

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING**

Case No: HC-MD-CIV-MOT-GEN-2022/00547

In the matter between:

COLLEXIA PAYMENTS (PTY) LTD

APPLICANT

and

BANK OF NAMIBIA

1ST RESPONDENT

JOHANNES !GAWAXAB

2ND RESPONDENT

EBSON UANGUTA

3RD RESPONDENT

LEONIE DUNN

4TH RESPONDENT

ROMEO NEL

5TH RESPONDENT

TRUSTCO BANK NAMIBIA LIMITED

6TH RESPONDENT

PAYMENTS ASSOCIATION OF NAMIBIA

7TH RESPONDENT

Neutral citation: *Collexia Payments (Pty) Ltd v Bank of Namibia* (HC-MD-CIV-MOT-GEN-2022/00547) [2024] NAHCMD 40 (9 February 2024)

Coram: OOSTHUIZEN J

Heard: 5 October 2023

Delivered: 9 February 2024

ORDER

IT IS ORDERED THAT:

1. The Applicant is refused leave to cross-examine the second to the fifth Respondents and their legal practitioner, Mr Kasper.
2. The Applicant is likewise refused discovery of the documents it wishes to cross-examine the second to the fifth Respondents and Mr Kasper on.
3. The Applicant shall pay the costs of the first to the fifth Respondents, not limited by Rule 32(11), such costs to include the costs of one instructing and two instructed counsel.
4. The matter is postponed to 11 March 2024 at 15h00 for a case management/status hearing and to establish hearing dates for the Opposed Motion if it is to proceed.

REASONS

OOSTHUIZEN J:

Summary of proceedings

[1] On 18 November 2022, the court heard argument on an alleged urgent application by Collexia Payments (Pty) Ltd against the Bank of Namibia and six other respondents, four of them being Board members of the first respondent.

[2] The aforementioned application was for a rule *nisi* to be issued against the first to the fifth respondents (the Bank of Namibia respondents) why an order should not

be confirmed that they be found in constructive contempt of court, alternatively in direct contempt of court further alternatively both constructive and direct contempt of the court order made on 3 November 2022 under case number HC-MD-CIV-MOT-REV-2022/00457 by Rakow J; why the first respondent's liquidation application of sixth respondent of 2 November 2022 should not be set aside and nullified and why the order of Rakow J, should not be suspended by first respondent's notice of appeal against it and also dated on 3 November 2022.

[3] On 30 November 2022, I struck the 'urgent' applicant from the roll.

[4] On 22 March 2023 Collexia Payments (Pty) Ltd (the applicant) filed a status report which reads as follows:

1. On 30 November 2022 the above Honourable Court struck the Applicant's urgent application from the roll, due to a lack of urgency.

2. The Applicant is desirous to proceed with the application against the Respondents, in the normal course.

3. In light of the aforesaid, the Applicant requests that the Honourable Court schedules the above matter for a status hearing, on such a date as the Honourable Court may deem fit, to determine:

3.1 The required further conduct by the parties in this matter; and

3.2 A hearing date for the opposed application.'

[5] On 3 April 2023 and after hearing counsel for the applicant, the first to fifth respondents and the sixth respondent, I made the following orders:

1. The case is provisionally set down for hearing as an Opposed Motion on 05 /10/2023 (Reason: Documents Additional Filing).

2. Applicants shall file supplementary founding affidavits by 28/04/2023.

3. Respondents shall file supplementary answering affidavits by 31/05/2023.
4. Applicant shall file supplementary replying affidavits by 16 June 2023.
5. The parties shall file their Rule 71 joint case management report by 22/06/2023.
6. The case is postponed to 26/06/2023 at 16:00 for Case Management Conference hearing (Reason: Documents Additional Filing).'

[6] On 8 May 2023 the court made the following order after hearing counsel for applicant and the first five respondents:

- '1. The case is set down for hearing as an Opposed Motion on 5 October 2023.
2. Applicant has elected not to file supplementary founding affidavits by 28 April 2023.
3. 6th Respondent has elected not to be joined as co/second applicant.
4. First to fifth Respondents shall file supplementary answering affidavits by 31 May 2023.
5. Applicant shall file supplementary replying affidavits by 16 June 2023.
6. The parties shall file their Rule 71 joint case management report by 22 June 2023.
7. The case is postponed to 26 June 2023 at 16:00 for Case Management Conference hearing (Reason: Agreement By Parties).'

[7] On Saturday, 24 June 2023 in the absence of the parties and from chambers, the managing judge noted that no case management report was filed on 22 June 2023 and postponed the case to 14 August 2023 for case management conference and ordered their report to be filed on 28 July 2023.

