



REPORTABLE

CASE NO: SA 11/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE ATTORNEY-GENERAL

First Appellant

THE SECRETARY TO CABINET

Second Appellant

and

GONDWANA COLLECTION LIMITED

First Respondent

HOLLARD INSURANCE COMPANY LTD

Second Respondent

THE REGISTRAR OF THE HIGH COURT

Third Respondent

Coram: DAMASEB DCJ, MAINGA JA and FRANK AJA

Heard: 17 March 2023

Delivered: 26 April 2023

Summary: A respondent in motion proceedings, Hollard Insurance Company Ltd (Hollard) brought an interlocutory application before it could file an answering affidavit to have subpoenas *duces tecum* issued against the Attorney-General of the Republic of Namibia (A-G) and the Secretary to the Cabinet of the Republic of Namibia (Cabinet Secretary). The two constitutional office holders were not party to the proceedings in which Hollard was sued but Hollard justified the subpoenas on the basis that it needed documents to resist the applicant's case (Gondwana).

Hollard maintains that in terms of Art 12(1)(a) and (e) of the Namibian Constitution (the Constitution) it has the right, before it can file an answering affidavit, to demand the production (discovery) of documents from the non-parties, and to cross-examine potential witnesses for Gondwana on the strength of documents produced under the subpoenas *duces tecum*.

The court *a quo* granted the order allowing the issuing of the subpoenas *duces tecum* against the A-G and the Cabinet Secretary. Dissatisfied with the order, the A-G and the Cabinet Secretary filed a rescission application to rescind the order. They maintained that the orders were 'extraordinary and invasive' and that the court was not entitled to grant subpoenas *decus tecum* in motion proceedings. Furthermore, that they ought to have been afforded an opportunity to make representations before the subpoenas were authorised. Emphasis was placed on the fact that the subpoenas interfered with their constitutionally directed duty of confidentiality and secrecy in relation to Cabinet deliberations.

The court *a quo* disallowed the application for rescission and endorsed Hollard's propositions in justification of the subpoenas *duces tecum*. The High Court held that the right to discovery includes pre-litigation discovery and that Art 12(1)(e) of the Constitution guarantees the right to seek discovery from anyone who may possess relevant evidence for the purpose of instituting or defending legal proceedings.

The primary consideration on appeal is whether the court *a quo* was entitled to authorise the granting of the subpoenas *duces tecum* in motion proceedings and against non-parties.

Held that, where the legislature has provided for a specific procedure for the ventilation of legal disputes it is to that procedure that the public must have recourse in the first place and not the Constitution. If the procedure is found wanting viewed from the prism of the Constitution, the appropriate course of action is not to skirt the procedure but to challenge it and have it set aside.

Held that, in the absence of statutory intervention and an appropriate rule framework, the novel procedure deployed by Hollard is bound to open the floodgates for fishing

expeditions, abuse, uncertainty and potentially contradictory practices by managing judges and may bring the civil justice system into disrepute; and that the High Court erred in departing from the well-established procedure for the conduct of motion proceedings without those procedures being challenged. Hollard was not entitled to demand discovery and production of documents by non-parties before it filed its answering affidavit and before pleadings closed and a triable dispute of fact had arisen. The appeal therefore succeeds.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA concurring):

Introduction

[1] This appeal raises the competence of an order granted by the High Court in the course of motion proceedings, authorising the second respondent (Hollard) to issue subpoenas *duces tecum* on Namibia's Attorney-General (A-G) and the Secretary to the Cabinet (Cabinet Secretary) – in respect of a pending private legal dispute between Hollard and the first respondent (Gondwana). At all material times, the Government of the Republic of Namibia (GRN) was not a party to the private dispute although the actions taken by it in relation to the Covid-19 pandemic which was declared a worldwide pandemic on 11 March 2020 by the World Health Organisation (WHO), provides the backdrop to it.

[2] Hollard is an insurance company with whom Gondwana is insured. In March 2020, Gondwana submitted a claim to Hollard to be indemnified for what it alleged were losses suffered as a result of loss of business due to Covid-19 and the GRN's response thereto. When, after exchange of correspondence between the parties in relation to Gondwana's claim, the parties had not yet resolved the matter, Gondwana in December 2020 instituted urgent motion proceedings against Hollard to be

indemnified for the alleged losses. According to Gondwana, it had lost revenue through tourist cancellations because of the pandemic and the national state of emergency (SOE) declared for the first time by the President of Namibia on 17 March 2020.

[3] From Hollard's vantage point, the dispute between it and Gondwana which informs its resolve to gain access to the Cabinet documents and deliberations, can be stated as follows: In the first place, Gondwana seeks a declarator for the indemnity tied to the date of 13 March 2020. Therefore, according to Gondwana the SOE and the resultant cancellation of inbound flights on 14 March 2020 was the direct result of two Romanian citizens testing positive for Covid-19 on 13 March 2020 on the shores of Namibia. This, Hollard maintains, implies that Cabinet only met to discuss the Covid-19 crisis after becoming aware of the positive test results of the two Romanians.

[4] According to Hollard, the fact of the two Romanians testing positive could never have been the reason for the declaration of the SOE and the suspension of inbound flights. As far as it is concerned, the true reason was the worldwide outbreak of the disease and the calls made by WHO to all countries to take steps to stem the spread of the disease.

[5] Hollard opposed Gondwana's urgent application and filed an interlocutory application in which it sought wide-ranging relief, amongst others, that Gondwana's application be struck for lack of urgency. In the event that the court found the application to be urgent, Hollard prayed for several alternative heads of relief in the order listed below:

- (a) That Gondwana be directed to discover an allegedly champertous agreement it entered into with an insurance claims handler (ICA); and upon being provided with it for Hollard to be allowed to set the matter down for a declarator that Gondwana's application is a nullity.
- (b) That the application is premature because Hollard had not yet rejected or accepted Gondwana's claim.
- (c) That the application be struck from the roll because Gondwana clearly foresaw material disputes of fact whether it complied with its obligation to provide to Hollard specified information to support the claim for indemnity.
- (d) That in the event all of the above alternatives did not succeed, Hollard is entitled to obtain subpoenas *duces tecum* against certain of Gondwana's witnesses in the urgent application, the A-G and the Cabinet Secretary.
- (e) That Hollard be allowed to cross-examine two of Gondwana's witnesses: Mr Gysbert J Joubert and Dr Bernard S Haufiku, before it can file its answering affidavit.

[6] Hollard maintains that the Cabinet documents it seeks will support its version and will establish that Cabinet had deliberated on Covid-19 long before 13 March 2020. In other words, that even if the two Romanians had not arrived in Namibia, Gondwana would have suffered the adverse consequences of the suspension of inbound flights.

[7] In the interlocutory application, Hollard had also sought an order striking out certain evidential material in the affidavits filed by Gondwana in support of its claim for indemnity.

[8] The matter came before Miller AJ who sustained Hollard's lack of urgency objection and struck the matter from the roll. Gondwana then elected to proceed with the application seeking indemnity in the ordinary course. Hollard claimed that regardless of the urgent application being struck, it was still entitled to the subpoenas *duces tecum* that it had initially sought in the last resort. Although Gondwana made some protestations about the propriety of the subpoenas *duces tecum*, Hollard persisted with the request to the managing judge who authorised the issuance of the subpoenas against the A-G and the Cabinet Secretary.

The subpoenas and their justification

[9] In the court *a quo*, Hollard withdrew the subpoena *duces tecum* against the A-G subsequent to the latter bringing a rescission application to set it aside. For completeness, suffice it to state that it required the A-G to produce documents and correspondence (including but not limited to all letters, notes, e-mails, texts or other electronic messages or WhatsApp) exchanged between members of Cabinet and relating to the outbreak of the Covid-19 pandemic.

[10] The subpoena *duces tecum* against the Cabinet Secretary required him to produce the following:

- '1. The minutes of the Cabinet meetings where Covid-19 and Regulations issued by the President of the Republic of Namibia in relation to Covid-19 was discussed up and until 30 June 2020;
2. The documents and correspondence exchanged between members of the Cabinet of the Republic of Namibia (concerning the measures to be implemented or to be included in Covid-19 Regulations) up until 30 June 2020.'

