REPUBLIC OF NAMIBIA **REPORTABLE**

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: A 94/2014

In the matter between:

SOUTH AFRICAN POULTRY ASSOCIATION	**1ST APPLICANT**
ASTRAL FOODS LIMITED	**2ND APPLICANT**
SUPREME POULTRY (PTY) LTD	**3RD APPLICANT**
CROWN CHICKENS (PTY) LTD t/a SOVEREIGN FOODS	**4TH APPLICANT**
AFGRI POULTRY (PTY) LTD	**5TH APPLICANT**
RAINBOW FARMS (PTY) LTD	**6TH APPLICANT**

And

THE MINISTRY OF TRADE AND INDUSTRY	**1ST RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**2ND RESPONDENT**
NAMIBIA POULTRY INDUSTRIES (PTY) LTD	**3RD RESPONDENT**
THE MEAT BOARD OF NAMIBIA	**4TH RESPONDENT**

Neutral citation: *South African Poultry Association v The Ministry of Trade and Industry (A 94/2014) [2014] NAHCMD 331 (07 November 2014)*

Coram: DAMASEB, JP

Heard: **29 September 2014**

Delivered: **07 November 2014**

Summary: **Interlocutory** – Discovery in terms of rule 28 – The limits of discovery in motion proceedings – no automatic right to discovery in motion proceedings – Applicants seeking discovery must demonstrate exceptional circumstances – The norm is specific as opposed to general discovery – But a case has to be made out therefor – A request for general discovery in motion proceedings an indication of fishing expedition – If confidentiality is sought to protect discovered documents, the party seeking confidentiality has the onus and must show exceptional circumstances – The default position is full inspection.

Costs – In interlocutory motions capped by rule 32(11) - But court has discretion - Costs order in excess of capped amount may be given if, inter alia,: a clear case is made out, based on the importance and complexity of the matter and the fact that the parties are litigating at full stretch; the parties must be litigating with equality of arms; reasonableness or otherwise of a party during the discussions contemplated in rule 32(9) ; the dispositive nature of the interlocutory motion and the number of interlocutory applications moved in the life of the case.

ORDER

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1. The main relief (general discovery) is denied.

2. Only specific discovery is allowed: first to sixth applicants are ordered to make discovery in the manner contemplated in rule 28(4) of the Rules of

the High Court, within 20 days of this order, of the documents and information set out in annexure 1 of Mr Koosie Ferreira's affidavit in the discovery application.

2.1 The discovery sought in respect of the SACU Treaty, the SA DTI and AMIE deliberations and discussions is denied.

3. Rules 28(5), (6) and (8) to (15) shall apply to the discovery made in terms of paragraph 1 of this order;

4. The first to sixth respondents are ordered to pay third respondent's costs, jointly and severally, the one paying the other to be absolved, to include the costs of instructing and two instructed counsel.

5. The matter is postponed to **25 November 2014 at 14h15** for status hearing and the parties directed to seek further directions on the future conduct of the matter.

JUDGMENT

Damaseb JP: [1] This is an interlocutory application for discovery arising from a review application launched on 17 April 2014 by a voluntary association of South African poultry producers[1] and some of its members. The applicants will, individually and collectively, be referred to as 'SAPA'. The review application principally seeks to review and set aside a determination by the Namibian Minister of Trade and Industry restricting the importation into Namibia of certain chicken products. The impugned notice in question in its amended form reads as follows:

'**RESTRICTIONS ON IMPORTATION OF POULTRY PRODUCTS INTO NAMIBIA, IMPORT AND EXPORT CONTROL ACT, 1994**

Published under

GN 81 in GG 5167 of 5 April 2013

[1] First applicant: whose objectives include 'the protection of the South African poultry industry from adverse legislation'.

as amended by

GN 321 in GG 5351 of 29 November 2013

Under section 2(1) (b) and section 3, respectively, of the Import and Export Control Act, 1994 (Act 30 of 1994), I-

(a) prohibit, except under the authority of and in accordance with conditions contained in a permit issued by the Ministry of Trade and Industry, or except a person falling under paragraph 1(2) in the Schedule, the importation into Namibia of the poultry products as set out in the Schedule;

(b) establish a limit of 900 tons per month for importation into Namibia of poultry products derived from slaughtered fowls of the species Gallus domesticus intended for human consumption as set out in the Schedule;

[Para (b) substituted by GN 321 of 29 November 2013.]

(c) authorise the Import, Export and Trade Measures Office of the Ministry of Trade and Industry to direct any person who intends to import into Namibia poultry products as set out in the Schedule to furnish that office within a period specified by that office any information at his or her disposal in relation to that import of poultry products; and

(d) determine that this notice comes into operation 30 days after the date of its publication in the Gazette.'

The above notice will hereafter be referred to alternatively as the 'Minister's determination', the 'quantitative quota restriction' or the 'impugned notice'.

[2] It is common cause that SAPA's members are poultry producers who import chicken products into Namibia and are affected by the quantitative quota restriction. SAPA alleges that the Minister's determination causes them 'direct, persistent and on-going harm'. It is common cause that SAPA members produce their chicken products outside Namibia and only import them into Namibia; whereas the third respondent in the review application, Namibia Poultry Industries (Pty) Ltd) (NPI) is Namibia's largest producer of poultry products and stands to benefit from the import quota restrictions imposed by the Minister. NPI has invested huge amounts of money in setting up a local poultry industry in Namibia which produces chicken products locally. In documents referred to in SAPA's founding affidavit in the review application, NPI's investment is characterized as 'A Project of National Interest' and the following is recorded amongst

others: 'The establishment of NPI and the broiler industry is in line with Government's Vision 2030 through investing more than N$ 600 million in the Namibian economy and industrializing the economy; creating more than 540 jobs on a permanent basis and close to 100 jobs through the rendering of services to the company and development of the manufacturing sector to make a meaningful contribution to the GDP'.

