

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

Case Title: JOHANNA KAHATJIPARA v FIRST NATIONAL BANK	Case No: HC-MD-CIV-ACT-CON-2019/05422 Division of Court: HIGH COURT (MAIN DIVISION) DEFENDANT
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 5 July 2023 Delivered on: 26 July 2023
Neutral citation: <i>Kahatjipara v First National Bank</i> (HC-MD-CIV-ACT-CON-2019/05422) [2023] NAHCMD 435 (26 July 2023)	
Results on merits: Merits not considered.	
The order: <ol style="list-style-type: none">1. The defendant must comply with the plaintiff's/applicant's notice of motion dated 30 March 2023, by no later than 15 August 2023, by permitting and allowing the plaintiff's expert and his or her videographer to inspect, copy and videograph all of the documents as per paragraph 1 of the notice of motion.2. The documents must remain available for examination or inspection for a period of not more than 10 days from 15 August 2023.3. The examination of the documents must be done at the business premises of the defendant.	

4. None of the original documents may be removed from the custody of the defendant.
5. The plaintiff must give notice to the defendant of the details of the expert, not less than 24 hours prior to the date of examining the documents in question.
6. The plaintiff/applicant is to pay the cost of this application limited to rule 32(11). Such cost to include the costs of one instructing and one instructed counsel.

Further conduct of the matter:

7. The matter is postponed to **28 September 2023** at **15h00** for pre-trial conference.
8. The plaintiff's expert report must be filed on or before 21 September 2023.
9. A joint proposed pre-trial order must be filed on or before 25 September 2023.

Reasons for orders:

PRINSLOO J:

Introduction

[1] In this matter, the plaintiff, Ms Kahatjipara, seeks an order compelling First National Bank (the Bank), the defendant, to hand over documents for a forensic handwriting examination. (I will refer to the parties as they are in the main action)

[2] The plaintiff irregularly joined a second respondent, Mr Stanley Tjipuka (Mr Tjipuka), to the current application, who is not a party to the proceedings. Therefore as far as the matter relates to Mr Tjipuka, in his capacity as a second respondent, it stands to be struck out.

The background of the matter

[3] In 2010, the plaintiff entered into an agreement with the Bank to advance to her a home loan subject to the registration of a mortgage bond over her immovable property. The standard terms regulated the agreement. One of the terms was that the plaintiff would be entitled to apply for a re-advance on the home loan.

[4] According to the plaintiff, in 2013, an employee of the Bank, while acting in the course and scope of their employment, completed an application for the re-advancement of the plaintiff's home loan and the amount of N\$60 000 was paid out, but was not advanced to the plaintiff.

[5] In February 2009, the plaintiff entered into an agreement with the Bank for a credit card and was granted a silver credit card account. However, in the same month, an unknown employee of the defendant, unbeknownst to the plaintiff, completed an application on behalf of the plaintiff for a limit increase from N\$8000 to N\$18 000. The plaintiff pleaded in her amended particulars of claim that the Bank and its employees fraudulently inflated the plaintiff's income on the credit increase application form in order to qualify for a higher credit amount and that the plaintiff's signature was forged on this form, amongst other things.

[6] Hereafter, according to the plaintiff, several other gold credit card accounts were fraudulently, and without her permission, opened in her name.

[7] When this came to her attention in 2017, the plaintiff approached the Bank and lodged several complaints, but as the response was unsatisfactory, the plaintiff issued summons against the Bank.

[8] I do not intend to go into the details of the remainder of the claims raised in the plaintiff's particulars of claim as it is not relevant for purposes of the current application.

[9] The plaintiff seeks the order hereunder directing the defendant to hand over documents, including the application forms re-advancing the home loan, the credit card facilities and several other documents detailed in the plaintiff's founding affidavit.

The application

[10] The plaintiff filed an application by notice of motion dated 30 March 2023, praying for the following relief:

'1. That the Respondent be compelled to hand over documents it gave to its experts Louis Nortje,

Yvette Palm, Paul Ludik and Sarel Snyman for forensic examination to the Plaintiff's expert for forensic examination (sic).

2. That the expert of the Plaintiff be able to examine the documents with mass spectrometers and other scientific equipment for a comprehensive forensic examination.

3. That the expert of the Plaintiff be allowed to bring a videographer to document and record the documents.

4. That the inspection of the documents be inspected at a neutral place such as the Registrar's office for the safety of the Applicant.'

The opposition

[11] The Bank opposes the plaintiff's application on the grounds that it is too vague and that the relief sought is not justified. Additionally, the Bank submits that the plaintiff has yet to identify the expert who will be examining the documents. Without the appointment of a suitably qualified expert, the requested relief is a *brutum fulmen*.

