REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

<table>
<tr><td rowspan="3">Case Title:

Else Tsuxus Plaintiff/Applicant

and

Ministry Of Health And Social Services 1st Defendant/Respondent
Government of the Republic of Namibia 2nd Defendant/Respondent</td><td>Case No:
HC-MD-CIV-ACT-DEL-2023/01253</td></tr>
<tr><td>Division of Court:
Main Division</td></tr>
<tr><td>Heard on:
14 August 2024</td></tr>
<tr><td>Heard before:
Honourable Lady Justice Rakow</td><td>Delivered on:
18 October 2024</td></tr>
<tr><td colspan="2">Neutral citation: Tsuxus v Ministry of Health and Social Services (HC-MD-CIV-ACT-DEL-2023/01253) [2024] NAHCMD 615 (18 October 2024)</td></tr>
<tr><td colspan="2">Order:</td></tr>
<tr><td colspan="2">1. The first and second defendants are directed, within five (5) days of the court order, to provide the plaintiff with the documents requested by way of the notice in terms of rule 28(8) dated 4 October 2023. If they cannot do so, they are ordered to properly answer on the request by filing a properly worded discovery affidavit.

2. Costs of this application is awarded to the plaintiff but capped in terms of rule 32(11).</td></tr>
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3. The matter is postponed to 5 November 2024 at 15h30 for a status hearing. The parties to file a joint status report on or before 1 November 2024.

Reasons for order:

RAKOW J:

Introduction

[1] The plaintiff launched an action seeking judgment in her favour against the defendants in the following terms:

a) Directing the first respondent and the second respondent to, within five (5) days of the Order of the Honourable Court, to provide the applicant with the documents requested by way of the notice in terms of rule 28(8) dated 4 October 2023.
b) That in the event of the Respondents failing to comply with the order in terms of paragraph 1 above, that the Applicant shall be authorised to apply to the above Honourable Court on the same papers, amplified is so far as may be necessary, on a date to be determined by the Honourable Court that the Respondents' defence against the Applicant's claims in the main action against the respondents be dismissed with costs and that judgment be granted against the Respondents.
c) Costs of suit beyond the cap set in terms of Rule 32(11) of the High Court Rules against the first respondent and second respondent and that such costs to be paid jointly and severally by the first and/or second respondent, the one paying the other to be absolved.

Background

[2] On or about 22 February 2016, the plaintiff attended to the Katutura Hospital complaining of among others, abdominal pain and excessive menstrual bleeding as a result of Myoma. She was subsequently admitted for hospitalization in Ward 3A of the said hospital. She was advised that she was admitted among others, for a surgical operation which was to be performed on 24 February 2016 by the medical personnel of the said hospital.

[3] It is the complaint of the plaintiff that the medical staff of the said hospital of the first defendant that attended to the plaintiff failed to properly and promptly treat the plaintiff. Consequent to the surgical operation performed on 24 February 2016, the plaintiff remained

admitted in the hospital and further complained of even more severe and excruciating abdominal pain, cramps and bloated stomach. A day after the surgical operation was performed by the employees of the first defendant at the hospital, the plaintiff was advised that the surgical operation performed on the plaintiff had gone wrong as one of the apparatus or needles used by the first defendant's medical staff during the operation had broken off leaving a piece of needle lodged in the plaintiff's uterus.

The application before court

[4] The application before court is one to compel the discovery of documents. This application is opposed by the defendants. On 9 August 2023, the defendants filed a document titled the plaintiff's medical records running into 26 pages. It is however the applicant's case that the documents filed by the defendants failed to address the key questions arising from the pleadings in the case. The defendant's special plea was filed on 24 June 2023. With their special plea they admitted that the plaintiff was indeed treated at the Katutura hospital during that period.

[5] The plaintiff therefore, requires the medical doctors' names and qualifications as well as those of the nursing staff who were present during the operation. The defendants refuse to provide their notes and or diaries as well as the exact individuals' names who were there during the operation and treatment of the plaintiff. These individuals are important because they arrived at key decisions and conclusions which stand to be determined by the court in this matter. The plaintiff further wants to dispute the authority of such persons but cannot do so as the defendants refuse to provide the names and qualifications and job descriptions of the staff members whose actions are critical to the court.

[6] The defendants admitted in their plea that they treated the plaintiff and that there was a needle deposited into the plaintiff's uterus. The plaintiff alleged that they only became aware of the small needle deposited into the plaintiff's uterus after the X-Ray imaging. The Executive Director of the first defendant alleged that the needle that was used is standard equipment used by the hospital. It can therefore not be understood why, if it is standard equipment, why the defendants refused to provide the description on such a widely utilized standardized needle.