[11] In its interlocutory application, Hollard justified the subpoenas *duces tecum* against the two constitutional functionaries as follows:

'17.4 Hollard is entitled to have *subpoenas duces tecum* issued before it will file answering affidavits in accordance with proper time periods . . . and also before it cross-examines Gondwana's witnesses [who deposed to affidavits in its application]

...

17.6 Hollard must be given an opportunity to cross-examine certain witnesses who deposed to affidavits on behalf of Gondwana.'

And that:

'60.1 Any person who is entitled to, and government was obliged to, consider contributions made by members of the public in respect of any measures implemented by Government with reference to the Covid-19 disease.

60.2. Hollard does not accuse anybody of being in cahoots or collusion with anybody else. Hollard simply wants to ascertain which information, if any, was exchanged between Gondwana's representatives (including legal representative that is employed by ICA) and officials of the Government of Namibia. These documents are of pivotal importance for the intended cross-examination of Mr Joubert and Dr Haufiku, as well as to present Hollard's case and to meet Gondwana's allegations.

60.3. The documents requested in the subpoenas *duces tecum* are also not in possession of Gondwana. It is of utmost importance for Hollard to obtain access to the documents to present its case.'

[12] It is made clear in the affidavit in support of the interlocutory application that Gondwana cannot 'demand affidavits from Hollard to say pertinent things under oath before. . . Hollard becomes entitled to the procedural device of issuing subpoenas *duces tecum*.'

[13] Hollard anchored the right to the production of the Cabinet documents on Art 12(1)(a) and (e)¹ of the Namibian Constitution (the Constitution). In other words that in the motion proceedings wherein it is a respondent it has the right before it can file an answering affidavit, to demand the production (discovery) of documents and to cross-examine Gondwana's affidavit witnesses on the strength of documents produced ad subpoena *duces tecum*.

Intervention by the A-G and the Cabinet Secretary

[14] Upon being served with the subpoenas *duces tecum*, the A-G and the Cabinet Secretary brought an urgent application to, on an interim basis, interdict implementation of the subpoenas and for a High Court Rule 103 rescission of the court order that authorised the issuing of the subpoenas. The parties came to an agreement in relation to the interim relief and proceeded to have the rescission application adjudicated.

[15] In the rescission application, the A-G and the Cabinet Secretary raised several grounds. They complained that considering that the orders were 'extraordinary and invasive' against two constitutional office holders who had not been cited in the suit between Gondwana and Hollard, they ought to have been afforded an opportunity to make representations before the subpoenas were authorised. Particular emphasis was placed on the fact that if an opportunity for representations was given, they could have demonstrated how the subpoenas interfered with their constitutionally

¹ '(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) . . .

(c) . . .

(d) . . .

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.'

directed duty of confidentiality and secrecy in relation to Cabinet deliberations. It was also asserted that the subpoenas were unintelligible, lacked specificity, and did not demonstrate relevance of the documents demanded.

[16] It was also alleged that Hollard was not entitled to a subpoena *duces tecum* in motion proceedings and that the procedural device was only applicable in action proceedings. It is further contended that at the stage the subpoenas *duces tecum* were authorised, an answering affidavit had not been filed and therefore no dispute of fact had arisen for the matter to be referred to oral evidence in terms of High Court Rule 67(1) for evidence to be led and witnesses to be cross-examined.

[17] All those grounds were disputed by Hollard. It maintained that the two officials had not established any valid basis for the setting aside of the subpoenas *duces tecum* either on the basis of protected secrecy or privilege. According to Hollard, the two functionaries were not entitled to any special treatment when it came to being required to produce documents required by litigants – and that the claim they made to being granted *audi* before the subpoenas were issued, had no basis in law.

[18] Hollard also pleaded that the information it sought was predicated on its Art 12 right to a fair trial and not sourced in the rules of court and therefore rules 37 and 65 were irrelevant; that as an outsider to Cabinet deliberations it had no access to the information; that the information in question concerns decisions made in the public interest and that all that the A-G and the Cabinet Secretary needed to do was to produce the information required and object to the production of any of it on any valid ground as only the court could decide whether or not the information should be suppressed.

The High Court

[19] The High Court agreed with Hollard and dismissed the rescission application. Hollard conceded on appeal that the High Court was made aware that the application in respect of the A-G was withdrawn and that the subpoena affecting the A-G ought to have been set aside, but regrettably was not. It follows that the subpoena *duces tecum* against the A-G should be set aside.

[20] As concerns the Cabinet Secretary, not only did the High Court endorse Hollard's propositions in justification of the subpoena *duces tecum*, but it went further and held that the right to discovery (and I assume production of documents) includes pre-litigation discovery. In other words, that Art 12(1)(e) of the Constitution guarantees the right to seek discovery from anyone who may possess relevant evidence for the purpose of instituting or defending legal proceedings. The High Court rejected the reliance on secrecy of Cabinet decisions and was satisfied that the subpoenas were intelligible and that they sufficiently and clearly identified the documents that were required by Hollard from the Cabinet Secretary.

[21] The learned judge *a quo* took the view that 'in appropriate circumstances' the court would be entitled 'to peer behind the veil of secrecy and demand disclosure of documents, minutes and decisions made by Cabinet'. Relying on a decision of this court in *Director-General of the Namibian Central Intelligence Service v Haufiku & others*² the High Court reasoned that secrecy of documents, which would . . . include confidentiality, cannot be invoked by the Government, willy-nilly' and that a 'proper case must be made for the invocation of either and to the satisfaction of the court'. In

² *Director-General of the Namibian Central Intelligence Service & another v Haufiku & others* 2019 (2) NR 556 (SC) paras 85-86.

that endeavour, the court will 'lean in favour of upholding fundamental rights and freedoms enshrined in the Constitution'.

[22] The High Court reasoned that production of the Cabinet documents was necessary for the exercise of Hollard's right under Art 12. In the view of the High Court, the 'documents and records of discussions that pertain to the Covid-19 pandemic, which it claims may have a bearing on the case launched against it by Gondwana . . . would not be regarded for any proper reason to be secret, because they relate to the pandemic, which was declared as such in the interest of all Namibians'.

[23] The High Court held that Rule 37 could in appropriate circumstances be used in motion proceedings in the court's discretion to order discovery by means of subpoena *duces tecum*. According to the court *a quo*, although the rule applies 'primarily' to trial proceedings, 'it may be unfair to confine the application of the rule strictly to matters for trial' and that 'there may be instances where certain documents are required to be obtained, in order to procure some evidence in preparation of pleadings or other pre-trial purposes'.

[24] The learned judge held:

[69] I am accordingly in agreement with Mr Heathcote that this rule must be accorded a wide, generous and purposive interpretation in order to enable litigants, in appropriate cases, to fully enjoy their rights to access critical information as they seek to prosecute their cases. This is so because if the documents, if relevant, may only be availed or only be made available at trial, a party may be deprived of the facilities to properly prepare their case or defence, as the case may be'.

[25] The court *a quo* was satisfied that the subpoenas *duces tecum* were not an abuse of the court process and that nothing was tendered by the two officials showing the State discharged the onus that the interests of justice to Hollard ‘must be subordinated to non-disclosure in favour of the State because of public interest in the non-disclosure’. The High Court concluded that the two officials ‘have failed to demonstrate to the court that there is any proper legal basis for setting aside the subpoena . . . especially considering that there is no evidence that public interest would be prejudicially affected by the production of the required documents and information’.

The appeal

[26] The Cabinet Secretary impugns the High Court’s judgment and order on a very wide front. I will refer to only those grounds of appeal that are material to the outcome of the appeal. It is stated that the High Court erred in its interpretation of Art 12(1)(e) as including the right in motion proceedings to a subpoena *duces tecum* ‘against a non-party . . . and in particular against members of the Cabinet to produce documents . . . for the purpose of preparing . . . answering affidavits and in the case of an Applicant for purposes of preparing . . . case for institution’.

[27] It is also said that ordering the A-G and the Cabinet Secretary to produce documents for the purpose of Hollard’s preparation of its answering affidavit is ‘incompatible and inconsistent with the binding decision of this Court in *Chairperson of the Tender Board v Pamo Trading*³’.

³ *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC & another* 2017 (1) NR 1 (SC) at 16-19.