[12] The Bank has clarified that it has no objection to the plaintiff's expert(s) examining the documents. However, the Bank is unwilling to surrender the original banking records to the plaintiff.

[13] The Bank is hesitant to release certain documents to the plaintiff due to an incident where she attempted to deface her signature on the original 're-advance application form' during a meeting with the Bank's employee, Mr Tjipuka. Mr Tjipuka filed a confirmatory affidavit to support this claim. Therefore, the Bank has a legitimate reason for not wanting to surrender the documents directly to the plaintiff.

[14] Rule 34 of the Rules of Court, in terms of which the application is purportedly brought, provides for documents to be availed for examination or inspection and not to be handed over. In addition, the documents only need to remain available for examination for a period not more than ten days. The rule, therefore, does not contemplate the removal of the documents from the custody or possession of the Bank as insisted upon by the plaintiff.

Arguments advanced on behalf of the parties

On behalf of the plaintiff

[15] The plaintiff maintains that the defendant's legal practitioner, Ms Vermeulen, deployed dilatory tactics in not wanting to hand the requested documents over. The plaintiff further takes issue with the fact that Ms Vermeulen sought to contact her expert and submitted that this was unsolicited 'assistance' that bordered on interference with her witness and that she (the plaintiff) can relate the arrangements to her expert without the intervention of Ms Vermeulen. The plaintiff contended that Ms Vermeulen's insistence that the plaintiff provide her with the name of the expert has the potential of compromising the integrity of the submissions of the expert.

[16] The plaintiff submits that the Bank raised objections to her claim because she is not willing to provide her expert's name which objection is frivolous because the expert's identity will become known in due course.

[17] The plaintiff submits that rule 34 does not expressly require that the name of the expert must be furnished to the defendant.

[18] According to the plaintiff, the Bank prevented her from accessing the documents and only wanted to communicate with her expert. This behaviour suggests that the Bank is not cooperating and is interfering with the plaintiff's case. The plaintiff asserts that the authenticity and genuineness of the documents are crucial in determining the outcome of the legal action. If the documents are found to be fraudulent or manipulated, the defendant's defence will be deemed false. Therefore, the plaintiff has the right to utilise rule 34 to verify the authenticity of the documents.

On behalf of the defendant

[19] Mr Jones submitted that there is no clear basis in the founding papers demonstrating precisely what the plaintiff wants and the legal basis for the alleged entitlement.

[20] Mr Jones argued that as the application is purportedly launched in terms of rule 34 of the Rules of Court, it is necessary to consider the wording of rule 34(1)(a), which only provides that (in as far as the documents are property sought to be inspected) these documents need to be availed for examination or inspection, and not to be handed over.

[21] The court was referred to *Zandry v Randle Yachts CC*,¹ wherein the court interpreted rule

¹ *Zandry v Randle Yachts CC* 2006 (5) SA 301 (C) 305C-H para [18]-[19].

36(6) of the South African Uniform Rule (similar to our rule 34(1) that the 'respondent (the plaintiff) was required to do no more than place it at the disposal of or make it accessible to, the applicant.'

[22] In the discussion of rule 34, Mr Jones submitted the following:

- a) that the rule does not provide the plaintiff with the right to be handed over the documentation;
- b) the rule does not contemplate the documents being removed from the defendant's custody or possession;
- c) the rule does not contemplate the defendant having to allow the document to be examined by an anonymous person with a mass spectrometer in circumstances where no explanation is provided as to the effect that this purported examination will have on the document and whether or not it will destroy and/or permanently disfigure and/or change the appearance of the document;
- d) more importantly, it is submitted that the plaintiff has already attempted to destroy and deface the very documents that she is now asking the court to simply hand over to her.

[23] To conclude, Mr Jones argued that the defendant's stance had been conveyed to the plaintiff by the Bank's legal representative, as evidenced by the email correspondences between them that the plaintiff has relied on. Despite this, the plaintiff remains dissatisfied, leading Mr Jones to believe that the application has been brought forth solely to obtain custody of the documents for the purpose of destroying them. Therefore, the plaintiff lacks bona fides, and the application should be dismissed with a special cost order that includes the fees of one instructing and one instructed counsel on an attorney own client scale.

Discussion

The applicable legal principles and application to the facts

[24] I must point out from the onset that the defendant's legal practitioner repeatedly tendered that the plaintiff's expert may examine the documents, however, takes issue with the fact that it is not known who the plaintiff's expert, who is intended to examine the documents. There is no hint as to who this expert possibly could be, the defendant remains apprehensive to simply turn

over original banking records to the plaintiff.

[25] The relevance of the documents sought by the plaintiff lies therein that the plaintiff challenges the authenticity of the signatures amongst others in the documents and the dates upon which these documents were created and by whom.

