasive nature in which he presented the defendants' case. The facts, however, provides that the second defendant in the opposing affidavit stated that:

> 'Where legal submissions are made, they are made on behalf of the Defendants, on the advice of the Defendants' legal advisors,'

[46] Legal advisors connotes to plurality. It is apparent from the record that other than retaining Mr Visser as their legal practitioners of record, the defendants obtained the legal advice addressed hereinabove from legal practitioners, Mr Corbett SC and Mr Muhongo. In the matter before court Mr Boesak is the other legal practitioner retained by the defendants. I, therefore, find that it cannot be said that the reference to legal advisors on whose advice the defendants make legal submissions is Mr Visser. There is further no confirmatory affidavit from any legal practitioner to confirm the argument advanced by Mr Boesak. I, thus, find that the defendants failed to establish that the legal advisors referred to in the opposing affidavit is Mr Visser or Mr Visser alone.

[47] In view of my finding above, it remains that the legal advisors on whose advice the defendants rely for legal submissions have no face and their legal advice constitutes hearsay evidence. It follows further as a matter of consequence that the advice that the defendants received from the legal advisors that any notes related to the legal advice were destroyed and/or discarded constitutes hearsay evidence.

[48] Damaseb AJA sitting in the Court of Appeal of the Kingdom of Lesotho in the matter of *Mokhosi & Others v Mr. Justice Charles Hungwe & Others*[5] remarked as follows at paragraph 55 regarding hearsay:

> 'As we have said before, admissibility of evidence is a question of law and not of judicial discretion. Evidence is admissible either under the rules of the common law or under statute. Hearsay evidence is no exception. Once an item of evidence constitutes hearsay, it must either be sanctioned by statute or the common law to be admissible. If it does not, it remains inadmissible as a matter of law and stands to be rejected by the court even if not specifically objected to by the opposing party.'

[49] I endorse the above passage and find that it has equal application to our jurisdiction. It is thus inevitable that the advice received by the defendants on the status of the notes constitutes inadmissible hearsay not sanctioned by statute or common law. It is plainly inadmissible hearsay evidence. The unavoidable result of this finding is that the court is not informed of the status of the requested notes.

[50] In respect of the requested correspondence regarding the ICIJ's Africa and Middle East partnership coordinator and the document referred to in annexure TA1, the defendants responded that they are not in possession of any further documents apart from the pleadings filed and the documents disclosed already. Similarly, the defendants do not state the whereabouts of the requested documents if such documents are not in their possession.

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[5] *Mokhosi & Others v Mr. Justice Charles Hungwe & Others* (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019) para 55.

[51] During arguments the court inquired from Mr Boesak that the record suggests that the defendants were once in possession of the document referred to in annexure TA 1, but when requested, the defendants are said not to be in possession of the said document. Mr Boesak submitted that he was just instructed that the said document was discovered to the plaintiff on 15 September 2022. This submission did not sit kindly with Mr Heathcote, who argued in reply that the document was not provided on 15 September 2022, hence the plaintiff requested for same on 28 October 2022.

[52] No proof was provided to court that the plaintiff on 15 September 2022 discovered the requested document which was an annexure to TA 1. Furthermore, the response by the defendants to the request for the said document leaves a lot to be desired. The defendants responded that they are not in possession of the requested document when they could easily have stated that the requested document was already discovered on 15 September 2022.

[53] A factual dispute arises between the parties on this subject and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[6] is referred to in order to resolve the impasse. I find the factual dispute that the requested document was discovered on 15 September 2022 to be far-fetched. It is settled law that factual averments in dispute raised must be real, genuine or *bona fide,* emanating from established facts. After considering the above-mentioned dispute, and arguments made, I find that it is highly probable that the requested document was not discovered.

[54] It is discouraged to go behind the oath with ease. This is premised on the basis that the oath taken by the deponents to discovery affidavits must be taken to bind on their conscience and, therefore, genuinely made with all its consequential effects in mind. Where there is *mala fides* on the part of the deponent that may grant the court ease access to go beyond the oath. Mala fides is not the only yardstick to go behind the oath, as there are other circumstances which are bound to be rare for reasons stated above, otherwise the oath will lose its texture.

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[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5.

[55] There are, however, instances where the requested discovery is not fully or appropriately made.

[56] Van Heerden J in the South African matter of *Rellams (Pty) Ltd v James Brown & Hamer Ltd*[7] said the following on discovery:

'It is, generally speaking, no doubt true that, whilst the Court should not and would not go behind a party's affidavit that the contents of a document are not relevant, such affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination and consideration of the recognised sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit. Herbstein and Van Winsen (*supra* at 410) and *Lenz Township Co (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T).'

[57] I am not persuaded that the plaintiff managed to establish a case to go behind the oath, but he established that there was insufficient discovery made by the defendants. Where the defendants are no longer in possession of certain of the specified documents in Notice "A", they should state so in unambiguous terms and in compliance with rule 28 and further state the whereabouts of such documents. There further appears to be no justification why the defendants opted to limit the period for the notes requested to 3 to 5 December 2019 outside the ambit of Notice "A". The defendants should further only state on oath after having conducted a diligent search for the requested documents.

Conclusion

[58] Having considered the findings and conclusions reached hereinabove, I find that the plaintiff established that he is entitled to the relief set out in the application to

[7] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) 560. See also: *Waltraut Fritzsche t/a Reit Safari v Telecom Namibia Ltd* 2000 NR 201 (HC) at 203.

compel. The application succeeds and the defendants shall, therefore, be compelled to comply with the relief mentioned below.

Costs

[59] It is well settled in our law that costs follow the result. I have not been persuaded to depart from the said principle. The plaintiff shall, therefore, be awarded costs.

[60] Mr Heathcote argued that costs to be awarded should not be limited to the threshold provided for in rule 32(11). I disagree, this being an interlocutory application in nature, is subject to rule 32(11) unless exceptional circumstances exist. I am not persuaded that this matter presents such exceptional circumstances so as not to be regulated by the threshold provided by the rule maker in rule 32(11). In view of the aforesaid, and in the exercise of my discretion, I shall award costs to the plaintiff against the defendants, subject to rule 32(11).

Order

[61] In the result, the following order to meet the justice of this matter:

1. The defendants are compelled to discover the documents, analogues or digital recording requested by the plaintiff in the plaintiff's notice in terms of rule 28(8)*(a)* dated 28 October 2022 (Notice A) thereto, and deliver same to the plaintiff within 15 days from date of this order.
2. The defendants must, in respect of requested documents that are not in their possession, state on oath or affirmation within 10 days of the order of this court that such documents, analogues or digital recording are not in their possession, in which case they must state their whereabouts, if known to them.

3. The plaintiff is granted leave to approach this court on the same papers, duly amplified if necessary, to apply for the striking out of the defendants' defence to the main proceedings should the defendants fail to comply with order 1 above.
4. The defendants must, jointly and severally, the one paying the other to be absolved, pay the costs of the plaintiff, including costs of one instructing and two instructed legal practitioners, subject to rule 32(11).
5. Parties must file a joint status report on or before 17 July 2023.
6. The matter is postponed to 20 July 2023 at 08h30 for status hearing.

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O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF:	R HEATHCOTE SC (with C E Van der Westhuizen) Instructed by Etzold-Duvenhage, Windhoek
DEFENDANTS:	A W BOESAK Instructed by ENSafrica Namibia, Windhoek