

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: POCA 02/2015

In the matter between:

SAID NADIRI

1ST APPLICANT

MOURAD DAHMANI

2ND APPLICANT

OXYGEN SPORT WEAR CC

3RD APPLICANT

and

THE PROSECUTOR-GENERAL

RESPONDENT

Neutral citation: *Said Nadiri v The Prosecutor-General* (POCA/2015) [2016]
NAHCNLD 105 (07 December 2016).

Coram: CHEDA J

Heard: 25.03.; 27.04; 15.05; 05.10.2015; 23.03; 26.04; 15.06; 25.07;
03.10.2016

Delivered: 07 December 2016

Flynote: POCA - An application for filing of further affidavits is at the discretion of the court. It can only be granted if applicant gives a satisfactory explanation as to why it was not filed timeously. In addition it is only be permitted under special circumstances and if there is no prejudice to respondent. Application is dismissed.

Summary: Second applicant is a co-director of third applicant. Respondent is the Prosecutor-General who applied for and was granted an order of preservation under Prevention of Organised Crime Act, Act 29 of 2004. Applicants' applied for a rescission of judgment. While they were still waiting for the hearing of the application, second applicant applied for permission to file a further supporting affidavit after all the three sets of affidavits had been filed. Held that only three sets of affidavits are allowed and permission to file further affidavit will only be allowed under special circumstances.

ORDER

1. Application to file further supporting affidavit by applicants is dismissed with costs.

JUDGMENT

CHEDA J:

[1] This is an interlocutory application.

[2] Applicants applied for an order that they be allowed to file a supporting affidavit for a rescission of judgment. The background of this matter is that respondent filed an application for a preservation order in relation to applicants' various assets which application was granted.

[3] First and second applicants are the directors of third applicant. Respondent gained knowledge that certain unlawful activities were taking place at third respondent's premises and applied for a preservation order under the Prevention of Organised Crime Act, Act 29 of 2004 (hereinafter referred to as "POCA"). A

provisional order was granted by this court on the 25 March 2015 and was subsequently confirmed on the 15 May 2015.

[4] Applicants applied for a rescission of judgment on the 16 June 2015 and it was accompanied by an affidavit of Said Nadiri who is one of the directors and is the first applicant. Respondent filed an answering affidavit on 21 July 2015 and applicants filed a replying affidavit on the 03 September 2015.

[5] The application for rescission of judgment as well as the application for forfeiture was postponed to the 23 November 2015 for hearing and the parties were ordered to file their heads of argument. On the 20 November 2015 applicants filed an application for postponement of the hearing to the 23 November 2015 and they filed their heads of argument on the 23 November 2015 which was the date of the hearing. The matter was further postponed to the 23 March 2016.

[6] On the 17 February 2016, applicants filed a notice of “supporting affidavit for rescission of judgment order” and was accompanied by a supporting affidavit of Mourad Dahmani (hereinafter referred to “Dahmani”).

[7] On the 26 February 2016, respondent requested applicants to withdraw the notice of “supporting affidavit for rescission of judgment order” and the unsigned supporting affidavit of Dahmani on or before the 29 February 2016, needless to say that this was not done.

[8] It is applicants’ argument that it should be allowed to file the affidavit that was deposed to by Dahmani in support of the application for the rescission of judgment. In addition to this there has been an application for the late filing of the heads of argument.

[9] This matter involves substantial amounts of money and it touches on the core of the national economic fibre. In my view, therefore, it demands an open mind and the need to delve into its nitty-gritties thereby ensuring that the issues involved are properly ventilated.

[10] The matter is of paramount importance to the parties involved and for those reasons, it is my view that the exercise of my judicial discretion commands that I should condone both parties' non-compliance with the court's rules with regards to the filing of their heads of arguments.

[11] In response to the applicants' application to file second applicants' supporting affidavit, respondent filed a notice in terms of Rule 61 which is a procedure where the proceedings are irregular. Respondent's argument is that:

- a) the pleadings in the matter have already used;
- b) the heads of argument has already been filed;
- c) the matter had already been set down for hearing on the 23 March 2016; and
- d) that applicants did not comply with the Rules of court.