[3] It is obvious therefore that the impugned notice is intended to protect NPI ostensibly in pursuit of an industrialization policy.

[4] After SAPA launched the review application, NPI brought a discovery application requiring SAPA to make discovery in terms of rule 28(4)[2] and seeking an order directing SAPA to make discovery of all documents relevant to the main application, including but not limited to those documents which it specifically references[3] in annexure 1 to the main affidavit deposed to by Mr Koosie Pretorius (the referenced documents); alternatively directing SAPA for review to make discovery only of the referenced documents.[4]

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[2] Which provides that: '(4) The party making discovery must do so on Form 10 specifying separately -

(a) documents, analogue or digital recordings in his or her possession or in possession of his or her agent other than the documents, analogues or tape recordings mentioned in paragraph (b);

(b) documents, analogues or digital recordings in respect of which he or she has a valid objection to produce; and

(c) documents, analogues or digital recordings which he or she or his or her agent had, but no longer has in his or her possession at the date of the affidavit.

(5) The following must be omitted from the discovery schedule -

(a) communications between a legal practitioner and another legal practitioner instructed by the party making discovery to prepare pleadings; and

(b) affidavits and notices in the action.'

[3] In other words general discovery.
[4] In other words specific discovery.

[5] Henceforth I will refer to the review application brought by SAPA as 'the main application' and the application brought by NPI as 'the discovery application'. NPI has given notice of its intention to oppose the main application.[5] The discovery application is opposed by SAPA.

[6] As concerns the main application, the next step is for the first and second respondents in the main application (the governmental respondents) to file of record the 'complete record and file with the registrar the original record of such proceedings sought to be corrected or set aside together with the reasons for the decision and to notify the applicant that he or she has done so'.[6] Once the complete record has been filed, SAPA will have the opportunity to amend, add to or vary the terms of its application and to supplement the supporting affidavit.[7]

The review grounds relied on by SAPA

[7] Central to SAPA's case is the allegation that the Minister's determination is *ultra vires* the provisions of the Import and Export Control Act, 1994 (Act 30 of 1994)[8] and that the purported Infant Industry Protection (IIP) embodied in the impugned notice runs fowl of the Namibian government's treaty obligations under the World Trade

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[5] As contemplated by rule 76(1) (a).
[6] Rule 76(2) (b).
[7] Rule 76(9).
[8] Which, in relevant part, states as follows: '(2) **Powers of Minister in relation to import and export of goods**

(1) The Minister may, whenever it is necessary or expedient in the public interest, by notice in the Gazette prohibit –
(a)…
(b) the import into or the export from Namibia, except under the authority of and in accordance with the conditions stated in a permit issued by the Minister or by a person authorised by him or her,

of any goods of a class or kind specified in such notice or of any goods other than goods of a class or kind specified in such notice.
(3)A permit issued under subsection (1) may prescribe the quantity or value of goods which may be imported or exported thereunder, the price at which, the period within which, the port through or from which , the country or territory from or to which and the manner in which the goods may be imported or exported , and such other conditions as the Minister may direct, including any condition relating to the possession, ownership or disposal of goods after the import thereof or the use to which they may be put.'

It is maintained by the applicants that this provision does not empower the Minister to publish an import quota that establishes a general limit on the quantity of goods that may be imported into Namibia as provided in the determination made by the Minister.

Organisation (WTO) Agreement,[9] Southern African Development Community (SADC Treaty) together with the SADC Protocol on Trade of 1996 , the General Agreement on Tariffs and Trade (GATT)[10] and the Southern African Customs Union (SACU) Agreement. Additionally, SAPA alleges procedural unfairness inconsistent with Art 18 of the Constitution in that SAPA, as interested parties, were not afforded a fair and reasonable opportunity to be heard before the Minister imposed the quantitative quota restriction. It is also alleged that the General Agreement on Tariffs and Trade (GATT) and World Trade Organisation (WTO) have been part of Namibian law since 15 September 1992 and that it prohibits the imposition of import quotas in the way done by the Minister in his determination; and that in any event the Import and Export Control Act did not amend or repeal the GATT. The Minister's determination is also impugned on the ground that it is an 'unconstitutional infringement of [their] SAPA's right to carry on a trade or business entrenched in Art 21(1)(j) of the Namibian Constitution'. It is also claimed that the Minister's determination is 'irrational' and 'contrary to the rule of law'. SAPA asserts further that the impugned notice is tainted by the improper influence exerted on the Namibian Government by NPI in both the bringing into effect of the determination and its enforcement. SAPA attacks the authorisation given by the Minister to the Meat Board of Namibia (fourth respondent in the main application) to administer the permit system created by the Minister's determination on the ground that it falls outside the purview of Meatco's competence under its creative deed.[11] The applicants also seek declaratory and interdictory relief.

[8] SAPA's allegations in support of the harm suffered are embodied in the following paragraphs of the founding affidavit in the main application resulting from the Minister's determination:

'39. The effect of the import quotas is drastic. The Initial Import Quota limited the importation of poultry products into Namibia by imposing a restriction of 600 tons per month for importation into Namibia of fowls of the species *Gallus domesticus*. . . . the recent increase to 900 tons in no way alleviates the adverse effects of the restrictions.

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[9] To which Namibia according to SAPA acceded upon inception on 1 January 1995.
[10] To which according to SAPA Namibia acceded on 15 September 1992.
[11] Statutory body created by the Meat Industry Act, No 12 of 1981.

40. It bears emphasis that the quantitative restrictions imposed is not only a numerical quantity but also a product type restriction. The annexure to Government Gazette No. 5167 (see attached hereto marked “E”) stipulates the poultry products that require a permit for importation. Tariff heading ‘020714.90-other’ includes IQF which is the most commonly exported product.