[28] The Cabinet Secretary also attacks the court *a quo*'s application of Rule 37 to motion proceedings. A further ground of appeal is that the High Court erred in holding that Hollard was entitled to seek leave from court to issue subpoenas *duces tecum* without any notice to the two officials. It is said in that regard that because of the extraordinary nature of the subpoenas and the constitutional positions of the two officials, the High Court erred in not finding that they were in the circumstances necessary parties with a substantial direct interest in the issuance of the subpoenas *duces tecum*.

Submissions

The Cabinet Secretary

[29] The Cabinet Secretary's written and oral submissions in substance mirror the grounds of appeal and I do not find it necessary to regurgitate them especially in the view that I take of the outcome of the appeal.

Hollard

[30] In its written heads of argument Hollard supports the High Court's judgment and order, principally as validating its alleged right to fair trial under Art 12(1)(e). That right, the argument goes, is not sourced in Rule 37 of the High Court Rules. It was argued⁴ that the court retains an inherent jurisdiction 'to adapt its procedure in circumstances where the rules of court or the common law do not make provision for a particular need or right'.

[31] It is stated that to the extent that the High Court invoked Rule 37 and adapted it to motion proceedings through a purposive interpretation, it did so *obiter*. The gravamen of Hollard's opposition to the Cabinet Secretary's appeal is that the

⁴ Relying on amongst others *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A).

objections raised in the rescission application to the subpoena *duces tecum* did not disclose any valid defence for its setting aside.

[32] Hollard rejected the notion that Cabinet deliberations should be accorded special status. In the latter respect it relied on comparative jurisprudence⁵ and a decision⁶ of the High Court of Namibia which it claims establish the principle that Cabinet deliberations are not immune to discovery and that if the government wishes to suppress disclosure, it bears the onus. Hollard submitted further that without access to the information it seeks, it will not be able to defend itself meaningfully against Gondwana's claim and that the information relates to decisions taken by the government in the public interest.

[33] Hollard cautioned that if credence is given to the Cabinet Secretary's argument that he ought to have been given the opportunity to make representations before the subpoena *duces tecum* was authorised against him, chaos would result in our civil justice system⁷. It was submitted that since the present are motion proceedings, no provision exists in the rules for subpoena *duces tecum* and that leave of court was required⁸, to be granted in the exercise of the court's inherent jurisdiction to adapt its procedure.

[34] Just like it is the case in relation to Rule 37 in action proceedings, the argument went, it was not necessary to give notice to the party to be subpoenaed and that doing so would result in chaos. Once subpoenaed, the Cabinet Secretary

⁵ *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 343 -344. P W Hogg *Constitutional Law of Canada* (5 ed) vol 1 at 311-312. *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 243. *Van der Linde v Calitz* 1967 (2) (SA) 239 (A).

⁶ *Nakanyala v Inspector-General Namibia & others* 2012 (1) NR 200 (HC).

⁷ *Podlas v Cohen & Bryden NNO & others* 1994 (4) SA 662 at 675F-G.

⁸ *Campbell & another v Kwapa & another* 2002 (6) SA 379 (W).

was required to present himself, produce the documents in his possession and present any valid objection for the decision of the court.

Analysis

[35] To recap, according to Hollard, to support its version and to refute that of Gondwana, it needs to have access to documents that served before Cabinet in connection with the Covid-19 pandemic and the resultant declaration of the SOE. On behalf of Hollard, Mr Heathcote emphasised that the source for the subpoena *duces tecum* granted by the court *a quo* is Art 12(1)(e) of the Constitution – a right not dependent on the rules of court. According to counsel, the High Court’s reliance on Rule 37 for the subpoena *duces tecum* was *obiter* as the learned judge held in the first place that he had the inherent power to grant such an order to give effect to Hollard’s Art 12 right to a fair trial. Reliance was placed in addition on the High Court’s wide discretionary power to adapt civil procedure to give effect to the constitutionally guaranteed right to fair trial.

[36] In oral argument, Mr Heathcote also relied for the far-reaching propositions which found favour with the High Court on a practice applied in the Commercial Court of England – known as *Khanna* summonses (*Khanna v Lovell White Durrant* [1994] 4 ALL ER 121). The source for that procedure is the England and Wales Civil Procedure rule 34.2.(4) which a party to litigation may use to subpoena documents. The English courts have recognised that the rule may be used to subpoena documents from non-parties even before a matter has been set down for trial. It involves requiring a third party to produce documents ad subpoena *duces tecum* at an interlocutory stage if production on the date of trial would likely lead to

postponement. The practice is thus designed to produce evidence at an earlier stage to save costs. The rule is limited to trial actions.

[37] I find Mr Heathcote's reliance on the English practice incongruous with the stance taken on appeal that Hollard does not place reliance on rule 37 for the subpoenas it sought. *Khanna* summonses are sourced in the English Civil Procedure equivalent (r. 34.2.(4)) of our rule 37 and since Hollard does not rely on a rule, it is unnecessary to further consider the reliance on the English Commercial Court practice.

[38] The role of an appellate court is to ascertain whether the first instance court came to a correct conclusion on the facts and the law. The appeal court engages in a consideration of the case afresh based, of course, on the record and the grounds of appeal.

[39] The question then is, was the High Court correct to grant the subpoena *duces tecum* against the Cabinet Secretary in the circumstances it did? Could it grant such an order in motion proceedings before pleadings had closed and a triable dispute of fact had arisen? In the absence of a specific provision in the rules to sanction the relief sought by Hollard, could the High Court grant such an order against the Cabinet Secretary without him having prior warning or being afforded the opportunity to make representations? All these questions quite fairly and reasonably arise from the grounds of appeal that I have summarised.

[40] I propose to test the correctness of the High Court's original order authorising the subpoenas *duces tecum* and its dismissal of the A-G's and Cabinet Secretary's rescission application against the backdrop of our system of civil procedure.

[41] Civil proceedings in the High Court are conducted according to rules and procedures determined in terms of s 39 of the High Court Act 16 of 1990.⁹ Those rules make provision for the manner in which particular claims may be instituted and defended and also for securing evidence to support a party's case. The purpose of the rules is to ensure an orderly and predictable procedure.

[42] Where the legislature has provided for a specific procedure for the ventilation of legal disputes it is to that procedure that the public must have recourse in the first place and not the Constitution. If the procedure is found wanting viewed from the prism of the Constitution, the appropriate thing is not to skirt the applicable procedure but to challenge it and have it set aside.¹⁰ That is the principle of subsidiarity which guards against the flourishing of parallel systems of law.

[43] Namibia's civil litigation process is delineated into action and motion proceedings¹¹, each with its peculiar rules and practices. It is largely left to a *dominis litis* party's election which route to follow. Besides, the choice of route chosen by the *dominis litis* party dictates the manner in which the party sued is to defend the claim.

[44] Under our current system of civil procedure, a party initiates litigation based on the evidential material available to it at the time a suit is contemplated. The party sued presents its defence also on the basis of the material in its possession. In action proceedings, the procedural device of a request for further particulars before

⁹ 39 (1) The Judge-President may, with the approval of the President, make rules for regulating the conduct of the proceedings of the High Court, and may prescribe therein-

(a) . . .

(b) . . .

(c) the practice and procedure in connection with the service of any summons, pleading, subpoena or other document or in connection with the issue of interrogatories or the execution of any writ or warrant . . .'

¹⁰ *Masule v Prime Minister of the Republic of Namibia & others* 2022 (1) NR 10 (SC) paras 34 and 35.

¹¹ Action proceedings are governed under Part 2 and 3 in the Rules of the High Court and Applications are governed under Part 8.

plea has been abolished. In other words, a party is not entitled to demand further particulars in order to present its defence. That is a deliberate choice made by the rule-maker and must have implications for motion proceedings where, in the history of our civil practice, such a right never existed.

[45] In motion proceedings, the respondent is required to file an answering affidavit without seeking further particulars. Discovery is not available in motion proceedings as of right and is granted only exceptionally¹² and in any event only against a party to proceedings. Only if there are irresolvable disputes of fact on the papers may the matter be referred to oral evidence in terms of rule 67(1)¹³. In the latter respect, parties will have the right, subject to the court's oversight, to demand discovery and production of documents.

[46] Under Namibia's system of civil procedure, a subpoena *duces tecum* is available only in action proceedings. In its current form, Namibia's civil procedure does not recognise pre-litigation (or preliminary) discovery, either in action or motion proceedings. It certainly does not entitle a respondent in motion proceedings to demand discovery or to cross-examine the opponent's witnesses before filing an answering affidavit.