[26] I believe that the two combatants should be placed in equal position concerning the opportunity to present proper expert evidence in the main application. The objection by the Bank is not the production of the documents but the release of the documents into the care of the plaintiff or her expert.

[27] The defendant clearly set out its apprehension on affidavit deposed to by Charity Mufwinda, a Legal Advisor: Legal and Credit Risk Compliance and Sidney Tjipuka. The concern of the defendant for the protection of the documents in question is a very valid consideration and something that must be weighed up against the interests of the plaintiff to be placed in a position to present its case fully in court.

[28] The plaintiff's first prayer in her Notice of Motion is 'that the defendant (respondent) be compelled to hand over the documents it gave to its expert Louis Nortje, Yvette Palm, Paul Ludik and Sarel Snyman for forensic examination to the plaintiff's expert for forensic examination'.

[29] Rule 34 of the rules of court reads as follows:

'Examination or inspection of property

34. (1) If it appears to a party that the state or condition of any property of any nature, whether movable or immovable, may be relevant to the decision of a matter at issue in any cause or matter that party may

–

(a) at any stage give notice requiring the party relying on the existence of the state or condition of that property or having that property in his or her possession or under his or her control to make it available for examination or inspection in terms of this rule; and

(b) in the notice referred in paragraph (a) require that the property or a fair sample of it remain available for examination or inspection for a period of not more than 10 days from the date of receipt of the notice.

(2) The party called on to submit the property referred to in subrule (1) for examination or inspection may require the party requesting it to specify the nature of the examination or inspection to which it is to be subjected and that party is not bound to subject the property to examination or inspection if this will

materially prejudice that party because of the effect the intended examination or inspection may have on the property.' (my emphasis)

[30] It is clear from the rule that property of any nature under the control of a party must be made available for examination or inspection and that the property or a fair example thereof must

remain available for examination for a period of ten days. It does not provide for the handing over of the property into the care of the opposing party.

[31] In *Zandry v Randle Yachts CC*² Van Reenen J not only discussed the words 'make available' but also elaborated on the interpretation of rule 36(6) (South African), albeit in a different context, as follows:

[18] The everyday dictionary meaning of the words 'make available' in the context is to cause the property in question to be placed at the disposal of or to be accessible to the litigant requiring its inspection or examination (see *The Shorter Oxford English Dictionary*; *The Random House Dictionary of the English Language*; and *Webster's Third International Dictionary* sv 'make' and 'available'). If Rule 36(6) is so interpreted, as in my view it should, the contentions of Zandry's attorneys have to be upheld and those of Randle Yachts' attorneys rejected. On that construction Zandry, by having offered to make the Modia available for inspection in Madagascar has not refused or failed to do what he is in terms of Rule 36(6) obliged to do. H J Erasmus Superior Court Practice at 31-268, under the heading 'to make it available for inspection or examination', states that '(t)he party merely has to keep the article available for inspection'.

[19] In my view, the drafters of Rule 36(6) could not have intended that the person who is required to make an article available for inspection has to do more than to place it at the disposal of or make it accessible. I say so for the following reasons. First, in terms of the subrule the party that has to make an article available for inspection is the party who relies upon the existence of a state or condition therein that may be relevant with regard to the decision of any matter in issue or the party having such property in his/her/its possession or under his/her/its control. The framers of the Rule could not have been oblivious to the fact that possession and control may exist apart from ownership and that, depending on the legal basis upon which it is exercised, such possessor's or controller's powers may exclude any entitlement to deal therewith other than the exercising of possession and control. Secondly, our Courts appear to recognise that the inspection or examination envisaged by Rule 36(6) should take place with as little inconvenience and disruption as reasonably possible (cf *Mgudlwa v AA Mutual Insurance*

² Supra footnote 1.

Association Ltd 1967 (4) SA 721 (E) at 723C, 723F). To require a party to do more than merely placing the article at the disposal of the party requiring inspection or examination could, in my view, in circumstances such as the present, be irreconcilable with that approach. Thirdly, some indication that the framers of the Rule envisaged that the party requiring inspection or examination is to take the steps required to achieve it is to be found in Rule 36(6)(c) which provides that such a party should bear the expense thereof and that it shall form part of such party's costs.'

[32] I fully associate myself with the view of the learned Judge in the Randle Yachts matter. The plaintiff's expert would, at best, be able to examine the impugned documents and make copies, should copies be required, but the plaintiff is not entitled to receive the original documents and remove them from the custody of the defendant.

[33] The plaintiff insisted that her expert should be able to examine the documents and referred to a mass spectrometer and other scientific equipment. This would imply that the original documents must be handed over to an unknown person as the plaintiff refuses to disclose the identity of her expert. At this stage, it is not even clear to this court if the plaintiff managed to secure the services of an expert. If the plaintiff cannot secure an expert, then the order sought would be an exercise in futility.