41. According to a presentation from the Meat Board, the Import Quotas are to be implemented by the Meat Board ‘as authorized by the Minister’. Importantly, the Meat Board‘s interpretation of the annexure referred to above is to completely restrict the importation of IQF (which is reflected in its current practice in relation to the issuing of permits). It goes without saying that that interpretation in itself is discriminatory and unfair and there is no legal basis for this reading of the Import Quotas. In any event, to the extent that the Meat Board is tasked with administering the Import Quota and that quota is unlawful, it follows that the Meat Board’s conduct is unlawful and equally falls to be set aside.

42. The likely financial impact of the quantitative restriction on SAPA’s members is substantial. The difference between the restricted amount (of 600 or 900) and SAPA’s ordinary figures for export to Namibia are enormous. On average, for the period measured from 1 January 2011 to 1 January 2012, SAPA’s members exported poultry products to Namibia at quantities of over 2 783 tons per month. The quantitative restrictions contained in the Initial Import Quota therefore resulted in an immediate decrease of 78.45 per cent in the average monthly exports of poultry products be the first applicant’s members, the financial impact of which is clearly evident. In some instances, producers have lost in excess of 10 000 tons in annual volumes (or 200 000kgs per week) as a direct result of the Initial Import Quota. This resulted in producers downscaling operations and has had a negative impact on employment.

43. The revised Import Quota and associated increase to 900 tons per month has not alleviated this harm as a month decrease of approximately 68 percent in the average exports of poultry still exists. In addition, the Revised Import Quota has not altered the Meat Board’s interpretation of the annexure to Government Gazette No.5167 and as such IQF (the most significant export to Namibia) remains completely excluded.

44. Unless both Import Quotas are reviewed and set aside, the harm experienced by the Applicants is set to continue. Moreover, the quantum of Import Quotas will result in shortages of broiler products in Namibia. This is because the local production of broiler in Namibia cannot possibly match the shortfall between the volume of these products that were previously imported into Namibia and the 900 ton quota in the Revised Import Quota.’

Background to the Minister's determination

[9] The background to the impugned notice is set out in some detail in the founding affidavit of Mr Kevin Lovell, the chief executive officer of SAPA. Mr Lovell locates the impugned notice in a series of actions undertaken by the Namibian government as far back as 2001 when, for the first time, the Minister of Agriculture Water and Forestry publicly announced the availability of Infant Industry Protection (IIP) for, amongst others, the broiler industry and stated that such a measure was sanctioned by the South African Customs Union. The core message conveyed in the public notice of 2001 was that the Namibian government could 'levy import duties on broiler products from outside Namibia including SACU members for an eight year period' 'in order to give Namibian companies protection and the opportunity to establish industries' in the broiler industry.

[10] Suffice it to say for present purposes that Mr Lovell vehemently denies that the SACU Agreement sanctioned what the Namibian Government embarked upon. In fact, SAPA maintains that the Namibian Government's pursuit of 'infant industry status for the broiler industry at that time was not authorised in terms of the SACU Agreement 1969' and that in any event there is no IIP status lawfully in force in Namibia which could lawfully justify the Minister's determination.

The discovery application of NPI

[11] The affidavit in support of the discovery application is deposed to by Mr Koosie Ferreira who is a director of NPI and responsible for 'guiding' it 'in establishing itself as a producer and supplier of poultry products in the Namibian market'. Mr Ferreira asserts that the discovery sought is to enable NPI to 'answer the founding papers in the main application' and to 'afford [NPI] the opportunity to meaningfully consider and answer the allegations' made in the main application. The claim to discovery is further premised on the 'the rule of law embodied in the Constitution and …[the] right to a fair trial guaranteed by Art 12 of the Constitution and the principles which underlie those rights and the principles (including, but not limited to, the right to transparency and access to information …'.

[12] Mr Ferreira then makes the critical allegation that whether the court grants general or specific discovery:

'…in order to address any endeavour by the applicants [in the main application] to oppose this application (by invoking concerns of trade confidentiality) asks that documents contended to contain confidential commercial information be dealt with pursuant to rule 28(10).[12] The Court is asked to direct a regime to govern the reasonable and appropriate disclosure of documents in which any valid confidentiality interest inheres. This, I am advised, must be proportionate to the extent to which the applicants may acquit themselves of the burden to justify a departure from the principle of open justice.' (My underlining for emphasis)

[13] Mr Ferreira justifies the discovery sought on the following broad bases:

SAPA's allegations in main application are bald

It is alleged by NPI that the bald allegations made are either not founded on 'primary best evidence' or no evidence at all and that NPI is prejudiced thereby in the conduct of its case. It is pertinently alleged that without the allegations being substantiated, NPI is unable to 'assess the veracity of the averments' and to make 'considered decisions on the evidence that it should present in response thereto'.

Categories of documents and information for which discovery is sought

[14] The first category of documents that NPI identifies as being subject to discovery is documents emanating from SAPA and relating to an application lodged by it with South Africa's International Trade Administration Commission in 2013 to seek some form of redress against what it perceived as 'dumping' of frozen bone-in portions of chicken products in SACU by German, Dutch and U.K business concerns.

Documents evidencing SAPA exports into Namibia

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[12] Which states: 'The managing judge may inspect the document, analogue or digital recording referred in subrule (9) to determine whether the party claiming the document to be protected from discovery has a valid objection and may make any order the managing judge considers fair and just in the circumstances.'

