

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No: I 2551/2014

In the matter between:

LOUIS JACOBUS CLOETE

LOUIS GROUP SA (PTY) LTD (*In Business Rescue*)

MICHAEL LOUIS

COLIA LOUIS

EMILE LOUIS

COLIA LOUIS FAMILY TRUST

SMARTSURVE WIRELESS (PTY) LTD

ELIZABETH MARIA HOLDINGS CC

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

FIFTH APPLICANT

SIXTH APPLICANT

SEVENTH APPLICANT

EIGHTH APPLICANT

and

KOMSBERG FARMING (PTY) LTD

(*In liquidation*)

ALWYN PETRUS VAN STRATEN N.O.

THE MASTER OF THE HIGH COURT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

In re:

**COLIA LOUIS FAMILY TRUST
DEFENDANT IN RECONVENTION**

PLAINTIFF

and

KOMSBERG FARMING (PTY) LTD

(In liquidation)

THE MASTER OF THE HIGH COURT

Neutral citation: *Cloete v Komsberg Farming (Pty) Ltd (in liquidation)* (I
2551/2014) [2022] NAHCMD 458 (25 August 2022)

**FIRST DEFENDANT/
PLAINTIFF IN RECONVENTION**

SECOND DEFENDANT

Coram: OOSTHUIZEN J

Heard: 30 May 2022

Ruling Delivered: 25 August 2022

Edited Reasons Released: 2 September 2022

ORDER

1. Sixth Applicant (Defendant in reconvention in Case No. I 2551/2014) is not allowed to tender documentary and oral evidence, alternatively to cross-examine the witnesses to give evidence on behalf of Komsberg Farming (Pty) Ltd (in liquidation) based on the contents of Louis Jacobus Cloete's founding affidavit and the annexures thereto in the pending default judgment application of first Respondent (Komsberg) against the sixth Applicant/Defendant in reconvention.
2. Second to fifth and seventh to eighth Applicants application to intervene in Case No. I 2551/2014 as defendants in reconvention is dismissed.
3. Second to fifth and seventh to eighth Applicants application to tender documentary and oral evidence, alternatively to cross-examine the witness to give evidence on behalf of Komsberg Farming (Pty) Ltd (in liquidation) based on the contents of Louis Jacobus Cloete's founding affidavit and the annexures thereto in the pending default judgment application of first Respondent (Komsberg) against the sixth Applicant/Defendant in reconvention, is refused.
4. The costs in the failed application shall be paid by the second to eighth Applicants and shall include the costs of one instructing and two instructed counsel and shall not be capped by rule 32(11).
5. Part B of the Notice of Motion, prayers 1 to 3 thereof, is struck from the roll.
6. Applicants are at liberty, if so advised, to bring part B of the application independently as a fresh application on e-justice, in compliance with rule 65(1) and (4).

RULING

OOSTHUIZEN J:

Introduction

[1] First to eighth Applicants on 29 April 2022 applied for relief that second to fifth Applicants and seventh to eighth Applicants be allowed to intervene as defendants in reconvention in Case No. I 2551/2014 (the main action) in order to present evidence, alternatively, for leave to cross-examine the witnesses to give evidence on behalf of Komsberg Farming (Pty) Ltd (in liquidation) in the pending default judgment application against the Colia Louis Family Trust (sixth Applicant/Defendant in reconvention), based on the contents of the founding affidavit of first Applicant and the annexures thereto.

[2] Applicants further request relief which they say is in terms of rule 65, that they are authorised (in terms of s 365 (1) of the Companies Act 28 of 2004, to inspect and copy the books and papers of Komsberg Farming (Pty) Ltd (in liquidation) and specifically, those after second Respondent (Van Straten) was appointed as final liquidator; and that Van Straten be ordered to convene a special second meeting of creditors within three months in order for second to eighth Applicants' claims to be presented for proof thereof.

[3] Van Straten was appointed as final liquidator of first Respondent ("Komsberg") by the Master of the High Court during 2013.

[4] The first meeting of creditors was held on 22 May 2013. The second meeting of creditors was held on 27 November 2013.

[5] On 16 May 2014 the sixth Applicant, as plaintiff, instituted action against Komsberg for a declarator that sixth Applicant is a creditor of Komsberg in the sum

of N\$15 951 133 and has a lien and right of retention over the Komsberg Farm and equipment.

[6] Komsberg defended the action, pleaded and counterclaimed.

[7] On 25 September 2014 the court ordered Plaintiff to plea to Komsberg's counterclaim by 30 October 2014.

[8] Plaintiff (sixth Applicant) failed to plea by 30 October 2014 and was automatically barred from pleading by virtue of rule 54(3) of the rules of Court.

[9] On 6 November 2014 the sixth Applicant withdrew its action against Komsberg.

[10] On 31 July 2015 Miller AJ pronounced himself against the sixth Applicant's application for upliftment of the automatic bar subsequent to sixth Applicants' late filing of the plea and the exchange of affidavits for the upliftment and heads of argument filed and the hearing of the application on 9 June 2015.

[11] On 19 October 2015 Van Straten rejected the second to eighth Applicants' claims against Komsberg.

[12] Since August 2015 up to 26 June 2017 the sixth Applicant failed to apply for leave to appeal.

[13] On 26 June 2017 the sixth Applicant applied for leave to appeal the order of Miller AJ and condonation for the late filing thereof.

[14] After the exchange of affidavits, heads of argument and oral argument on 27 October 2017, this court on 29 January 2018 disregarded certain documents as

inadmissible for want of compliance with rule 128(2); struck certain paras, inclusive of annexures, as being irrelevant; struck certain paras as being frivolous and/or vexatious and refused the condonation application for the late filing of the leave to appeal and the leave to appeal.

[15] The whole matter then became stale.