[12] Further and most importantly that respondent will be prejudiced if the said supporting affidavit for rescission and the unsigned affidavit of Dahmani served on it is not set aside as an irregular step. It is further its argument that by seeking to file this "supporting affidavit by Dahmani, applicant is seeking to introduce new facts which respondent did not have an opportunity to respond to.

[13] In response to this, applicants raised a *point in limine* being that respondent should not have applied Rule 61, but, applied to strike-out the supporting affidavit. In support of her argument she referred me to Rule 66 (1) which read thus:

"Rule 66 (1) of the High Court regulates the sequence of the filling of affidavits and reads as follows:

66 (1) A person opposing the grant of an order sought in an application must-

- a) within the time stated in the notice give the applicant notice in writing that he or she intends to oppose the application and in that notice appoint an address within a flexible radius of the "Court at which he or she will accept notice and service of all documents;
- b) within 14 days of notifying the applicant of his or her intention to oppose the application deliver his or her answering affidavit, if any, together with any relevant

documents, except that where the government is the respondent, the time limit may not be less than 21 days, and

- c) if he or she intends to raise a question of law only, he or she must deliver notice of his or her intention to do so within the time stated in paragraph (b), setting out such question.”

[14] I agree with Ms. Kishi on that submission, Rule 61 is not applicable here. Respondent should have proceeded under rule 66 (1).

[15] In my determination I cannot overlook the matter of *Mauno Haindongo t/a Onawa Wholesales v African Expense Pty Ltd Case No. PS A 104/2005 delivered by Silungwe J on 26/07/2005* quoted with approval the Appellate Division case of *James Brown & Hammer (Pty) Ltd v Simmons, N. 0(4) at 656 at 660 E-G:*

“It is in the interest of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should having regard to all the circumstances of the case nevertheless be received.” (emphasis added)

[16] From the above passage it is clear that the rules must not be rigidly observed and should be flexible and allow the Court to exercise its judicial discretion in relation to the facts of the case. Ultimately, it is for the Court to decide whether it will allow the affidavit filed out of sequence or not.

[17] In those two cases it is clear that the courts advocated for flexibility in the application of the rules. This is the approach I am comfortable with and I am indeed fortified by those authorities. I should add, that this approach in my opinion is motivated by the need to attain justice for the parties and for the avoidance of

yorking the court into slavery of its own rules. While this is not an approach cast in stone, it is an approach which should be exercised judicially.

[18] Irrespective of the step taken by respondent, one cannot lose sight of the fact that, respondent has without any iota of doubt expressed its desire to oppose, this move by third applicant and equally so, applicants have demonstrated their unfailing desire to prosecute their application to file their supporting affidavit by Dahmani. It is for that reason that I decided that this application proceeds on the basis of a court application of setting aside the said affidavit and applicants' application to have second applicant's application filed and used in support of the application for rescission of the order complained of.

[19] The issue before the court is whether or not applicants should be allowed to file a further affidavit at this stage. The general rule is that three sets of affidavits are allowed, being supporting affidavits, answering affidavits and replying affidavits, see *Hayward v Gradwell 1932 EDL 305*; *VIAN v Victor 1938 WLD 16*; however, the court can in the exercise of its judicial discretion and upon a reasonable explanation as to the necessity, thereof, allow the filing of a further affidavit.

[20] These will be supplementary affidavits. In order for the applicant to succeed it must fulfil the following requirements:

- a) give a satisfactory explanation as to why it failed to put the said information or facts and to file the said affidavits timeously;
- b) that such failure was not *mala fide* or due to its culpability ; and
- c) that regard being had to all the circumstances, the affidavit should be allowed.

[21] In this jurisdiction this principle was laid down in the matter of *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others at {101}* where the Supreme Court stated:

“[101] We appreciate that appellants' application for leave to supplement their papers may be interlocutory to the subject matter of the main dispute but, as to the substance of the application, the court must be (1) satisfied that the explanation as to

why they did not put the facts or information before the court at an earlier stage is adequate; that it was not due to *mala fide* or culpable remissness on their part and that, regard being had to all the circumstances, the affidavit should be allowed. As Franklin J put it in *Cohen NO v Nel and Another*-

Where an affidavit is tendered in motion proceedings, both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court; he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although his affidavit is late, it should, having regard to all the circumstances, nevertheless be received. On any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit is always an important factor.”