[34] The plaintiff's third prayer is for leave to allow the plaintiff's expert to bring a videographer to document and record the documents. The defendant raised no pertinent objections in this regard, and I am of the view that this is not an unreasonable request and granting the plaintiff leave in this regard will essentially resolve the fourth prayer of the plaintiff.

[35] The fourth prayer in the notice of motion is that the documents are inspected in a neutral place for the plaintiff's safety. Even though the matter between the parties have turned quite acrimonious, I fail to see how the plaintiff's safety is compromised. The plaintiff referenced a meeting in 2018 when a security guard with a firearm was in attendance. The relevance of this averment eludes me. The plaintiff does not aver that she was threatened with violence in any way, and if so, she would have stated as much. On the contrary, it is the defendant's case that the plaintiff attacked Mr Tjipuka with a pen when he prevented her from defacing the original document.

[36] The plaintiff's concern regarding her safety can be addressed if the plaintiff's appointed

expert and his or her videographer attend the meeting at a convenient time for the parties. There would, therefore, be no need for the plaintiff to attend the meeting.

The mootness of the application

[37] Ms Vermeulen repeatedly invited the plaintiff to arrange a time to examine the documents. The plaintiff replicated to the emails between her and Ms Vermeulen. However, the plaintiff took offence to the invitation as Ms Vermeulen enquired the identity of the expert to set up the meeting.

[38] In an email directed to the plaintiff on 10 February 2023, Ms Vermeulen wrote as follows in this regard:

'Dear Mr.(sic) Kahatjipara

We are in agreement that your expert needs access to all the original documents that was made available to the forensic examiner of the Plaintiff. However, due to the sensitive nature of the documents, we cannot simply hand them over. Our client will also not risk the originals via courier. We previously arranged with a legal practitioner that was on record for you that the original documents will be made available to your expert to inspect them at the offices of FNB, where they are being kept in a safe. This offer still stands. Please advise who you have identified to be your expert to the original documents. I will not correspond with your expert without you being copied into the correspondence, I simply want to arrange the inspection as fast as possible.

Regards Jenny Vermeulen'.

[39] The plaintiff claims that the defendant's actions were an apparent refusal and an attempt to stop her from presenting evidence and seeking justice in the main case. However, this accusation contradicts what was stated in the email.

[40] During the current proceedings before me, Mr Jones reiterated the defendant's willingness to make the documents available to the plaintiff for examination. In light of the repeated tenders by the defendant, which is undisputed, there was no need to engage in the

current interlocutory proceedings.

Costs

[41] Whilst I agree that the plaintiff is entitled to utilise the remedies at her disposal, it must be considered whether her conduct was reasonable and resulted in unnecessary cost. In the current instance, I believe that the issue between the parties could have been resolved amicably as far

back as March/April 2023 if the plaintiff accepted the defendant's invitation to have her expert examine the impugned documents.

[42] In *Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another*,³ the court held that a party must pay such costs unnecessarily incurred through his failure to take proper steps or through him taking wholly unnecessary steps.⁴

[43] As a result, the plaintiff should be liable for the costs of this application.

Personal attacks on the integrity of Ms Vermeulen

[44] Lastly, I need to address the accusations made by the plaintiff against the defendant's legal team, particularly Ms Vermeulen. The plaintiff has made numerous attacks on Ms Vermeulen's character, which can no longer be accepted. Although the plaintiff is a lay litigant, she cannot make unfounded accusations against her opponent's legal representative. The plaintiff's allegations against Ms Vermeulen include her trying to interfere with the plaintiff's expert witness, blatant misrepresentations and the telling of untruths.

[45] All legal practitioners must conduct themselves in a manner that maintains the dignity and decorum of the court. Their first duty is to the court and not to anyone else. As an officer of the court, Ms Vermeulen has a paramount duty to uphold the highest standards of integrity and

³ *Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C) referred to in *Ngwarati v The Chief of Immigration* (HC-MD-CIV-MOT-GEN-2022/00397) [2022] NAHCMD 640 (23 November 2022).

⁴ See Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 483; *De Villiers v Union Government (Minister of Agriculture)* 1931 AD 206 at 214.

honesty. In my view, there is nothing in the manner in which Ms Vermeulen conducted this matter to show that she discharged this duty in any way other than with integrity and honesty.

[46] This is a classic case where the parties, specifically the plaintiff, is urged to play the ball rather than the man and to allow this matter to move forward in line with the overriding objectives of the Rules of Court.

Order

[47] As a result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
J Kahatjipara In person Windhoek	JP Jones (assisted by J Vermeulen) Instructed by Ellis Shilengudwa Inc, Windhoek