[16] The second to eighth Applicants did nothing subsequent to Van Straten rejecting their creditor claims on 19 October 2015 and the sixth Applicant did not petition the Chief Justice for leave to appeal my judgment and orders of 29 January 2018.

[17] The second to eighth Applicants were prompted into action only after this court's order of 28 February 2022 when it became clear that Komsberg wishes to pursue default judgment against the sixth Applicant, the defendant in reconvention in Case No. I 2551/2014.

[18] Subsequent to 29 January 2018 and sixth Applicant's failure to petition the Chief Justice for leave to appeal and in part, due to the fact that this court did not schedule a follow up hearing to establish from Komsberg whether and when it plan to bring a default judgment application in terms of rule 15(2), the default procedure fell off the radar until September 2020. From March to August 2020 the Covid-19 pandemic played a role in the court's and Komsberg's delay in dealing with the matter.

[19] Komsberg applied for condonation for its delay to pursue the application for default judgment and for re-instatement of the matter on the judicial case management roll on 13 December 2021. In its application, it dealt satisfactorily with the reasons for the delay and the court granted condonation and re-instatement on 7 April 2022. Although the sixth Applicant purported to appear through a Mr

Lochner, there was no formal notice to oppose the condonation and the reinstatement filed.

Second to eighth Applicants application to intervene

[20] First Applicant (Cloete) applied for the intervening relief, relief to adduce evidence and to cross-examine the witnesses to be called for Komsberg in the default proceedings and for relief in terms of s 365(1) of Act 28 of 2004 and for Van Straten to be ordered to convene a special second meeting of creditors.

[21] No confirmatory affidavits of any of the second to eighth Applicants or proof of authority to bring such an application is attached to the papers.

[22] Despite a notice by Komsberg and Van Straten to supply security for costs in terms of Rule 59, none was forthcoming.

[23] Part B of the Notice of Motion was not brought under a fresh case number and on e-justice, despite the fact that e-justice is in operation since June 2016 and despite rule 65(1).

[24] No index was supplied in terms of rule 131(6) and (7) of the Rules of Court.

[25] No annexures were attached to the double barrelled application. A dropbox link to annexures to the founding affidavit of Cloete does not suffice. The convenience of the court is totally ignored. See rule 65(4).

[26] The Applicants' for intervention attempt to resubmit material which was ruled to be inadmissible and struck on 29 January 2018, is noted and deplored.

[27] I repeat that the second to eighth Applicants knew that their creditor claims were rejected on 19 October 2015. First Applicant says that he was the in house accountant for the Applicants and only severed ties with them during 2020. He says that he had control over all the financial records of the Louis Group and the Louis family and is therefore best suited to depose to the founding affidavit of the present motion. I have already referred to the absence of any confirmatory affidavit and annexures.

[28] There is no explanation at all in the papers submitted why it took at least four years for the applicants to bring the intervention application. This is not reasonable, and a reasonable explanation was required.

[29] The intervention application at this stage, in order to take part in the default proceedings against the sixth Applicant, is inordinately late without any explanation.¹

[30] Sixth Applicant is barred from pleading and to take part in the default proceedings.²

[31] At the moment, none of the second to fifth and seventh and eighth Applicants are recognised creditors in any amounts of Komsberg and they (exclusive of sixth

¹ See rule 19(i) and para 24 of *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011(2) NR 469 (SC) at 479.

² *Abramacos v Roman Gardens (Pty) Ltd and Others* 1960(1) SA 470 (SR) at pg 471 H to 472 A-D and H Daniels Beck's *Theory and Principles of Pleading in Civil Actions* 6 Ed (2002) at 174 para 11.1.1

Applicant) do not have vested interests in the case before court and shall not be allowed to intervene.

[32] Komsberg, on the other hand, has a vested interest in this court's order and judgment of 29 January 2018 and has obtained condonation for its delay in proceeding to default judgment. Komsberg is entitled to rely on the finality of this court's order and judgment.

[33] For the reasons set out hereinbefore and without pronouncing on the merits and or demerits of Part B of the Notice of Motion, the following orders are made:

1. Sixth Applicant (Defendant in reconvention in Case No. I 2551/2014) is not allowed to tender documentary and oral evidence, alternatively to cross-examine the witnesses to give evidence on behalf of Komsberg Farming (Pty) Ltd (in liquidation) based on the contents of Louis Jacobus Cloete's founding affidavit and the annexures thereto in the pending default judgment application of first Respondent (Komsberg) against the sixth Applicant/Defendant in reconvention.
2. Second to fifth and seventh to eighth Applicants application to intervene in Case No. I 2551/2014 as defendants in reconvention is dismissed.
3. Second to fifth and seventh to eighth Applicants application to tender documentary and oral evidence, alternatively to cross-examine the witness to give evidence on behalf of Komsberg Farming (Pty) Ltd (in liquidation) based on the contents of Louis Jacobus Cloete's founding affidavit and the annexures thereto in the pending default judgment application of first Respondent (Komsberg) against the sixth Applicant/Defendant in reconvention, is refused.

4. The costs in the failed application shall be paid by the second to eighth Applicants and shall include the costs of one instructing and two instructed counsel and shall not be capped by rule 32(11).

5. Part B of the Notice of Motion, prayers 1 to 3 thereof, is struck from the roll.

6. Applicants are at liberty, if so advised, to bring part B of the application independently as a fresh application on e-justice, in compliance with rule 65(1) and (4).

G H Oosthuizen
Judge

APPEARANCES:

PLAINTIFF(S): V Kauta
Instructed by Francois Erasmus and Partners, Windhoek

DEFENDANT(S): R Heathcote SC and (with him J Schickerling)
Instructed by Van der Merwe-Greeff Andima Inc, Winhdhoek