



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: I 668/2004

In the matter between:

NAMIBIA DEVELOPMENT CORPORATION

PLAINTIFF

and

AUSSENKEHR FARMS (PTY) LTD

DEFENDANT

Neutral citation: *Namibia Development Corporation V Aussenkehr Farms (Pty) Ltd*
(I 668/2004) [2013] NAHCMD 354 (22 November 2013)

Coram: MILLER AJ

Heard: 25 September 2013

Delivered: 22 November 2013

JUDGMENT

MILLER AJ: [1] On 10 October 2013 I dismissed an application, at the instance of the defendant in the main action, for an order to compel the plaintiff to make further discovery. I indicated then that I will give reasons if so requested.

[2] On 16 October 2013, the defendant gave notice that it will seek my leave to appeal against the order I granted. That application will be heard by me on 26 November 2013.

[3] On 14 November 2013 the plaintiff requested me to provide it with the reasons for the order. They are these.

[4] The matters the defendant sought to be discovered were the following:

‘1. All statements, containing the particulars of amounts paid by the defendant and amounts owing to the plaintiff, dispatched to the defendant by the plaintiff from the date of the conclusion of the:

1.1 suspensive sale agreement concluded in November 1994; and the

1.2 loan agreement concluded in November 1994;
to 1 July 2000;

2. Copies of all NDC receipts and NDC bank statements, reflecting transactions involving the plaintiff and defendant for the period of 16 November 1994 to 1 July 2000;

3. Copies of all documents, papers and pleadings in the possession of the plaintiff relating to the litigation between plaintiff and defendant in the Magistrate’s Court of the District of Windhoek under case number 16105/07, in which the plaintiff claimed from defendant the outstanding amounts owing under the above loan agreement of November 1994;

4. All the documents, statements, receipts, working documents and similar papers upon which Mr. Ismael Gei-Khoibeb purported to certify in his capacity as “Manager Supportive Services of the Namibia Development Corporation”, in the proceedings under the above case number, that the defendant was indebted to the plaintiff in the sum of N\$2 611 818.85, “as certified in the particulars of claim to the summons in respect of the loan agreement dated 25 November 1994”.

5. All the notifications and/or NDC “letters of advice” to the defendant that were required to notify the defendant of the deviation from the interest stipulated in clause 2.1 of the loan agreement as being 13,5% per annum, that would have justified the charging of any interest higher than such percentage, such as the interest rate of 20% per annum applied by Mr. Ismael Gei-Khoibeb for purposes of the certificate referred to in the foregoing paragraph;

6. All the documents, statements, receipts, working documents and similar papers upon which the plaintiff calculated that the defendant was indebted to the plaintiff in the sum of

N\$2 611 818.85 “as certified in the particulars of claim to the summons in respect of the loan agreement dated 25 November 1994” at the interest rate of 20,5% per annum being the percentage rate used in the summons in the proceedings referred to in paragraph 3 above;

7. Copies of all documents, papers and pleadings in the possession of the plaintiff relating to the litigation between plaintiff and defendant in the Magistrate’s Court of the District of Windhoek under case number 16106/97, in which the plaintiff claimed from defendant the outstanding amounts owing under the above suspensive sale agreement of November 1994;

8. All the notifications and/or NDC “letters of advice” to the defendant that were required to notify the defendant of the deviation from the interest stipulated in clause 4.1 of the suspensive sale agreement as being 13.5% per annum, that would have justified the charging of any interest higher than such percentage, such as the interest rate of 20,5% per annum being the percentage rate used in the summons in the proceedings referred to in paragraph 7 above;

9. All the documents, statements, receipts, working documents and similar papers upon which the plaintiff calculated that the defendant was indebted to the plaintiff in the sum of N\$596 662.42 using the interest rate of 20,5% per annum, being the percentage rate used in the summons in the proceedings referred to in paragraph 7 above;

10. All correspondence, memoranda and written exchanges between the plaintiff and the Government of Namibia that related to the occupation of the 600,9813 hectares of defendant’s land, described as “portions 9 and 10 of the farm Aussenkehr” that the Government of Namibia intended to purchase from the defendant;

11. All documents, letters, correspondence, memoranda, notes, legal transactions and similar documents, relating to the winding up of the plaintiff as referred to in paragraph 16.2.3 of the affidavit of Mr. Clifford Bezuidenhout jurat 16 December 2008, described in such paragraph as the winding up of the plaintiff “in terms of section 22” of the Development Bank of Namibia Act, 8 of 2002.

12. All documents, letters, correspondence, memoranda, notes, legal transactions and similar documents, relating to the transfer of the “plaintiff’s litigation” against the defendant as referred to in paragraph 16.2.6 of the affidavit of Mr. Clifford Bezuidenhout jurat 16 December 2008, described as “litigation...(that)...was in the process of transfer to the newly established Development Bank of Namibia”.

13. All documents, letters, correspondence, memoranda, notes, legal transactions and similar documents, relating to the transfer of the “plaintiff’s assets” as referred to in paragraph 16.2.7 of the affidavit of Mr. Clifford Bezuidenhout jurat 16 December 2008, distinguishing between those assets:

13.1 in respect of which the transfer was already “completed” (as stated in paragraph 16.2.7 of the above affidavit; and

13.2 the assets that still had to be so transferred;

as at “the end of 2007” (such being the juncture as specifically identified by paragraph 16.2.7 of the affidavit of Mr. Clifford Bezuidenhout;:

14. All documents, letters, correspondence, memoranda, notes, legal and similar documents, exchanged between the Ministry of Trade and Industry and the plaintiff in relation to the purported “decision” of Cabinet of 25 October 2007” not finally wind up the plaintiff;

15. All documents, letters, correspondence, memoranda, notes, legal transactions and similar documents, relating to the re-transfer of the “plaintiff’s litigation” against the defendant back to the plaintiff, subsequent to the above decision of 25 October 2007;

16. All documents, letters, correspondence, memoranda, notes, legal transactions and similar documents, relating to the re-transfer of the plaintiff’s assets which had already been transferred to the Development Bank of Namibia, back to the plaintiff, subsequent to the above decision of 25 October 2007.’