[8] On 10 August 2023, the applicant filed the following status report:

'1. The above matter was postponed to 14 August 2023 for a case management conference. The parties are yet to file a case management report.

2. The Applicant is acutely aware of the seriousness of the allegations made in terms of this application with regards to the conduct of the Governor of the Central Bank and other senior representatives.

3. The Applicant would therefore not want to rush into these proceedings, but rather adopt a cautious approach by familiarizing itself with the intricacies and sensitivities of the events which unfolded in the concurrent matters which may have influenced the approach adopted in this matter.

4. Given the extent of the complexities of other litigation between Trustco and Bank of Namibia, as well as the appeal lodged by the First Respondent against the Order of Justice Rakow, dated 03 November 2023, the Applicant requests a postponement of 04 (four) weeks to consider its position with regards to this application.'

[9] On 14 August 2023, I issued the following order out of chambers and in the absence of the parties:

'1. The case is postponed to 11/09/2023 at 15:00 for Case Management Conference hearing (Reasons: Parties to file case management conference report in terms of Rule 71 by 7 September 2023).'

[10] On 8 September 2023, the applicant and the Bank of Namibia respondents filed a joint status report to the following effect:

'1. On 14 August 2023, the Honourable Court ordered the parties to file a case management report on or before 7 September 2023.

2. The Applicant prepared a proposed joint case management report, but was only able to provide the proposed report to the First to Fifth Respondents on 05 September 2023, considering that the Applicant has both junior and senior instructed counsel on the matter.

3. As at the date hereof, the First to Fifth Respondents are still engaged with the report provided by the Applicant as it too has junior and senior instructed counsel on the matter.

The First to Fifth Respondents envisage to be in a position to revert to the Applicant on Monday, 11 September 2023.

4. The allow sufficient time for final proposals and amendments, the parties request the Honourable Court to postpone the matter to 18 September 2023, should the Honourable Court deem it fit to grant such an Order.'

[11] On 11 September 2023, I issued another order from chambers in the absence of the parties after having considered their joint status report and postponed the intended case management conference to 18 September 2023 and ordered the joint case management report to be filed on 15 September 2023.

[12] On 15 September 2023, the applicant filed the following one sided status report. Due to the current request (application) by the applicant I find it necessary to reproduce applicant's whole one sided status report —

'The applicant herewith files the following status report reporting on the current status of the matter and sets forth the proposed further conduct of the matter. Due to time constraints, this status report was not provided to the Respondents for comment and input, and therefore does not contain or reflect the view and/or opinion of the Respondents:

1. On 11 September 2023 the Honourable Court directed that the parties are to file their joint case management report on 15 September 2023.

2. The Respondents indicated that they intend to return the proposed joint case management report draft, as amended, to the Applicant on 18 September 2023. Unfortunately, the Respondents are presumably still engaged therewith, and the Applicant is not in possession of the amended draft as of yet.

3. Furthermore, the Applicant envisages further amendments it intends to bring to the joint case management report, which the Respondents in turn would require an additional opportunity to consider and comment on.

4. The applicant therefore does not foresee the parties filing the joint case management report as ordered or on or before 18 September 2023, which is the next scheduled hearing date.

5. The Applicant believes that it is likely that extended duration required for the finalization of the case management report is attributable to the Applicant's expressed intention in the case management report to seek leave for the cross-examination of the deponents to the Respondents' answering affidavits. In light of this, the Applicant considers it improbable that the hearing will proceed as initially scheduled on 05 October 2023.

6. Accordingly the Applicant proposes as follows:

6.1 That the hearing date of 05 October 2023 be vacated;

6.2 The matter be postponed to 30 October 2023 for a status hearing.

7. Further argument will be addressed to the Honourable Court at the case management hearing on 18 September 2023.'

[13] On Friday, 29 September 2023, it was conveyed to the managing judge by way of the parties' Joint Case Management Report (which was repeatedly due for filing since 22 June 2023) that applicant intends to seek leave to refer the matter for hearing of oral evidence in order to endeavor by way of cross-examination of the Bank of Namibia respondents to establish an intention to defeat the course of justice; to prove *mala fides* on the part of the Bank of Namibia respondents; and to prove deliberate disobedience of the court order of Rakow, J of 3 November 2022.

[14] On 2 October 2023 and after hearing the parties, the court by agreement ordered that oral submissions on whether cross-examination and oral evidence should be allowed, will be heard on 5 October 2023 (instead of the Opposed Motion) and that the parties should file their arguments before the hearing.