The High Court's approach considered

¹² *Moulded Components & Ratomoulding SA (Pty) Ltd v Coucourakis & another* 1979 (2) SA 457 (W) at 470D-E; *Kauaaka & others v St Phillips Faith Healing Church* 2007 (1) NR 276 (HC) para 17.

¹³ '(1) Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may

—

(a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or

(b) refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter.'

Reliance on Art 12

[47] At Hollard's prompting, the High Court sanctioned a wholesale departure from established procedure by invoking Art 12(1)(e) of the Constitution – and allowing Hollard to demand production of documents from the Cabinet Secretary for the purpose of cross-examining witnesses for Gondwana in anticipated interlocutory proceedings and to gainsay Gondwana's assertions regarding the reason for the declaration of the SOE and the suspension of inbound flights.

[48] If regard is had to the principle of subsidiarity, Hollard's case before the High Court was not advanced on the basis that the current rules of procedure impeded its right to a fair trial in so far as they impose limitations on what it sought to do and that the established rules and the common law informing them must make way to the novel procedure deployed by Hollard. Until that happened, Hollard and the High Court were bound by the existing regime of rules applicable to the particular circumstances.

[49] It is not surprising that the South African Courts have refused to recognise a right to pre-litigation discovery even in circumstances where that country's Constitution has guaranteed a right of access to information both from public bodies and private instances.¹⁴ Brand JA put it as follows in *Unitas Hospital v Van Wyk*¹⁵:

'[21] . . . I do not believe that open and democratic societies would encourage what is commonly referred to as 'fishing expeditions' which could well arise if s 50 is used to facilitate pre-action discovery as a general practice (see *Inkatha Freedom Party*

¹⁴ Section 32 of the South African Constitution of 1996 guarantees everyone the right of access to information held by the state or by any other person and that is required for the exercise or protection of any rights. That right is given effect under the Promotion of Access to Information Act 2 of 2000, which in terms of s 46 relates to disclosure by public bodies and s 50 relates to the right of access to records of private bodies.

¹⁵ *Unitas Hospital v Van Wyk & another* [2006] (4) SA 4 36 (SCA) para 21.

(*supra* 137C). Nor do I believe that such a society would require a potential defendant, as a general rule, to disclose his or her whole case before any action is launched. The deference shown by s 7 to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and to avoid abuse. Documents are only discoverable if they are relevant to the litigation while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication, I think, that the legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course.'

[50] In the absence of an enabling legislative or rule framework the novel procedure deployed by Hollard and sanctioned by the High Court is bound to open the floodgates for fishing expeditions, abuse, uncertainty and potentially contradictory practices by managing judges and bring the civil justice system into disrepute. It is no wonder that in *Chairperson of the Tender Board v Pamo Trading*¹⁶ Smuts JA stated:

'I accept that under the common law pre-litigation discovery is a rare exception and would not be permitted as a 'fishing expedition' to enable persons to ascertain whether they have a case or not. Although discovery under judicial case management in the High Court rules can be ordered at a very early stage of proceedings to ensure that cases are dealt with expeditiously and fairly, this would of course only arise after the institution of proceedings. But the respondents do not have to invoke judicial case management to secure early discovery or the record of the decision making.'

Pre-litigation discovery

[51] I accept that there will be cases where a prospective plaintiff or applicant wishes to obtain certain information in order to institute legal proceedings and, by parity of reasoning, for a defendant or respondent to mount a defence to a claim.

This is the realm of pre-litigation or preliminary discovery. How is such a situation to

¹⁶ *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC & another* 2017 (1) NR 1 (SC) para 66.

be dealt with under our law? I have already shown that this court recognised in *Pamo* that at common law there is a limited right to pre-litigation discovery.

[52] Some jurisdictions¹⁷ have enacted specific provisions for such discovery in two circumstances. Either where the identity or location of a prospective defendant is unknown or where a prospective plaintiff has reasonable belief¹⁸ that an intended respondent has in his or her possession or control documents relevant to the question whether the prospective plaintiff has the right to obtain relief. In both circumstances an application is made to court. Naturally, where there is a danger that the intended relief is likely to be frustrated or defeated through premature disclosure, such an application may be heard *ex parte*.

[53] For example, in England preliminary discovery may be granted in order to identify a potential defendant.¹⁹ Australian courts have followed that approach.²⁰ The case cited by Mr Heathcote, *Krygkor Pensioenfonds v Smith*,²¹ and the cases cited therein fall within that category and I find nothing objectionable about the practice.

[54] The reported cases certainly do not support the general proposition put forward by Mr Heathcote that the court has the power independent of the rules of court to grant the extra-ordinary preliminary discovery that Hollard sought in motion proceedings. On the contrary, it is apparent from the sworn translation of the judgment in *Krygkor Pensioenfonds* (helpfully provided to us by Mr Heathcote during argument on appeal) that the exception to the normal procedure is where a

¹⁷ For example, Australia: Federal Rules 2011 (Cth), rule 7.22 and rule 7.23, available at www.comlaw.gov.au/Details/F2011L011L01551.

¹⁸ *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193.

¹⁹ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

²⁰ *Re Pyne* [1996] QSC 128.

²¹ *Krygkor Pensioenfonds v Smith* [1993] 2 All SA 296 (A) (31 March 1993).

'prospective claimant applied to a partnership's agent to compel the agent to disclose the name of the partner in order to enable the claimant to institute an action against the partnership'. The sworn translation records further as follows:

'In the present case it is not denied that the respondent bona fide intends to bring his action, and the sole object of the application is to obtain from the appellant, who is the only person who can give it, information as to the names of the persons forming the company which the respondent intends to sue. The application . . . was properly granted. The relief, the court made clear, was proper in view of the "rule of procedure which requires that the parties be named".'

[55] In fact, *Krygkor Pensioenfonds* expresses the salutary caution that only in exceptional cases will the court exercise its inherent power to allow a procedure for which no provision is made in the ordinary law of procedure. Speaking of that normal procedure, Grosskopf JA made it clear in *Krygkor Pensioenfonds* that, barring the exceptional case:

'Normally, the provision of information is regulated as part of the legal proceedings regulated by the rules of court. Provision is made for *inter partes* exposures and for witness summonses or writs of summons to appear in respect of third parties. Our courts are traditionally disinclined to go beyond these stipulations.'

[56] Even where, in exceptional circumstances, the court is persuaded to grant pre-litigation discovery, a proper case must be made out by the person seeking such an order, including why the person against whom the order is sought should not be cited or made aware of the intended relief.

[57] On the facts before us, no case is made out why the Cabinet Secretary was not cited or at the very least made aware that such information is required and that

should he fail to provide it legal recourse may be sought to compel him to do so. There is no suggestion on the present record that had the Cabinet Secretary been cited the information sought might have disappeared.

[58] I find it anomalous for Mr Heathcote to disavow reliance on rule 37 for the relief Hollard obtained against the Cabinet Secretary while placing reliance on the jurisprudence²² developed on the same rule to deny the Cabinet Secretary the right to have been afforded the opportunity to make representations.

[59] In my view, there is a very weighty consideration why in circumstances where a court is approached to invoke its inherent power to order pre-litigation discovery, different considerations would apply compared to when a party resorts to rule 37. I will set out some of these criteria and in so doing am not suggesting that they are exhaustive.

[60] Since in that situation the court is not acting under the authority of a rule or statute, it has to ensure that there is fairness to both the party seeking pre-litigation discovery and the person against whom the coercive order is sought. *Ex parte* proceedings should only be countenanced if the circumstances clearly justify it. Where there is no risk of destruction or concealment of the information sought, affected persons must be cited or be made aware of the intended relief – if only to elicit their attitude to such relief. If the proceedings proceeded *ex parte*, the affected person must be afforded sufficient opportunity to state their case after the initial order is granted.

²² *Podlas v Cohen & Bryden NNO & others* 1994 (4) SA 662 at 675F-G; JR de Ville, *Judicial Review of Administrative Action in South Africa*, revised (1 ed), at 242-245.

[61] A government official in his or her official capacity is in no different position to any other person in that regard. A repository of official government documents may, upon being served with a court order requiring him or her to make pre-litigation discovery, object to its production either because it is privileged, secret or irrelevant.

