

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b>  Zico Investment Close Corporation  and  Messrs Elize Investments (Proprietary Limited) Messrs Elize Investments One (Proprietary Limited) Ondumbu Properties (Proprietary) Limited Municipal Council for the Municipality Swakopmund Pieter Willem Jacobus Reyneke IHS Fund Two (Namibia GP) (Proprietary) Limited	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2021/02841 <b>Division of Court:</b> Main Division <b>Heard on:</b> 19 September 2023
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<b>Heard before:</b> Honourable Mr Justice Usiku	<b>Delivered on:</b> 10 October 2023
<b>Neutral citation:</b> <i>Zico Investment Close Corporation v Messrs Elize Investments (Proprietary Limited)</i> (HC-MD-CIV-ACT-OTH-2021/02841) [2023] NAHCMD 635 (10 October 2023)	
<b>Order:</b>	
1. The plaintiff's application for specific discovery is dismissed.	

2. The plaintiff is ordered to pay the costs of the third defendant, such costs include costs of one instructing and one instructed counsel.
3. The matter is postponed to 8 November 2023 at 15h15 for a status hearing.
4. The parties shall file a joint status report on or before 1 November 2023.

**Reasons for order:**

USIKU J:

Introduction

[1] In this matter, the plaintiff applied for an order compelling the third defendant to make specific discovery of its annual financial statements and bank statements for the year 2020.

[2] The third defendant opposes the application, on the basis that the production of its financial and bank statements are irrelevant and that such disclosure may cause prejudice to it.

Background

[3] On 22 November 2018, the third defendant sold its 100 percent of the issued share in the second defendant, to the sixth defendant for N\$40 321 000. On 3 July 2019, the plaintiff acquired 20 percent shareholding in the second defendant. On 14 October 2020, an addendum to the sale of shares agreement ('the first addendum') was executed. The effect of the first addendum was to introduce the plaintiff as a 20 percent shareholder in the second defendant and as a seller of the 20 percent of those shares to the sixth defendant. Thereafter, on 2 November 2020, another addendum to the sale of shares agreement, ('the second addendum') was executed. The effect of the second addendum was to:

- (a) reduce the purchase price of the shares from N\$40 321 000 to N\$13 553 875; and
- (b) make provision that the purchase price was to be paid by the sixth defendant directly to Sanlam, in settlement of a loan liability of N\$42 768 735 which the second defendant owed to Sanlam.

[4] On 19 November 2020, the sixth defendant allegedly made payment of a total amount of N\$42 768 735 to Sanlam in settlement of the loan liability.

[5] On 26 July 2021, the plaintiff instituted action against the third and fifth defendants, ('the defendants') claiming that they have misappropriated the proceeds of sale of its 20 percent shareholding in the second defendant, and that they be ordered to pay to the plaintiff an amount of N\$8 064 200 representing the value of the 20 percent of the shareholding.

[6] The defendants defend the action.

#### Application to compel discovery

[7] In its application to compel specific discovery, the plaintiff states that the financial and bank statements of the third defendant are relevant to the determination of the dispute in the present matter. The plaintiff submits that it will suffer trial prejudice if those documents are not ordered to be discovered by the third defendant. The plaintiff further contends that the financial and bank statements of the third defendant for the year 2020 shall shed light on the actual monies received for the sale of the 100 percent shares in the second defendant. The plaintiff argues that it has not received any money for the sale of its portion of the shares and that the significant decrease in the purchase price of the shares was never explained.

[8] On the other hand, the defendants state that the second defendant had incurred a loan liability with Sanlam in the amount of N\$42 768 735. In the second addendum to the sale of shares agreement, the parties, including the plaintiff, agreed that the full purchase price in respect of the shares, shall be paid directly to Sanlam in settlement of the loan amount. The defendants contend that the full purchase price was paid to Sanlam, in settlement of the loan as per the agreement.

[9] The defendants also argue that the idea that anyone misappropriated any funds, disregards the fact that the second defendant has incurred a loan liability which had to be repaid. The defendant further contends that, in terms of the agreement, no payments would be made to the third defendant. The defendants therefore, argue that the financial and bank statements of the third defendant are wholly irrelevant to the present action, as no monies were paid to it. The defendants further argue that the financial and bank statements contain confidential information that has a proprietary value and that their disclosure may be harmful to the business of the third defendant.

## Analysis

[10] In terms of rule 28(8), a party who is not satisfied with the discovery made, bears the *onus* of proving on the balance of probabilities that the required documents exist, are in possession of the other party and are relevant. The test as to whether or not a document should be discovered, is one of the relevance, having regard to the issues defined in the pleadings.<sup>1</sup>

[11] The main issue to be decided now is whether the plaintiff has made out a case to compel the third defendant to make specific discovery of its financial and bank statements for the year 2020.

[12] On the pleadings, the core of the plaintiff's action appears to me to be that the fifth defendant, with intention to deceive the plaintiff, misrepresented facts and failed to disclose correct and material facts, and that the misrepresentation and the failure to disclose correct facts induced the plaintiff to conclude the two addendums to the sale of shares agreement, and as a consequence, the plaintiff suffered damages in the amount of N\$8 064 200.

[13] It is common cause that, in terms of the sale of shares agreement, read with the second addendum, no payment was to be received by any of the sellers of the shares. In other orders, in terms of the agreement, the plaintiff had no expectation of receiving any payment of money, in the form of proceeds of the sale in respect of its 20 percent shareholding. The full purchase price was to be paid by buyer to Sanlam.

[14] It is also common cause that the action of the plaintiff is based on misrepresentation of facts and failure to disclose material facts, which induced the plaintiff to conclude the two addendums to the sale of shares agreement.

[15] In its application to compel specific discovery, the plaintiff asserts that it believes that the financial and bank statements for the year 2020 shall shed light on the actual monies received for the sale of the 100 percent shares in the second defendant. The plaintiff has not disclosed the basis of such belief. Neither has the plaintiff established a link between the alleged misrepresentation and failure to disclose material facts, on the one hand and the financial and bank statements on the other hand.

[16] Having had regard to the pleadings and the evidence adduced in the present application,

<sup>1</sup> *Rellams (Pty) Ltd v Brown* 1983(1) SA 556 at 564A.

I am not persuaded that the financial and bank statements sought to be discovered are relevant to any matter in question in the action or contain information that is proportionate to the needs of the case. I agree with the submission by counsel for the defendants that on the pleadings and other papers filed of record, the financial and bank statements of the third defendant are irrelevant to the present action. Accordingly, the plaintiff's application for specific discovery falls to be dismissed.

[17] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs follow the event must find application. The third defendant asks for costs not limited by the provisions of rule 32(11). I am not convinced that the third defendant is entitled to costs not limited pursuant to the provisions of rule 32(11). I shall therefore, not grant such request.

[18] In the result I make the following order:

1. The plaintiff's application for specific discovery is dismissed.
2. The plaintiff is ordered to pay the costs of the third defendant, such costs include costs of one instructing and one instructed counsel.
3. The matter is postponed to 8 November 2023 at 15h15 for a status hearing.
4. The parties shall file a joint status report on or before 1 November 2023.

<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Third Defendant:</b>
J Diedericks (with him A Jantjies) Instructed by Afrika Jantjies And Associates, Windhoek	L Lochner (with him D Lubbe) Instructed by Lubbe & Saaiman Incorporated, Windhoek