[5] During the course of the argument before me the matter became more confined inasmuch as discovery of the documents in paragraphs 1-16 were sought. In its application for leave to appeal reference is made only to the order made insofar as it relates to those paragraphs.

[6] At the heart of matter, at least as far as relevance is concerned, is the issue raised by the defendant in its plea that the plaintiff does not have *locus standi*. I contend that the plaintiff was wound up and ceased to exist on 15 May 2003 when its assets and liabilities were transferred to the Development Bank of Namibia. The defendant contends that the plaintiff is in possession of the document, relating to that process, which it refuses to discover.

[7] For this assertion the defendant points to an affidavit deposed to on 16 December 2008 by the plaintiff’s legal practitioner, Mr. Bezuidenhout.

[8] In that affidavit Mr. Bezuidenhout stated that the plaintiff “was wound up”.

[9] Mr. de Wet, the plaintiff's acting managing director, deposed to the affidavit on behalf of the plaintiff in the present matter. In paragraphs 15.3 – 15.8 he states the following:

15.3 What the defendant in effect seeks is some or other proof that this action instituted by the plaintiff against the defendant was transferred to the Development Bank of Namibia. I state unequivocally and under oath that this action was never transferred to the Development Bank of Namibia at any time. It remained with the plaintiff throughout. The litigation was taken up again by the plaintiff after Cabinet, on 25 October 2007, decided not to finally wind-up the plaintiff Mildred Hendricks, the plaintiff's legal advisor at the time, and under whose control this litigation and action resorted, confirms that same was never transferred to the Development Bank of Namibia. I refer to her confirmatory affidavit filed herewith.

15.4 I furthermore refer to the affidavit of Renier Johannes van Rooyen, Chief Financial Officer of the Development Bank of Namibia, which I annex hereto marked "NDC43", in which he also confirms that since the inception of the Development Bank of Namibia, no assets or liabilities were transferred from the plaintiff to such bank.

15.5 I concede that Mr. Bezuidenhout in his affidavit stated that "in terms of section 22 of the Act the plaintiff was wound-up as set out in that section as read with subsections 21(2) to 21(10)...". Whereas it may have been grammatically more correct for him to have stated that the plaintiff "was being wound-up" in terms of those sections the fact of the matter is that the plaintiff was not wound-and the Namibia Development Corporation Act was never repealed up because section 22 of the Development Bank of Namibia Act never came into force and effect.

15.6 What is stated in paragraph 16.2.5 to 16.2.7 of Mr. Bezuidenhout's affidavit is correct. As pointed out above, numerous properties belonging to the plaintiff and AMCON, the plaintiff's wholly owned subsidiary, were disposed of during this period. Before the process was completed, however, the winding-up of the plaintiff was halted. I annex hereto marked "NDC44" a media briefing from Cabinet dated 11 October 2007 and refer specifically to paragraph 3 thereof in which it is explained why the plaintiff would not be dissolved, but instead restructured.

15.7 Insofar as the defendant seeks an order from this court compelling the plaintiff to discover "all documents, letters, correspondence, memoranda, notes, legal transactions and similar documents" in relation to the transfer of each and every of the immovable properties set out in "NDC41" and "NDC42" above I state that such an order should not be granted as those documents are irrelevant to this action. It will take an inordinate amount of time and unjustified expense for such documents to be compiled.

15.8 All that is relevant to this litigation is whether or not this action was transferred to the Development Bank of Namibia, this being the basis of the defendant's locus standi defence. I refer to what is stated above and say unequivocally to this action and this litigation was never transferred to the Development Bank of Namibia. There was no transfer of any assets, liabilities or litigation between these two entities and consequently also no need for any "re-transfer", but a which the defendant attempts to make.'

[10] Mr. Barnard who appears for the defendant submits that I should not rely on these averments in view of the contradictory affidavit deposed to earlier by Mr. Bezuidenhout.

[11] The learned author Erasmus in his work, Superior Court Practice, correctly sets out the law on this score as follows:

'The Courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action as (iv) from any admission made by the party making the discovery affidavit or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made.'

[12] To my mind none of the exceptions the learned author refers to find any application in this matter.

[13] Mr. Bezuidenhout's allegation is denied by the plaintiff. In order for me to have reasonable certainty that the documents sought to be discovered exist I will have to conclude that the allegations made by Mr. de Wet are not correct. I can not do that on the papers before me, even more so in view of the fact that Mr. Bezuidenhout in the present mater deposed to an affidavit, in which he confirms the allegations of Mr. de Wet insofar as it relates to him.

[14] It follows that I am not reasonably certain that the documents exist.

[15] I accordingly dismissed the application.

P J MILLER
Judge

APPEARANCES

PLAINTIFF :

T FRANK SC assisted by G DICKS
Instructed by Engling, Stritter & Partners,
Windhoek

DEFENDANT:

T BARNARD
Instructed by Diekmann Associates,
Windhoek