[15] NPI seeks discovery of the documents in support of the claim by second, third fourth and sixth applicants (members of first applicant) that they export broiler products into Namibia. Such documents to cover the period preceding the Minister's determination and the year subsequent thereto. SAPA is being challenged, through appropriate discovery, to prove its alleged export into Namibia of poultry products of over 2783 tons per month between 1 January 2011 and 1 January 2012. Discovery is also sought from SAPA in respect of the allegedly unsubstantiated claim of:

(a) the 'immediate decrease of 78.45 percent in average monthly exports of poultry products by SAPA's members;
(b) the alleged loss by producers 'in some instances' 'in excess of 10 000 tons in annual volumes (or 20 000 kg per week); and
(c) a monthly decrease of 68 per cent in the average poultry exports;

in the wake of the Minister's determination.

[16] In particular, NPI seeks discovery in respect of each producer member of the association who exported poultry products to Namibia of 'all documents demonstrating the total turnover, both inclusive of the Namibian exports and exclusive of Namibian exports, for the period of April 2012 to April 2014.

Documents evidencing harm caused to SAPA by the Minister's determination

[17] NPI wants the second to sixth applicants seeking review and all members of first applicant who claim to be suffering harm, to be ordered to discover documents supporting the claim that they suffer 'direct, enormous, persistent and on-going harm' as a result of the Minister's determination.

SAPA's Reliance on GATT WTO , SADC Treaty of 1992 and protocol on Trade of 1996 and SACU Agreement of 2002.

[18] To the extent that SAPA places reliance on these instruments, it is implied, NPI maintains, that same was, in terms of Art 144 of the Constitution, incorporated into Namibian law, and that SAPA is duty bound to prove that same became part of Namibian law, and in particular to prove, (a) the act of signing thereof by the President

or his delegate in terms of Art 32(3)(e) of the Constitution, (b) ratification of the respective instruments by the National Assembly in terms of Art 63(2)(e), (c) the coming into force thereof in accordance with the respective terms of the instruments , and (d) publication in the gazette. SAPA is also required to produce copies of the text of each instrument relied on. NPI takes issue with SAPA's assertion that the restriction imposed by the Namibian Government is prohibited in absolute terms by Articles 18(2) and 25(1) of the SACU Treaty and maintains that Art 25 of the SACU Treaty in fact permits quantitative restrictions in respect of goods grown, produced or manufactured outside the Common Customs Area. Following thereon, NPI asserts an entitlement to discovery by SAPA of 'all documents evidencing the country in which their imports into Namibia were grown, produced or manufactured' in respect of the period April 2012 to April 2014. The claim for discovery in this latter respect concludes in the following terms:

> 'In addition, and in order for the third respondent to assess the veracity of the applicants' statements, the applicants should be compelled to discover all documents pertaining to their total imports for the last three financial years, from outside SACU, of broiler chickens and poultry products derived from slaughtered fowls of the species *Gallus domesticus* intended for human consumption.'

Association of Meat Importers and Exporters of Namibia (AMIE).

[19] It is apparent from Mr Lovell's founding affidavit in the main application that the first applicant, as a member of AMIE, had been engaged in discussions with the Meat Board and NPI in regard to the subject matter of the present dispute. The discovery sought in that respect is that SAPA discloses its relationship with AMIE and the outcome of the discussions in question and to produce the minutes of such meetings.

Documents relating to SAPA's dealings with the SA DTI

[20] In Mr Lovell's founding affidavit SAPA alleges that after the imposition of the quantitative import restriction by the Namibian government it sought to resolve the matter with the Namibian government and when that failed engaged the South African Department of Trade and Industry (DTI) to interceded on its behalf with the Namibian authorities. It was, it is said, assured by the South African authorities that its concerns

were in fact discussed by the DTI with the Namibian authorities but that its concerns were not 'expressly considered and decided upon'. SAPA also gives the impression that the DTI had assured it that a Task Team of the South African government is seized with the matter. The discovery claim in this regard is that SAPA be ordered to discover 'all documents relevant to the nature and outcome of the meetings' between it and the DTI and, presumably, between the DTI and the Namibian authorities.

General as opposed to specific discovery

[21] NPI's case is that given the multitude of documents that it requires to be discovered, the appropriate form of discovery in the present case is general discovery as more documents may exist than those referenced in annexure 1 to Mr Ferreira's affidavit. Whether it is general or specific discovery that is authorised by this court, NPI maintains that the court must direct discovery to be subject to the terms of rule 28(4) of the rules of court so as to enable it, should it be necessary, to compel discovery.

[22] SAPA opposes the discovery sought by NPI. The opposing affidavit to the discovery application is deposed to by Mr Kevin Lovell who is the chief executive officer of the first applicant in the review application. The gravamen of the opposition to the discovery is three-fold:

(a) That it is not merited by the nature of the relief SAPA seeks which is to curb governmental abuse of power which the quantitative restriction represents;
(b) That no relief is sought against NPI;
(c) That general discovery is overbroad, is not appropriate in a review application, and is not necessary for NPI to answer to the review application and amounts to a fishing expedition.

[23] Be that as it may, the SAPA offered and purported to discover the information and documents sought by NPI in paras 1 – 8 and paragraph 14 of annexure 1 to Ferreira's

affidavit but seeks an order of this court that such information be subject to a confidentiality regime which would allow only NPI's lawyers and professional advisers to have access to the documents and the information and that it must not be disclosed to NPI or its officials or to the public. In justification for the confidentiality, Mr Lovell asserts as follows:

'Indeed, each of the items discovered by the applicants are highly confidential documents that relate to the applicants' and their members' exports and imports, the applicants' financial statements, and the harm to the applicants' financial positions arising from the impugned import quota. Such information is commercially sensitive and would harm the competitiveness of the applicants and their members were it to be made publicly available or available to the third respondent'.