[62] Thus, in the ordinary course, a government official who has been required to produce documents may object, and must state the basis for such objection whereupon the court will adjudicate the matter. In the first place, as correctly held by the court *a quo* bound as it was by this court's jurisprudence, there is no right to blanket prohibition of disclosure of information in the government's possession on the basis that it is secret. The court is the ultimate determiner of whether government information may be disclosed or suppressed. On the other hand, when an objection to produce is taken it is not to be rejected lightly.

[63] It needs to be stressed that in any process where a person is being compelled *ex parte* to do something on pain of contempt of court – such as to produce documents needed for litigation – that imposes a special obligation on the person seeking the coercive process and certainly the court which has inherent power to prevent an abuse of its process – to make sure that the seeker of the order makes out a proper case for it. Such relief should not be had for the asking.

[64] As *Sarfu*²³ warns, the court must 'exercise restraint' when what is demanded to be disclosed potentially involves integrity of the operation of the Executive. Where it is permissible to seek the production of Cabinet documents in the course of litigation the same considerations would apply as that which faced the SA

²³ *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 234.

Constitutional Court in *Sarfu* where a litigant sought to compel the President of South Africa to testify in contested proceedings. In such a situation, the court should seek to balance two interests. As recognised in *Sarfu*, there is the ‘public interest that the efficiency of the Executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed’. The second interest is the need to ensure that courts are not impeded in the administration of justice and that litigants are afforded every reasonable facility to exercise their rights. ‘Careful consideration must . . . be given to a decision compelling [production of Cabinet documents and deliberations] and such an order should not be made unless the interests of justice clearly demand that this be done. The Judiciary must exercise appropriate restraint in such cases, sensitive to the status . . . and integrity of the executive arm of government.’

[65] It would be setting a dangerous precedent to hold that all a litigant need do is ask for the information without demonstrating its relevance, that it is not available any other way and that without its production the person seeking it will suffer trial prejudice.

[66] In the present case, not only did the relief not fall within the recognised common law exception, but even assuming it did, a case was not made out to justify the width and breadth of the discovery sought (Cabinet deliberations and exchanges between its members) given that the issue as defined by Hollard (the reason for the SOE) is quite confined.

[67] Besides, it is a matter of public record that in the wake of the outbreak of the Covid-19 pandemic, the GRN had rolled out a massive information outreach including regular briefings – some of it by the head of state. Several political

executives who are members of Cabinet gave regular briefings²⁴ including the Ministers of Health, Justice and the Attorney-General. There is no indication on the record that it was pointed out to the managing judge that Hollard could not garner the information it sought from such alternative sources. If established to exist, statements by responsible government officials addressing issues raised on pleadings by litigants can be attributed in court proceedings to its author(s).²⁵

[68] Thus, where potentially there is available alternative admissible evidence (or sources of information) a litigant should only in the last resort seek disclosure of Cabinet documents and deliberations. If it were otherwise it can have deleterious consequences for our system of Cabinet government. The Cabinet occupies a central role in our national affairs. As Art 40 of the Constitution provides, its work and responsibilities touch upon virtually all aspects of our lives as inhabitants. That its members should perform that task conscientiously, in confidence and through robust debate is the antithesis of what they say at that forum being opened up to the public for the asking.

Conclusion

[69] The conclusion I come to is that the High Court erred in departing from the well-established procedure for the conduct of motion proceedings without that procedure being challenged. When the subpoenas *duces tecum* were sought and authorised, Hollard had not yet filed its answering affidavit. Hollard was therefore not entitled to demand discovery and subpoena *duces tecum* before it had filed its

²⁴ These are in fact referred to by Gondwana (attributing it to Hollard as the source) in an answering affidavit deposed to on its behalf in Hollard's interlocutory application. There reference is made to statements by at least one member of the Cabinet (Utoni Nujoma, MP referring to Cabinet meetings he attended and decisions taken there concerning Covid-19 and the declaration of the state of emergency).

²⁵ Compare: *Namibia Media Holdings (Pty) Ltd & another v Lombaard & another* 2022 (3) NR 682 (SC) paras 134-142.

answering affidavit and before pleadings closed and a triable dispute of fact had arisen.

[70] Although repeated reference is made in Hollard's interlocutory application to disputes of fact that Gondwana should have foreseen, that remains academic until all the pleadings (answer and reply) had been filed. If no genuine disputes of fact arise after the close of pleadings, the application brought by Gondwana stands to be adjudicated on the trite discipline applicable to motion proceedings.²⁶ There would then be no need for the production of documents under subpoena *duces tecum*.

[71] Without statutory intervention, I am not prepared to sanction the extra-ordinary procedure adopted by Hollard in the present case: A procedure which asserts a procedural right in motion proceedings to suspend the filing of an answering affidavit; demand the production of documents under *subpoena*; first cross-examine a deponent to an affidavit in the applicant's founding papers and then only file an answering affidavit. By allowing that procedure the court *a quo* has created a parallel system of civil procedure.

[72] For the same reason, the view taken by the High Court relying on Art 12(1)(e) – that a prospective litigant has a right to obtain evidence and documents (including from the Cabinet) for the purpose of instituting legal proceedings is stating the principle too widely. For present purposes, I will confine that exceptional remedy to the kind of situation already recognised under common law.

²⁶ Motion proceedings are designed for the resolution of common cause facts. In motion proceedings, the affidavits constitute the pleadings and evidence, therefore the parties must make out their cases on affidavit. Where there are genuine disputes of fact on the papers and these have not been referred to oral evidence, the version of the respondent prevails unless it is so far-fetched that it can be rejected merely on the papers.

[73] The appeal must therefore succeed and the subpoenas *duces tecum* issued against both the A-G and the Cabinet Secretary should be set aside.

Order

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

1. The appeal succeeds and the judgment and order of the High Court are set aside and replaced by the following:
 - ‘(i) The application for the rescission of the order of 3 June 2021, authorising the issuing of subpoenas *duces tecum* against the Attorney-General and the Secretary to Cabinet, is granted.
 - (ii) The subpoena *duces tecum* issued against the Secretary to Cabinet is set aside, with costs, including costs of one instructing and one instructed legal practitioner.
 - (iii) In respect of the Attorney-General, the first respondent (Hollard Insurance Company Limited) is ordered to pay the costs of the Attorney-General up to the date of the withdrawal of the subpoena *duces tecum* against him.
 - (iv) The costs are not subject to the provisions of Rule 32(11).’
2. The appellants are granted costs in the appeal, to include costs consequent upon the employment of one instructing and two instructed legal practitioners.

DAMASEB DCJ

MAINGA JA

FRANK AJA:

[75] The facts and disputes arising between the parties in this matter are evident from the judgment of Damaseb DCJ and I do not reiterate them. I agree with the conclusion and the order granted by Damaseb DCJ and these are my reasons for this.

[76] Because Gondwana decided to approach the court *a quo* by way of an application, it meant that the rules applicable to application proceedings applied. This further meant that Gondwana did not foresee material factual disputes as this is what application proceedings are primarily designed for. It further follows that what was foreseen was that there would be an exchange of the usual number of affidavits whereafter the application would be dealt with by the court.

[77] If it turned out that Gondwana's assumption that no material factual dispute(s) would arise was wrong then the court *a quo* would have three options to consider, namely: dismiss the application or direct that oral evidence be heard on specific issues or refer that matter to a trial.²⁷

[78] Where the matter is referred to oral evidence the court may 'order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness'. Similarly when a matter is referred to trial the normal trial procedures will provide for the matters relating to witnesses and other trial related procedures.

[79] Because that whole basis of the application procedure is the premise that it would primarily be utilised in situations where no material factual disputes arise it is

²⁷ Rule 67(1) of the Rules of the High Court.

the court seized with the application and only that court that can direct that oral evidence be heard, either in respect of certain deponents or subsequent to the issuing of subpoenas. As put in *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*²⁸ where a similar rule with regards to referral to evidence in applications apply:

‘ . . . a party to an application cannot on his authority cause the registrar to subpoena a witness to appear at the hearing of the application, for the discretion to direct the calling of witnesses under (the Rule) lies with the court and not a party. No witness may be called without the express approval of the court, which will, as part of its order, direct which witnesses are to be called and specify the issues on which oral evidence is to be heard.’