[22] It is now settled law that throughout its determination, the court will always be motivated by the need for flexibility, see *Mauno Haindongo t/a Onawa Wholesales v African Expense Pty Ltd Case No. (PS A 104/2005 delivered by Silungwe J on 26/07/2005* quoted with approval in the Appellate Division case of *James Brown & Hammer (Pty) Ltd v Simmons, N. 0(4) at 656 at 660 E-G* where Ogilvie Thompson stated:

“It is in the interest of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should having regard to all the circumstances of the case nevertheless be received.”

[23] The permission of filing of a further set of affidavits is at the discretion of the court, which discretion is to be exercised judicially. In the past leave to grant such permission has been granted under the following circumstances:

- a) where there is in existence special circumstances, see *Kusiyamhuru v Minister of Home Affairs* 1991 (1) SA 643 (w) at 649-650 and *Joseph & Jeans v Spitz* 1931 WLD 48 and *Sartk v Fisher* 1935 SWA 44;
- b) where the court considers such a course advisable, see *Rieseberg v Rieseberg* 1926 WLD 59;
- c) where there was something unexpected in the applicant's replying affidavit or where a new matter was raised in them;
- d) where the court wanted to have further information on record; and
- e) where there is a possibility of prejudice to the respondent if further information is allowed.

[24] The general rule is that only three sets of affidavits should be filed. Applicant must satisfactorily explain to the court why an additional affidavit is filed out of time. Second applicant is a co-director of third applicant. He was aware that his premises had been raided and certain assets had been seized. He was fully aware of the allegations against them.

[25] First applicant deposed to an affidavit in his capacity as one of the directors. He did not state that he had no capacity to do so, neither, did he state that second applicant's affidavit would be used in support thereof.

[26] It is respondent's argument that second applicant filed an unsigned affidavit, that is invalid and has not been withdrawn. He, however, filed a signed one. In addition thereto, it is respondent's argument that second applicant is now seeking to introduce new facts when respondent has already filed a replying affidavit and this will prejudice it.

[27] This matter had already been set down for the hearing of the application for rescission of judgment and would have been heard had it not been for the postponement due to prior commitments and late filing of heads of argument by the parties' legal practitioners.

[28] I find no reason why second applicant did not file his supporting affidavit timeously. Even if he was out of the country, this cannot be an excuse as the world

is now a Global Village, because documents can be dispatched from wherever one is in the world.

[29] Respondent argued further that the application for rescission as provided for in section 58 of the Prevention of Organised Crime Act (hereinafter referred to as "POCA") limits the points raised in the statutory affidavit by applicant under section 52 (5) (3) (a) of the said Act. Therefore, it stands to reason that, if allowed, this will infringe the said provisions. I am however, mindful of the fact that the said provisions can be overridden if the court is satisfied that justice demands that it should allow the filing of further affidavits.

[30] The need for an explanation for non-compliance should be properly explained as it can only be granted on good cause shown, see, *Augst Maletzky v Minister of Justice (A 9/2013) [2013] NAHCMD 316 (08/11/2013 per Cheda J.* This unfortunately is lacking.

[31] The new affidavit by Dahmani is not provided for in the rules and as such can not be allowed, this has been the approach by our courts, see, *Minister of Health & Social Services v Amutenya (A16/2013) HAHCNLD (02/12/2013) as per Miller AJ.* The learned Judge held that, this was an irregular step. I would go further and state that as it is an irregular step, applicant need to do more thereby to which justify the filing of the said further affidavits. This was the position which was followed by our courts, see, *Maritima Comating Services CC v Northgate Distribution Services Ltd (A 282 – 2014) [2015] NAHCMD 121 (29/05/2015) at para 9.*

[32] The position of these courts and indeed the South Africa courts too is that the introduction of new facts is prejudicial to respondent and should be struck out, see, *Shepard v Tuckers Land & Development Corporation 1978 (1) SA 173 (W) at 177.*

[33] Prejudice to respondent who has been deprived of an opportunity to reply is clear and it is my view that applicants do not deserve the second bite of the cherry.

[34] In the result, the following is the order:

Order:

1. Application to file further supporting affidavit by applicants is dismissed with costs.

M Cheda
Judge

APPEARANCES

APPLICANTS : F. Kishi
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

RESPONDENT: M. Nghiyoonanye
Of the Office of the Prosecutor-General, Oshakati