SAPA's members who ceased to be members or no longer exporting to Namibia

[24] Mr. Lovell asserts that the sixth applicant in the review is no longer a member of SAPA. No allegation is made though that it will withdraw from the present application. It is also said that the fourth applicant is no longer directly exporting to Namibia and does so indirectly through Spar DC WC and will only discover limited documentation. The fifth applicant, it is said, does not export broiler products to Namibia and objects to discovering additional documents except financial statements.

Relationship with AMIE

[25] Objection is made to the discovery of documentation relating to AMIE on the ground that it is not a party to the present proceedings and that, in any event, the information is not relevant to the present proceedings. The deponent maintains further that SAPA does not have in its possession the minutes relating to the AMIE meetings and that in any event NPI attended the meetings and should be in a position to confirm or deny the meetings or the existence of the minutes.

Documents concerning DTI

[26] Mr Lovell attests that no minutes were kept of the discussions with DTI and that SAPA is not in a position to produce such minutes.

Reliance on Treaties

[27] As regards the discovery sought in relation to the treaties on which reliance has been placed for the allegation that the quantitative restriction imposed by the Namibian Government is unlawful, SAPA's response is two-fold: (a) these documents are public knowledge to which NPI has or ought to have access and (b) is the subject of discovery by the Namibian Government as regards when they came into force.

Discovery already made by SAPA

[28] Mr Lovell, under Schedule A to his founding affidavit, identifies the documents in respect of which discovery is being made and objects to the discovery of the other documents which SAPA does not concede discovery. In the replying affidavit of Ferreira it is confirmed that with the answering papers SAPA made available to NPI ten lever-arch files purporting to be discovery in respect of items 1-8 and item 14 of annexure 1 to Ferreira's affidavit.

NPI's reply

[29] NPI in reply attacks SAPA's claim to confidentiality on the basis that (a) the documents already discovered under the ten lever-arch files were furnished under Schedule A which lays no claim to confidentiality as the express claim to confidentiality is made only in Part B, (b) the sweeping claim to confidentiality is not supported by any factual foundation and falls short of the test for invoking confidentiality: in an adversarial system such as ours the dictates of open justice entitle a litigant access to information, (c) the issue of confidentiality had become moot as SAPA's offer contained in the letter of 6 August 2014 was allegedly accepted in NPI's legal practitioner's letter of 13 August 2014 and there is now an agreement between the parties that NPI officials will have sight of the discovered documents and information.

[30] NPI also maintains that the discovery made in the ten lever-arch files falls short of its reasonable needs to meaningfully answer SAPA's review application, in the

following respects: (a) the discovered documents cover only paragraph 13 of annexure 1, (b) the discovered documents do not provide evidentiary support for:

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i. The extent to which (and with reference to volumes or turnover) all applicants (and the members of the first applicant) who exported chicken to Namibia were affected by the quantitative restriction, and how those figures compare with the total sales, volumes or turnover of those applicants.
ii. That any losses were sustained as a direct result of the imposition of the quantitative restrictions by the first applicant’s members generally or by the third, fifth and sixth applicants specifically.
iii. That any loss was suffered as a consequence of the quantitative restrictions and what exactly (or even by way of reasoned estimate) these losses amount to. It is impossible to extract any figures from the consolidated reports. The reports do not deal with the subsidiaries of the holding companies individually. The reports often do not even refer to Namibia at all, and those reports which do refer to Namibia do so without any complaint about the quantitative restrictions.
iv. The sources of all the chicken exported by all applicants to Namibia (and in the case of the first applicant, its members), both before and after the imposition of the quantitative restrictions.
v. That the international agreements and treaties and Namibia’s alleged assent thereto were ratified and published in the Government Gazette and deposited in accordance with their terms.’

[31] NPI also persists with its claim to discovery in respect of AMIE-related documents. In the first place, the argument is made that it is not enough for SAPA to say it does not have the minutes of the meetings as that is not all that was asked for, and that it must discover any other documents such as letters and faxes. In particular, it seems to suggest that it is entitled to know why some within AMIE opted out of the present litigation and the impact that had on the current review application.

[32] NPI also insists to discovery of SAPA's dealings with DTI. The premise here is that the information sought includes a ‘multitude of other relevant documents that would in all probability exist to evidence the nature and outcome of the meetings’.

Issues to be decided

[33] The following issues call for decision:

(a) Does the discovery already made by SAPA meet applicant's reasonable discovery needs?

(b) Should a confidentiality regime apply and in respect of which documents?

(c) In respect of which items that SAPA objects discovery may NPI be allowed discovery?

The law on discovery in motion proceedings

[34] In terms of rule 28 of the Rules of the High Court:

'(1) A party must, without the necessity of being requested by any other party to make discovery, identify and describe all documents, analogues or digital recordings that are relevant to the matter in question and are proportionate to the needs of the case and in respect of which no privilege may be claimed and further identify and describe all documents that the party intends or expects to introduce at the trial.

(2) A document, analogue or digital recording that has not been disclosed and discovered in terms of this rule may not, except with the leave of the managing judge granted on such terms as he or she may determine, be used for any purpose at the trial by the party who failed to disclose it, but any -

(a) other party may use such document; and

(b) any document attached to the pleadings on which that party relies in support of allegations made by that party may be used by that party without discovery thereof under this rule.' (My underlining for emphasis)

[35] There can be no doubt that the primary focus of the discovery regime under the rules of court is directed at action proceedings. As far as motion proceedings go, rule 70 (3) states that:

'The provisions relating to discovery apply to applications subject to such modifications required by the context or they may apply to such an extent as the court may direct.'