[80] In many orders where there is referral to evidence, parties are authorised to subpoena witnesses. It is thus a common occurrence when disputes in applications are referred to evidence.²⁹

[81] The question that arises in this matter is whether a court seized with the case management of an application where only the founding papers (Notice of Motion and Founding Affidavits) have been filed can direct that a subpoena *duces tecum* be issued. In other words, whether the court in application proceedings can direct the issuing of such subpoena without knowing what the material disputes (if any) will be as this will only become apparent subsequent to the filing of the answering affidavits. It should also be kept in mind that a subpoena *duces tecum* is by its nature directed at a person who is not a party to the application for parties can be made to discover

²⁸ A C Celliers, C Loots and H C Nel *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed Vol 1 at 465. See also 3 ed at 93–94 and *Campbell & another v Kwapa & another* 2002 (6) SA 379 (W) at 381F-382D.

²⁹ See eg *Alpine Caterers Namibia (Pty) Ltd v Owen & others* 1991 NR 310 (HC) at 316J–317H and *Rosen v Barclays National Bank Ltd* 1984 (3) SA 974 (W).

documents pursuant to discovery procedures. It should be pointed out that discovery in applications only apply 'to such extent as the court may direct'.³⁰

[82] That there is no general right to information, either through the discovery procedure or through the use of subpoenas (including subpoenas *duces tecum*), outside the rules of court can in my view be accepted as the law. In *Krygkor Pensioenfonds v Smith*³¹ the position is stated as follows:

'Normally, the provision of information is regulated as part of the legal proceedings regulated by the rules of court, provision is made for *inter partes* exposures and for witness summonses or writs of summons to appear in respect of third parties. Our courts are traditionally disinclined to go beyond these stipulations. See, for example, a part from those already dealt with herein, *Biden v French and D'Esterre Diamond Mining Company* (1882) 1 Buch AC 95; *Colonial Government v W H Tatham* (1902) 23 NLR 153 at 157-8; *Spies v Vorster* 1910 NLR 205 at 216; *Messina Brothers, Coles and Searle v Hansen and Schrader Ltd* 1911 CPD 781; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 462H-463B; *Roamer Watch Co SA and Another v African Textile Distributors also t/a M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) at 282C and 284C and *Seetal v Pravitha and Another NO* 1983 (3) SA 827 (D) at 832G-833E. Also compare the discussion in *Jafta's case supra* at 293J-294D. What is clear from these modifications is that only in exceptional cases will the Court exercise its inherent power to follow proceedings for which no provision is made in the ordinary law of procedure. The exceptional cases are described in various ways in the decisions referred to above. For present purposes, however, it is sufficient to say that the Court will exercise such jurisdiction just where justice requires deviation from the ordinary procedural rules. And even where a deviation may be necessary the Court will naturally endeavour to adhere as closely as possible to recognised practices.'

[83] In *Krygkor* the applicant sought an order against her ex-husband's pension fund compelling it to furnish certain information to her about payments made to him.

³⁰ Rule 70(3).

³¹ *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469E-I. I quote the portion from a sworn English translation handed up by counsel for Hollard.

In terms of a divorce order she would be entitled to half of such pay-outs and her husband, who went on pension, did not make any payment to her and refused to provide her with the necessary information. The court held that even if it had the inherent power to do so it would not do so if the information could have been obtained by using normal discovery procedures or by serving on a non-litigant a subpoena *duces tecum* in the ordinary course. As use could be made of the discovery procedures on the facts of this case the application was dismissed with costs.

[84] In Namibia, this Court in *Chairperson of the Tender Board v Pamo Trading Enterprises*³², in essence, came to the same conclusion. In this case an unsuccessful tenderer sought documents from the Tender Board for the purposes of seeking advice in order to decide whether or not to review the decision of the Tender Board. This pre-litigation discovery was sought on the basis of an entitlement thereto pursuant to Arts 12 and 18 of the Constitution.

[85] This court found that pre-litigation discovery was not a constitutional right either under Art 12 or Art 18 but could be granted in exceptional circumstances in rare cases³³. Further, the court in *Pamo Trading* – after referring to the South African case of *Unitas Hospital v Van Wyk & another*³⁴ – concluded as follows:

‘Quite apart from the weighty consideration of an adequate alternative remedy in the hands of the respondent which would preclude the need to develop the common law on the facts of this case, the respondents furthermore do not properly specify in their application what right they wish to protect, what information is required and how that would assist them in exercising, asserting or protecting that right.

³² *Chairperson of the Tender Board & another v Pamo Trading Enterprises & others* 2017 (1) NR 1 (SC).

³³ *Supra* para 66.

³⁴ *Unitas Hospital v Van Wyk & another* 2006 (4) SA 436 (SCA).

As I have pointed out, the respondents were sketchy and vague in setting out the right they wish to assert and not even address the further aspects of explaining what information is required and how this could assist them in asserting their right. The vagueness in this regard is compounded by their failure to exercise their statutory and constitutional right to request reasons before launching their application. The respondents thus comprehensively failed to justify the need to develop the common law to compel the board to provide the documentation sought by them.³⁵

[86] In *Unitas*, the South African court held that in its view open and democratic countries would not necessarily encourage ‘what is commonly referred to as “fishing expeditions”’ which would happen if pre-litigation discovery is accepted as a general rule nor would such a country require a potential defendant, to disclose his or her whole case before proceedings are launched against such person. That the rules relating to discovery had served that country well over the years and had built-in measures to promote fairness and avoid abuse. Documents are only discoverable if relevant to the litigation which is determined by reference to the issues in the litigation under consideration. Whereas it is correct that the fact that the information sought will, in the general scheme of things only become available in terms of the rules this does not mean that there is an absolute bar to that information prior to the date it would become available pursuant to the rules. However, if the information which would be available at a later stage, is needed prior to such later stage a litigant would have to justify it and show an ‘element of need’ or a ‘special advantage’ before a court will allow it. In other words, it will remain an exceptional case³⁶.

[87] As in South Africa, the rules in Namibia served us well for decades and the inherent jurisdiction of the High Court to depart from the rules when circumstances

³⁵ *Pamo Trading* paras 72-73.

³⁶ *Unitas* paras 21 and 22.

warrant it has insured that the rules remain the procedural backbone for litigation that is fair to all concerned in such litigation. It has never been suggested that the rules which apply to all litigants equally was in any matter skewed so as to favour one party over the other, nor could there be if regard is had to the rules coupled with the power of the High Court to ameliorate the effect of non-compliance with the rules, and in its inherent jurisdiction authorises a departure from the rules in exceptional circumstances. It is evidently sensible that the question of the relevancy of evidence (both oral and documentary) only be determined after the disputes between the litigants have been identified on the pleadings in both actions and applications. As in South Africa, the rules in Namibia (which to a large extent borrows from the South African rules) 'have their own built-in measures of control to promote fairness and to avoid abuse'. The rules thus objectively viewed provide the framework for a fair trial as contemplated in Art 12 of the Constitution.

[88] As is evident from what is stated above there may be cases where the rules are inadequate and where a rigid adherence to the rules would constitute an unfairness to a litigant but this will indeed be a rare exception. Where such exception arises, the High Court will have the power to deal with it and to remedy such unfairness with an appropriate order in its inherent jurisdiction. As also pointed out in the cases mentioned above, it goes without saying that such unfairness cannot arise in circumstances where the rules or the law provides an adequate remedy because if there is such a remedy the litigant will be expected to adhere to the existing remedies. The fact that the remedy might not be available at the time most convenient to a particular litigant cannot be an excuse for a deviation from the rules.

[89] With the above principles in mind, I now turn to consider whether the present matter was one where Hollard established exceptional circumstances for a subpoena

duces tecum to the Secretary to Cabinet (the Secretary) prior to filing an answering affidavit in the application brought by Gondwana against it. The subpoena directs the Secretary to produce certain Cabinet minutes and other documents and correspondence exchanged between members of Cabinet.

[90] Gondwana brought an urgent application seeking a declarator that Hollard is liable to indemnify it in terms of a policy issued by the latter to the former for damages suffered by the former allegedly as a result of the outbreak of Covid-19 in Windhoek on 13 March 2020 which allegedly in turn led to a country-wide lockdown by Government.