Arguments by the parties

[7] For the plaintiff it is further argued that the opposing affidavit of Taimi Amaambo is

defective in that there is nowhere an averment that the deponent has personal knowledge of the contents of the affidavit. The deponent also does not inform the court to whether the information alleged therein arises as a direct personal involvement in the issues contained therein. There is also no indication that the information contained therein is gleaned from the records kept directly by the deponent in his/her office or for which the deponent has direct control and supervision. The deponent further does not indicate that the contents of the affidavit is true and correct, nor does the deponent allege that he/she got the details from third parties and if so, who and what exactly they told the deponent. The deponent does not state that there was a diligent search in the record of the defendants or the hospital to enable the deponent to conclude that the documents sought are not in the possession of the defendants or what happened to those documents.

[8] The defendants either refuse or are vague and evasive in their reply. Their responses can further mean a number of things, like that the documents are not in their possession, or that they at some stage did exist or that they were previously in their possession but not anymore. The key question whether the defendants know where the documents are and from whom such documents could be requested, is not answered. It is also argued that the test for relevance is wider than direct relevance to the pleaded issues.

[9] For the defendants it was argued that they have already discovered some of the information which is requested by the plaintiff. The defendant further stated that they do not have a record of the description, manufacturer and the supplier of such needle that was used on 24 February 2016 as the operation was done in 2016 which is about 8 years ago. The defendants in response to some paragraphs indicated that this is a mere fishing expedition, and the information is not relevant.

[10] In responding to paragraphs 7, 8 and 9 of the application to compel, the defendants indicated under oath that they discovered all the documents in their possession and listed what they discovered. They stated that they discovered all the documents that were in their possession, and they are not aware of any other documents. They reiterated that if such documents exist then they do not know the whereabouts of such information or documentation.

[11] The defendants submitted that the material facts can be derived from the particulars of claim and the plea. It is well established that relevance is determined from the pleadings and not extraneously therefrom. Hence a party may only obtain inspection of documents relevant to the issues on the pleadings. A party must disclose all documents related to the case that are

relevant to any aspect of it. Consequently, any document that is entirely irrelevant to the issues between the parties does not need to be disclosed.

[12] The documents or information such as the ones pertaining to the itemised list and description of the manufacturer of the blades, needles and similar equipment used are all not relevant to the plaintiffs' claims as they are currently pleaded before court. Relevance is determined based on the pleadings, not from external sources.

Legal requirements

[13] Rule 28(8) provides as follows:

'(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, analogue 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 or 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 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.'

[14] In *Walvis Bay Salt Refiners (Pty) Ltd v Blaauw's Transport and Others,*[1] Usiku J held as follows:

'[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. The defendants, by using answers of the type described above, failed to specify how the

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

documents listed in items 1 to 22 of the defendants' index, served to address the specific request made in paragraph 1 of the plaintiff's notice in terms of Rule 28(8).

[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.

[14] In view of my opinion stated above, it follows that the responses given by the defendants to the plaintiff's Rule 28(8) notice, do not constitute proper responses. The plaintiff is, therefore, entitled to the relief as set out in paragraph 1 of its notice of motion.

Whether the category 2 documents are discoverable or not on the ground irrelevancy

[15] The issue for consideration now concerns the relevance of the category 2 documents to the matters in question in the action.

[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.[1]

[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* (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.'

[15] The learned authors Herbstein and van Winsen point out that:

'As a general rule, hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. Indeed, this is very often done. Alternatively, when a deponent includes in his affidavit facts in respect of which he does not have first-hand knowledge he may annex a verifying affidavit by a person who does have knowledge of those facts.'

Conclusion

[16] For the defendant to answer that any other documents other than the documents discovered are not in their possession without indicating whether they searched for it diligently or who might be in possession of the said documents, are unacceptable. They further indicated that they do not know in whose possession the requested documents are or even if they existed, is not acceptable as clearly they must have things like the qualifications of the doctors that treated the plaintiff, the names and qualifications of the nursing staff that assisted in the theatre and something like the specific type of needle that was used and which point broke off and was left inside the plaintiff.

[17] I echo my brother Usiku J sentiments in *Walvis Bay Salt Refiners (Pty)Ltd v Blaauw's Transport (Pty) Ltd*[2]*:*

'On the basis of the evidence put forth by the plaintiff, I am satisfied that the plaintiff has established an arguable case entitling it to the discovery of the documents in question. In addition, I am also satisfied that on the pleadings, the interest of justice also requires disclosure of the documents in question. To withhold discovery, under the circumstances, would be 'contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation.'

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

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

1. The first and second defendant are directed, within five (5) days of the court order, to provide the plaintiff with the documents requested by way of the notice in terms of rule 28(8) dated 4 October 2023. If they cannot do so, they are ordered to properly answer on the request by filing a properly worded discovery affidavit.

2. Costs of this application is awarded to the plaintiff but capped in terms of rule 32(11).

3. The matter is postponed to 5 November 2024 at 15h30 for a status hearing. The parties to file a joint status report on or before 1 November 2024.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	**Defendants**:
T Phatela (with him L Mukondomi) Instructed by Gaenor Michaels & Associates, Windhoek	J Hinda Office of the Government Attorney, Windhoek