[36] At the outset I wish to deal with two important submissions made by NPI. The first proposition by NPI was to the effect that SAPA improperly chose to proceed by way of review under rule 76 when it should have foreseen factual disputes and ought therefore to have proceeded by way of action. I am unable to accept that proposition. Applications to review decisions of administrative officials are brought in terms of rule 76. That has been the premise under the old rules[13] and continues to be the case. That is regardless of whether or not disputes are anticipated or may arise on the facts. The court has always retained an inherent power to have any unresolved dispute resolved by way of oral evidence, if the circumstances of the facts justify that course of action. [14]

[37] The second proposition by NPI was to compare motion proceedings to action proceedings as regards discovery. The submission was made that in motion proceedings, just as in action proceedings, there is a right by a respondent, and therefore a corresponding obligation on the applicant, to make general discovery. The point was made that the importance of fair trial guaranteed by art 12 of the Constitution produces that result. This submission is untenable. It has always been recognized in our practice that motion proceedings stood on a different footing to action proceedings when it comes to discovery.

[38] In motion proceedings, the affidavits of the parties constitute both pleadings and the evidence. That is not the case in action proceedings. As has recently been correctly

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[13] Old rule 53.

[14] **The old rule 53 reads**:

‘ 53(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and

(b) Calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so’

The new rule 76 reads:

’76. (1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administration body or administrative official are, unless a lw otherwise provided, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.

restated by the South African Supreme Court of Appeal in *National Director of Public Prosecution v Zuma (Mbeki and Government of the Republic of South Africa Intervening*)[15], motion proceedings are aimed at arriving at an outcome based on undisputed facts. In fact, it behooves an applicant in motion proceedings to found its case on facts that are not disputed. The consequence of this principle is that our courts have approached discovery in motion proceedings differently from action proceedings.

[39] That much has been judicially recognised. For example, in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*[16] Botha J observed that in 'application proceedings we know that discovery is very, very rare and unusual procedure to use and I have no doubt that that is a sound practice and it is only in exceptional circumstances that discovery should be ordered in motion proceedings'.[17] Hoff J cited the *Coucorakis* case with approval in *Kauaaka and others v St Phillips Faith Healing Church*[18] and decided the case on the basis that discovery will only be allowed in motion proceedings in 'exceptional circumstances'.[19] Hoff J was not satisfied that the party seeking discovery established exceptional circumstances and refused to grant discovery in motion proceedings. I am bound by that decision.

[40] Even in the case of action proceedings, conscious of the oppressive effect that excessive and disproportionate discovery claims may have on parties engaged in litigation, the rule-maker has ordained that discovery must be 'proportionate to the needs of a case'. That makes the case for general discovery even harder in motion proceedings; and where asked is an indication of a fishing expedition.[20] Therefore, to obtain discovery in motion proceedings, the party seeking it must show exceptional circumstances and, as a rule, must make out the case for specific information or documents subject to relevance and proportionality to the needs of the case. Once such a case has been made out, the normal rule is 'full inspection'.

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[15] 2009 (2) SA 277at 26 para 26; Nqumba v State President 1988 (4) SA 224 (A) para 27.
[16] 1979 (2) SA 457 (WLD) at 470D-E.
[17] See also First Rand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd and Another 2013 (5) SA 238 (GSJ) at 243 para 19.
[18] 2007 (1) NR 276 (HC) at 278-279 para 17.
[19] Ibid at 281B.
[20] African Bank Ltd v Buffalo City Municipality 2006 (2) SA 130 (CkH) at 135 para 8.6.

[41] Against the above backdrop, discovery entitlement in motion proceedings must be a rarity. It follows that there is no right to general discovery such as is the case in action proceedings

[42] A party that seeks an order that the opponent not have access to discovered documents and information because they are competitors in the same market or industry must make out a clear case for such an order because, in the nature of the practitioner-client relationship, such a gagging order may have undesirable consequences for the credibility of our justice system in that it may well raise the claim in future that had the client known the full facts, it could well have contributed to the conduct of its case in its best interest. As Thring J aptly observed in *Unilever plc and another v Polagric (Pty) Ltd*[21]:

> 'It is unwise…unless very special circumstances exist, to create a situation in which the legal advisors or experts of a party to oppose litigation may find themselves in possession of information which may be highly relevant to the litigation but which they are precluded from communicating with their client. What are they to do with such information? How are they to obtain instructions in relation thereto? How are they to advise their client on the further conduct of the litigation or on whether it should be proceeded with at all?'

[43] A gagging order such as the one asked for by SAPA will be rarely granted and must, in any event, be premised on a demonstrable need therefor and not a mere say-so.[22]

[44] SAPA maintains that NPI's statement quoted in paragraph [12] of this judgment is an acceptance that SAPA is entitled on the facts of this case to a confidentiality regime which, in relation to documents and information discovered, would involve only NPI's legal practitioners and professional advisers having insight into them and not NPI or its officials.

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[21] 2001 (2) SA 329 at 341C-F.

[22] Compare: Competition Commission v ArcelorMittal South Africa Ltd 2013 (5) SA 538 (SCA) paras 42-43.

Items for which discovery has been conceded

[45] SAPA has readily offered to discover the documents and information sought in paragraphs 1-8 and paragraph 14 of annexure 1 to Ferreira's affidavit. No question therefore arises as to whether or not NPI is entitled to discovery in respect of that discovery claim of NPI's. The only question that remains is whether there was sufficient discovery and whether it should be subject to a confidentiality regime craved by SAPA.

[46] I am satisfied that what NPI did was to propose a confidentiality regime subject to SAPA making out the case for it and not to concede that such a case was made out. In turn, SAPA has, apart from a mere say-so, not laid a factual basis for the court departing from the normal rule of 'full inspection'.[23] What is more, the blanket claim to confidentiality without setting out in respect of which particularized items confidentiality is claimed undermines SAPA's claim to a confidentiality regime. For example, I see no plausible reason why confidentiality must attach to financial statements or treaties. I therefore decline to grant an order imposing a confidentiality regime in the form proposed by SAPA as it had not made out a case for it.