[91] Hollard, in response to the application, did not file an answering affidavit but what it termed an 'interlocutory application'. In the interlocutory application it sought the following relief against Gondwana:

- (a) That the urgent application be dismissed for 'lack of urgency', alternatively;
- (b) If the application is urgent that Gondwana be ordered to provide Hollard with a copy of an agreement it concluded with Insurance Claims Africa (ICA) and allowing it to approach the court on the same papers once they studied the said agreement to have the application declared null and void. (In the founding affidavit to the interlocutory application, allegations are made that the agreement with ICA may constitute an illegal contingency agreement), further and alternatively;
- (c) Insofar as the matter is found to be urgent and the agreement with ICA is not an illegal contingency agreement then the application is premature and

academic and Hollard has not yet rejected Gondwana's claim; further and alternatively;

(d) That Gondwana should have foreseen material factual disputes in respect of certain information allegedly due by Gondwana to Hollard which warrant the striking from the roll Gondwana's application; further alternatively;

(e) Insofar as all Hollard's points mentioned in (a) – (d) are dismissed 'then in that event':

- (i) Hollard is entitled to issue subpoenas *duces tecum* in respect of four mentioned individuals namely, Dr Haufiku, Dr Kandetu, Mr Mbandeka, Dr Simaata and Ms Eyesele. (Dr Haufiku was a deponent to an affidavit in the Gondwana application, Dr Kandetu was involved in the Covid-19 task force, Mr Mbandeka is the Attorney-General, Dr Simaata is the Secretary to Cabinet and Ms Eyesele who is involved with Marsh (Namibia) (Pty) Ltd is the broker for Gondwana in respect of its insurance portfolio);
- (ii) Hollard's striking-out application in respect of evidence objected to in Gondwana's founding papers had to be dealt with; and
- (iii) A declaration that Hollard is entitled to cross-examine Mr Gys Joubert (the Managing Director of Gondwana Collection Namibia), and the deponent of an affidavit, and Dr Haufiku, who deposed to a supporting affidavit to the founding affidavit of Hollard.

[92] I must point out that the interlocutory application, in respect of most of the relief sought therein, is not interlocutory at all but seeks to raise points which should have been raised *in limine* in an answering affidavit. This relates to all the issues raised in paragraphs (a) – (d) above. In applications, unless a litigant wishes to raise legal issues only when a rule 66(1)(c) notice will suffice, a respondent is required to file an answering affidavit which deals with all aspects such respondent intends to raise in answer to the founding affidavit(s). Thus, one cannot raise a special defence and not plead over one's other defence(s)³⁷. If the time provided by Gondwana in the bringing of the urgent application was not sufficient Hollard should have raised the urgency issue up front in an answering affidavit and dealt with this issue and then sought a postponement to file a complete answering affidavit at some stage indicating at least the nature of its other defences. There was simply no basis for bringing a so-called 'interlocutory application'³⁸. Whereas the relief sought and referred to above does not feature in this appeal it is apposite that I mention two aspects. How the court *a quo* was to decide if the factual disputes was such as to dismiss the application of Gondwana without an answering affidavit simply cannot be done except to, in essence, use this 'interlocutory application' to respond to the founding affidavit. In respect of the point that the application was premature as Gondwana's claim had not yet been rejected by Hollard it is quite a strange claim to make because in the founding affidavit supporting the interlocutory application it is

³⁷ With the possible exception of a defence of lack of jurisdiction.

³⁸ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782A-D which reads as follows (my own translation): 'In the case of an urgent application, an applicant is allowed to act by way of a notice of motion without adhering to the rules applicable in the ordinary course. The applicant is allowed, in a sense to, in the circumstances of the case, make his or her own rules which must as "far as possible" be in accordance with the existing rules. Rule 6(12) thus provides for a process subject to different rules than the normal ones and when the applicant appears before the judge he must then seek leave of the judge to allow his or her non-adherence with the ordinary rules. He or she need not obtain the prior approval of the judge for the non-adherence to the ordinary rules because rule 6(12) expressly stipulates that the judge can deal with such matter as he or she deems fit. Where an applicant acts under this rule, he or she notifies the respondent that the application is regarded as an urgent one and it follows, in my view, that the respondent is compelled, in the sense that he or she runs the risk of an order against him or her by default, to provisionally accept the rules stipulated by the applicant. When the case serves before the judge, the respondent can object, but he or she dare not in the meantime, ignore the rules set by the applicant.'

clear that Hollard rejects the claim as its stance is that the Covid-19 infection of the Romanians did not occur within 25 km of Gondwana's business premises as prescribed in the policy and also that it was not this outbreak that caused the government lock-down as alleged by Gondwana which according to Hollard is fatal to the case of Gondwana. The rejection of Gondwana's claim was thus a foregone conclusion.

[93] I mention the above response to the urgent application however as it demonstrates the attitude of Hollard that it, as respondent, can decide what procedure should apply to it and if the rules of court do not provide for such procedures they will ignore the rules so as to assert their right to a fair trial. As will become apparent below when Gondwana insisted that Hollard adhere to the rules, the latter in an arrogant fashion, dismissed such suggestion and insisted it would determine the procedures applicable to it.

[94] It follows from the relief sought in paragraph (c) of the interlocutory application that Hollard sought to cross-examine the witnesses mentioned prior to the filing of an answering affidavit. The reason for the subpoena *duces tecum* directed at the Secretary to Cabinet is stated to be that the documents specified in this subpoena were needed for the purpose of cross-examination of Dr Haufiku. This is also apparent from the fact that the calling of the witnesses and the issuing of the subpoenas *duces tecum* were persisted with and were obtained at the case management meeting from the managing judge after the application proceeded in the normal cause and prior to the filing of the answering affidavit.

[95] In the founding affidavit to the interlocutory application, the managing director of Hollard states that the basis of this application is as follows: 'At the heart of this matter lies Article 12 of the Namibian Constitution (Article 12)' and sanctimoniously states that 'Gondwana cannot, and hopefully does not, dispute the application of Article 12 . . . '.

[96] Under the heading 'Subpoenas' in the interlocutory application Hollard, presumably bolstered by the reliance on Art 12 as set out above, fires the following warning shot at Gondwana:

'Any person who wishes to make out a case that Hollard is abusing its rights (which is denied by Hollard) must make out such case. It is not for Gondwana to demand affidavits from Hollard to say pertinent things under oath before – according to Gondwana – Hollard becomes entitled to the procedural device of issuing subpoenas *duces tecum*.'

[97] Gondwana's urgent application was eventually dismissed on the basis that it was not urgent. The High Court thus did not deal with all the alternative relief that would only follow had the urgency point not succeeded. After the dismissal of Hollard's application based on the finding that it was not urgent, Gondwana in terms of rule 73 (5)³⁹ elected to proceed with the application in the ordinary course and the matter was referred to case management.

[98] It needs to be mentioned in passing that Gondwana filed an answering affidavit to the interlocutory application brought by Hollard where it states in respect of the subpoenas *duces tecum* sought as an alternative that it was seeking the sanction of the court to conduct 'an unwarranted fishing expedition' and that Hollard

³⁹ Rules of the High Court.

was required to file an answering affidavit before it could make application for such an order and concluded that 'Hollard is protected by rules of evidence which apply to motion proceedings and it is not necessary for Hollard to issue the subpoenas in order to meet Gondwana's case in the main application'.

[99] Hollard at a case management meeting informed Gondwana that it would apply to the managing judge for an order to issue the subpoenas to which Gondwana indicated that they could not prevent Hollard from so applying. The application was then made and the managing judge granted Hollard the order that it sought. This led to an application by the Attorney-General and the Secretary to Cabinet to have the subpoenas *duces tecum* directed at them to be set aside.

[100] During the course of the proceedings instituted by the two government officials to have the subpoenas directed at them set aside, Hollard withdrew the subpoena issued against the Attorney-General and it was conceded in this Court that the correct order in respect of the Attorney-General would have been a costs order in his favour up to the point of the withdrawal of the subpoenas against him. Whereas the court *a quo* was aware of the fact that the subpoena against the Attorney-General had been withdrawn⁴⁰ it nevertheless dismissed his application with costs and furthermore where it quotes the subpoena it states to be the one directed at the Secretary to Cabinet it actually quotes the subpoena directed at the Attorney-General.⁴¹

⁴⁰ *The Attorney-General and Another v Gondwana Collection Limited and Others* (HC-MD-CIV-MOT-REV-2021/00234) [2022] NAHCMD 23 (28 January 2022) paras 4 and 2 of the order (Judgment *a quo*).