[15] The Bank of Namibia respondent's heads of argument was filed at 10h35 on 4 October 2023.

[16] The applicant's heads of arguments was filed at 14h10 on 4 October 2023.

[17] The applicant seeks leave to cross-examine the second to fifth respondents and the lawyer of first to fifth respondents on the issue of whether the liquidation application filed on 2 November 2022 was filed with the *mala fide* intention of frustrating the court order of Rakow J which was handed down on 3 November 2022.

[18] The applicant relies on rule 67 of the Rules of Court and argues that its application for the first to the fifth respondents to be found in constructive and/or direct contempt of court (and the setting aside of the first respondents liquidation application against the sixth respondent) cannot properly be decided on the affidavits in view thereof that applicant has to prove intent and *mala fides* which is unlikely without cross-examination of the deponents as to their subjective states of mind when their decisions were taken and the liquidation application filed. The applicant therefore argues that rule 67 empowers the court hearing the application with a discretion to allow oral evidence and cross-examination on limited issues with a view of resolving any dispute of fact.

[19] I agree with counsel for the applicant that the court has such a discretion and more so where the High Court Rules prescribe motion proceedings for a contempt proceeding (Rule 74).

[20] The applicant did not regard it necessary to file supplementary founding affidavits by 28 April 2023 (wherein it could supplement its case as it was on 30 November 2022 and initiated the issue of cross-examination/oral evidence of the Bank of Namibia respondents).

[21] Neither did the applicant introduce the issue of cross-examination/oral evidence in its supplementary replying affidavits of 16 June 2023.

[22] We must be mindful of the fact that it is the applicant who elected to continue with the ('urgent') application which was struck from the roll on 30 November 2022, in the normal course (see para [4] supra).

[23] The overriding objectives of the Rules of the High Court of Namibia is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and

cost effectively as far as practicable by *inter alia* ensuring that cases are dealt with expeditiously and fairly, and recognising that judicial time and resources are limited (Rule 1 (3)).

[24] At an early stage (and on request of applicant) the court has allocated an opposed motion hearing date being 5 October 2023 (see paras [4] to [6] supra).

[25] The court has also granted leave to the parties to supplement their motion papers. The applicant specifically was accorded the opportunity to supplement its earlier founding and replying affidavits of November 2022 (paras [5] and [6] supra).

[26] It was only on 15 September 2023 that applicant revealed its intention to seek leave for the cross-examination of the Bank of Namibia respondents (para [12] supra).

[27] It is common cause between the parties that the law in relation to the *onus* on the subjective elements of constructive and/or direct contempt of court was well settled in Namibia by November 2022.

[28] It cannot be disputed by the applicant that it was accorded the opportunity to supplement its papers and to timeously raise the issue of oral evidence/cross-examination which it failed to do well knowing that the Opposed Motion was set down for hearing on 5 October 2023 and the joint case management report was due firstly on 22 June 2023, then 28 July 2023, then 7 September 2023 and lastly on 15 September 2023.

[29] The applicant has simply squandered its opportunities and missed the applicable law timeously (alternatively has kept its request in abeyance in order to surprise, which I doubt). In the process, however, the applicant has seriously violated the overriding objectives of the court rules (See para [23] supra). In fairness to present counsel for the applicant, it needs to be mentioned that they are not the same as counsel who initiated the application.

[30] I therefore decline to exercise my discretion to allow oral evidence and cross-examination as requested by the applicant.

[31] Counsel on both sides are *ad idem* that the costs are not to be capped in terms of Rule 32(11). I concur.

[32] In the premises, the following orders are made:

1. The Applicant is refused leave to cross-examine the second to the fifth Respondents and their legal practitioner, Mr Kasper.
2. The Applicant is likewise refused discovery of the documents it wishes to cross-examine the second to the fifth Respondents and Mr Kasper on.
3. The Applicant shall pay the costs of the first to the fifth Respondents, not limited by Rule 32(11), such costs to include the costs of one instructing and two instructed counsel.
4. The matter is postponed to 11 March 2024 at 15h00 for a case management/status hearing and to establish hearing dates for the Opposed Motion if it is to proceed.

G H OOSTHUIZEN
JUDGE

APPEARANCE

APPLICANT: R. Heathcote (SC), assisted by R. Lewies
of Cronjé Inc, Windhoek

1ST TO 5TH RESPONDENTS: T. Motau (SC), assisted by T. Muhongo
of Murorua Kurtz Kasper Incorporated,
Windhoek