Was there an agreement on discovery?

[47] NPI relies on the correspondence between the legal practitioners of record as establishing that the parties had agreed to the full extent of the discovery sought by it. In the view that I take of the matter as regards SAPA not making out the case for confidentiality, I do not find it necessary to decide whether or not there was an agreement reached between the parties on the question of confidentiality.

Why no general discovery?

[48] There is no right to general discovery in motion proceedings and any claim to specific discovery will depend on the circumstances of each case and must be justified on the imperative that without it a party will suffer trial prejudice. The onus rests on the

[23] Crown Cork and Seal Co Inc and another v Rheem SA (Pty) Ltd 1980 (3) SA 1093 at 1099H-1100D.

party seeking discovery in motion proceedings to make out the case for it. I agree with Mr Unterhalter (SAPA's counsel) submission that recognising a right to general discovery in motion proceedings will frustrate the very essence of motion proceedings which is that the affidavits constitute both the pleadings and the evidence and that a party must make out its case on its papers.

[49] There is force in SAPA's argument that if they are unable to make out their case as regards the prejudice they allege, they assume the risk that comes with that. That however does not detract from NPI's legitimate expectation in our adversarial system to have placed at its disposal information which is within SAPA's peculiar knowledge, to enable it assess the merits of the claim of financial harm (past and present) and to meet it, lest its failure to properly meet it might raise the inference that it is not disputed.

[50] I conclude that NPI has made out a case for requiring the applicant to discover information relating to the losses allegedly suffered as a result of the Minister's determination.

Discovery relating to breach of treaty obligations

[51] I got the impression that in respect of some of the information sought, SAPA's attitude is that it is information that it expects of the government respondents to furnish as part of the review record and which it will seek to compel if not provided. I express no view thereon at this stage of the proceedings, except that I find it odd that SAPA would make positive assertions about the existence of certain facts which it claims to found its cause of action only to claim that it is unsure of the existence thereof when challenged to produce the evidence. In any event, the matter must be approached not from the perspective of the government respondents but that of NPI who, the applicant's counsel conceded during argument, is entitled to mount an opposition independent of the government respondents. NPI is thus entitled to the discovery of the documents which the applicant positively asserted exist and support its case. NPI will be well within its rights should SAPA fail to make discovery of the treaties relied on by SAPA as founding its cause of action to, as adumbrated in the replying affidavit of Mr Ferreira, move in the

fullness of time that SAPA not be permitted to rely on the treaties which it failed to establish to have the force of law in Namibia.

Extent of discovery

[52] What remains for me to consider is the breadth of discovery to which the respondent is entitled in order to fairly meet the case of the applicant in regard to the alleged prejudice. The discovery to be allowed must (a) lay the basis for SAPA's cause of action and (b) must be sufficient to enable the respondent to deal with the alleged prejudice but it must not be so wide as to become a license for the respondent accessing trade-sensitive information concerning the applicant disproportionate to the legitimate needs of the respondent to fairly present its case to the court. NPI is also entitled to the discovery of the treaties which SAPA relies on for its cause of action.[24] In any event, the discovery must be proportionate to the needs of the case.

[53] NPI's averments about the Art 25 exceptions under the SACU Treaty which would entitle the imposition of a quantitative restriction on products which originate in a non-SACU country, is a tacit admission that the SACU treaty has the force of law in Namibia and would thus render unnecessary this court having to direct SAPA to discover proof of its applicability in Namibia. Besides, the public announcement made by the Minister of Agriculture, Water and Forestry in 2001 accepted that Namibia was a signatory to the SACU Treaty and it becomes a moot point whether or not that treaty is binding on Namibia.

AMIE-related documents

[54] I am not persuaded that this kind of information is relevant either as regards the unlawfulness of the Minister's determination or the harm suffered by SAPA as a result of such administrative action. It unnecessarily casts the net too wide and comes close to a fishing expedition as alleged by SAPA in the main application. In any event, by its own

[24] A cause of action is the 'entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim' : Abrahamse & Sons v SA Railway and Harbours 1933 CPD 626. See also Evins v Shield Insurance Co Ltd 1980 (2) SA 815 at 838.

admission, NPI was privy to the discussions and must bear some knowledge about the nature of the discussions. NPI has failed to demonstrate the relevance of the information under this rubric in so far as its right to properly meet SAPA's case is concerned. Besides, SAPA says it does not have any of the minutes and cannot say if minutes were kept. Absent minutes, it is not clear to me what other documents NPI is particularly in need of to meet the grounds of review and the harm allegedly suffered by SAPA. It is stretching beyond limits the right to information to have a fair trial to demand to know why a party chooses no longer to be associated with litigation which it initially made common cause with but no longer does.

SAPA members no longer exporting to Namibia

[55] It is no answer for a SAPA member to say that either it no longer exports to Namibia or only does so indirectly, as long as they continue to make common cause with those who do. Their identity of interest with those applicants who continue to export to Namibia place them, as far as discovery goes, in no different a position. They are bound by the orders this court makes on discovery.

Discovery relating to alleged losses

Role of prejudice in a review application

[56] In para [30] of this judgment, I have recorded NPI's complaint how SAPA's discovery in its answering papers does not comply with its discovery demand as reflected in annexure 1 to Mr Ferreira's affidavit. I'm conscious that such allegation is made in the replying affidavit and that SAPA had no opportunity to deal with it although, as pointed out by Mr Gauntlet in argument, nothing prevented SAPA from seeking the indulgence of this court to file a fourth set of papers to deal with that assertion. I'm satisfied that a case has been made out by NPI that the discovery already made is non-compliant as aforesaid especially because Mr Ferreira under oath makes the allegation

that he has examined the ten lever-arch files and came to the conclusion that the discovery is non-compliant.