⁴¹ Judgment *a quo* para 75. The subpoena directed at the Secretary to Cabinet is not that extensive as in the one directed at the Attorney-General.

[101] For the purpose of the appeal it is thus only necessary to consider whether the authorisation by the court *a quo* for the issuing of the subpoena *duces tecum* on the Secretary to Cabinet was properly granted and only in relation to the legal background spelled above. This aspect is spelled out in the judgment *a quo* as follows:

'The first point of attack by the applicants was that this was not a proper case in which to apply and be granted subpoena *duces tecum*. This, it was submitted, was for the reason that in the main application, Hollard had not yet filed its answering affidavit. For that reason, it was argued, there was no dispute of fact that had developed and which could require a resolution that would entail the issuance of a subpoena. The application for the subpoena was, in the absence of a dispute of fact, accordingly an abuse of process by Hollard and for that reason, the court should set aside the subpoenas issued.'⁴²

[102] Hollard's case in respect of the above aspect raised by Gondwana as spelled out by the judge *a quo* is as follows:

'It was Hollard's case that in essence, it sought the relief granted by the court in a bid to enforce its fair trial rights envisaged in Art 12 of the Constitution. In this connection, it had and has a right to adequate facilities to prepare his defence against the proceedings initiated against it by Gondwana. The application it made was to give effect to this Constitutional right in Art 12. To hold otherwise, would render the right illusory.'⁴³

[103] The judge *a quo* concentrates on the abuse element referred to above in his summary of Gondwana's position and states that 'abuse does not appear to be an element'. And as stated above, the applicants do not allege abuse in the circumstances of this case and then concludes this aspect as follows:

⁴² Judgment *a quo* para 29.

⁴³ Judgment *a quo* para 33.

'The party to litigation should be allowed to access documents and it needs to be able to properly prosecute its case and this is what Hollard has stated that it seeks to do. Nothing of substance appears to or seeks to detract from their position, which can be regarded as trite. A legitimate purpose for the issuance of the subpoenas have been stated on oath by Hollard and it must be accepted as genuine and perfectly legitimate.'

[104] There was no suggestion in the founding affidavit of the interlocutory application that if Hollard had to wait until the close of pleadings or after the answering affidavit had been filed and it was then decided by the court that there was a material dispute of fact in respect of whether the Covid-19 lock-down announced by Government was caused by the discovery of the disease in two Romanian tourists (as alleged by Gondwana) or based on the exhortations of the World Health Organisation for the global lock-down so as to prevent or hinder the spreading of the disease globally (as alleged by Hollard) that it would be irrevocably prejudiced in any manner. Furthermore, Hollard stated expressly that the documentation would be needed for cross-examination of certain mentioned deponents with reference to such documents. Once again whether the deponents would have to give oral evidence would also depend on what material facts or disputes the court would decide to refer to evidence. Thus for example, if the court decided, assuming that Hollard persisted with its 'illegal contingency agreement' point to deal with it *in limine* and if this point was decided in favour of Hollard there simply would not have been any need to refer any other disputes to evidence. A similar situation would arise if the application is dismissed on the basis that Hollard should have foreseen factual disputes. The same reasoning would apply to all the other points taken *in limine* in the interlocutory application mentioned above. There is simply no basis for allowing the respondent in application proceedings to, in interlocutory applications, simply file papers to state that they foresee certain factual disputes, and then asked for a referral to oral

evidence on those facts and seek documents *duces tecum* to use for the intended cross-examination. This would be tantamount to ignoring the current rules and from a practical perspective have the effect of doing away with answering affidavits or lead to unnecessary delays. What happens to the oral evidence that is heard midstream? Does it simply become part of the record to be followed by the answering affidavit or does one simply assume that after such oral evidence one or other of the parties will have to concede to one version in respect of the factual disputes referred to for oral evidence. What happens if further factual disputes develop after the filing of an answering affidavit and subsequent to the hearing of oral evidence *in limine* as envisaged in this matter? Is there a further referral to evidence by the court? To seek to cross-examine deponents prior to allowing the court hearing the application to decide on what issues oral evidence should be heard is simply astoundingly outlandish and falls to be rejected out of hand. Obviously, if the hearing of oral evidence of the deponents can't be dealt with in this manner, neither can subpoenas *duces tecum* be issued for the purpose of cross-examining witnesses at such an early stage of the proceedings.

[105] The fact that Hollard sought to cross-examine the deponents prior to filing an answering affidavit, in any event, indicates that the purpose for this was to either elicit admissions from them or put evidence before the court through them that might supplement the allegations that they would then set out in the answering affidavits. This would amount to a fishing expedition.⁴⁴ It goes without saying that the court should not assist a party in such endeavour by authorising the issuing of a subpoena *duces tecum* the purpose of which is to assist such party in his or her 'fishing expedition'.

⁴⁴ *Hopf v Pretoria City Council* 1947 (2) SA 752 (T) at 768 and *Seton Co v Silveroak Industries (Ltd)* 2000 (2) SA 215 (T) at 213.

[106] At the heart of the issue in this matter is an affidavit by Dr Haufiku to the effect that the country wide lock-down announced was imposed 'in response to, and were. . .caused by the outbreak of Covid-19 in Windhoek'. Hollard took issue with this by casting aspersions on the integrity of Dr Haufiku as he is a shareholder of Gondwana and hence, according to Hollard has a financial interest in the application and by denying the veracity of these allegations as none of the proclamations announcing the lock-down state the cause of the lock-down to be the outbreak of the disease in Windhoek. It is then averred by Hollard that it is clear that the lock-down was implemented because of the Government's fear of the spread of this 'worldwide outbreak' to this country and that it contends that the lock-down would have been implemented even in the absence of any confirmed cases in Namibia. In this court there was also a reference to the time period from the time it was established that the two tourists indeed had Covid-19 at a Cabinet meeting resolving the lock-down to submit the version of Dr Haufiku was improbable. Whereas Hollard stated in the interlocutory application that it has no personal knowledge of what caused Cabinet to resolve to have a lock-down declared, hence request for the Cabinet minutes and the communication between Cabinet members, there was no suggestion that the facts raised by them and stated above would not have been enough to establish a genuine factual dispute in this regard. In fact, counsel for Hollard informed the court that an answering affidavit had eventually been filed where the facts and reasons relied on to dispute the averments of Dr Haufiku had been spelled out in this answering affidavit.⁴⁵ There was thus no need for the order sought to 'properly prosecute' the defence.⁴⁶

⁴⁵ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.

⁴⁶ *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 137C.

[107] There was just simply no reason for Hollard to be exempted from the ordinary rules when it came to the application instituted against them by Gondwana. They would become entitled to a referral to oral evidence coupled with an order to issue subpoenas *duces tecum* once the pleadings had closed and if the court, on the basis of the affidavits placed before it, was satisfied that the dispute as to the cause of the lock-down was material and would have to be resolved on the basis of the hearing of oral evidence. There is no basis or need, in the absence of exceptional circumstances, to establish prior to the full exchange of affidavits, whether and which material factual disputes are bound to arise, so as to attempt to take one's best guess as to whether an applicant is to be exempt from the relevant rules of court. As mentioned the deviation from the rules should be limited to exceptional circumstances unless one opens up a situation where each litigant can decide for him or herself which procedural rules should apply in his or her case as was done by Hollard.

[108] The mere invocation of Art 12 by a party to litigation does not mean, without more, that the relief sought must be granted. As mentioned above it would mean that each litigant would be entitled to stipulate the procedures that will apply to his or her litigation. I have pointed out above if there are exceptional circumstances which need to be established by a party to the litigation the court can sanction a deviation from the rules. This Hollard did not establish, in fact it was not addressed at all because it was assumed that the mere invocation of Art 12 gives a party such right. In such circumstances, it was a misdirection to approve the application which amounted to nothing more than expressing knowledge of the contents of Art 12 without understanding its role when it comes to the rules of the High Court. To have granted the application in the above circumstances was to, an effect, respond to a pious

incantation of Art 12 by Hollard and to aid and abet its conduct of a 'fishing expedition'.

[109] It follows that the order of the High Court *a quo* is to be set aside and the appeal accordingly succeeds as per the order of Damaseb DCJ.

FRANK AJA

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