[57] In review proceedings, prejudice plays an important role in the determination of the court's discretion. It is settled practice that even if the improper conduct of an administrative official is unlawful, the court retains discretion to review it. It is trite that the court's review power may be declined in the public interest.[25]

[58] The nature of the harm (or prejudice) suffered by SAPA will therefore be an important issue in the review application.

[59] The essence of SAPA's allegations on financial harm is that the importation of the quota has had the result that its members now export less than what they did before the quantitative import quota. The first applicant is an association representing the interests of its members. It does not itself export chicken products to Namibia. As Mr Gauntlet correctly put it in argument, we do not know how many members make up the first applicant and the extent of the prejudice suffered by each. The extent of the prejudice suffered by individual members could, taken individually, be insignificant compared to the overall benefit to Namibia of the measure put in place. It is not that the applicant has no remedy except for legal challenge. The SA DTI's involvement, taken together with the extent of harm caused to individual exporters, could well persuade the court not to review the decision in the exercise of its discretion. The harm allegedly suffered is therefore not a matter subsidiary to the review grounds as argued by Mr Unterhalter on behalf of SAPA.

[60] The industrial policy of a small country such as Namibia with very high unemployment is not something this court can take lightly. Even if all the allegations made which found the applicant's cause of action are established, this court must against that background consider whether it is in the public interest that the government's impugned decision should be reviewed. What no doubt will come in the mix is the fact, as so eloquently ventilated by the applicant in its papers, that the applicant is entitled to seek and is actively seeking the intervention and protection of its

[25] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at 246, para 36.*

own government through bilateral and international instruments which, it is said, are binding on the government of Namibia. The gravity of prejudice which SAPA's individual members the applicant allegedly suffered is therefore a very crucial consideration in this review application and may well be decisive of its outcome.

The relief

[61] Although I am satisfied that NPI has made out a case for discovery relative to non-SACU imports into Namibia, it has failed to make out the case for discovery of information and documents relating to SAPA's dealings with the SA DTI.

[62] I am satisfied that the interests of justice in the present case justify that NPI obtain specific discovery of all of the information and documents listed in annexure 1 to Ferreira's affidavit without any confidentiality restriction as far as NPI is concerned. I am also satisfied, on the strength of the allegations made in the replying affidavit, that the discovery made in the ten lever-arch files is inadequate to the extent stated by Mr. Mr Ferreira. Proper discovery, subject to rule 28(8), must be made by SAPA and all the applicants who continue to be parties to the present proceedings. For the avoidance of doubt, NPI is entitled to the discovery of the following class of documents and information as listed in annexure 1 to Ferreira's affidavit in the discovery application:

(a) Except for the SACU Agreement, documents proving that the treaties relied on by SAPA for the conclusion that the Minister's determination is unlawful has the force of law in Namibia;

(b) Documents and information supporting the claim by SAPA that its members suffered persistent and ongoing financial harm from the imposition of the quantitative quota restriction. That information must be provided in respect of each of SAPA's members who continues to be a party in the present proceedings and thus make common cause with the allegations in the founding affidavit in support of the review application.

(c) SAPA's Imports of chicken products from outside SACU.

[63] I wish to make plain that NPI is not entitled to discovery of the AMIE-related documents or those relative to the role played by the SA DTI in respect of SAPA's endeavors to have the matter resolved bilaterally between the South African and Namibian governments.

Costs

[64] I see no reason why costs should not follow the event. NPI has achieved substantial success. As far as costs are concerned, rule 32 (11) caps costs in interlocutory applications. It states:

> '(11) Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N$20 000.'

[65] While preparing this judgment, it occurred to me that an application seeking discovery being interlocutory in nature, NPI was obliged to comply with the peremptory terms of rule 32 (9) and (10) which state as follows:

> '(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.
>
> (10) The party bringing any proceeding contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in subrule (9), without disclosing privileged information.'

[66] SAPA's counsel did not suggest either in the pleadings or in argument that there was non-compliance by NPI with these requirements of the rules and I will accordingly assume that NPI complied with them. Had it occurred to me during argument I would have raised the issue *mero motu* but since I did not do so, I will not now hold it against NPI. Managing judges must be alive and vigilant to this important provision in our rules which is intended to curb costs associated with litigation.

[67] Mr Gauntlet argued on behalf of NPI that this court has discretion to grant costs on a higher scale and that given the importance and complexity of the matter and the

fact that the parties are litigating at full stretch, the court should in exercise of its discretion grant costs on a higher scale. I did not get the impression that Mr Unterhalter took a view different to Mr Gauntlet's. The rationale of the rule is clear: to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real disputes in the case. A clear case must be made out if the court is to allow a scale of costs above the upper limit allowed in the rules. The factors mentioned by Mr Gauntlet are some of the grounds which will play a role in the court's exercise of its discretion. The onus rests on the party who seeks a higher scale. To add to the factors mentioned by Mr Gauntlet: the parties must be litigating with equality of arms and it will be a weighty consideration whether both crave a scale above the upper limit allowed by the rules. Another critical consideration will be the reasonableness or otherwise of a party during the discussions contemplated in rule 32(9). Another important consideration is the dispositive nature of the interlocutory motion and the number of interlocutory applications moved in the life of the case; the more they become the less likely it is that the court will countenance exceeding the limit of the rules.

[68] This is only the first interlocutory application between the present parties. It has been brought early enough and raises important questions. The parties are litigating with equality of arms[26] and comparable strength and both command substantial resources. Both are desirous for a scale of costs above the rule's limit. In the exercise of my discretion I will allow the taxing officer to tax the bill of costs on a scale higher than the limit imposed by rule 32(11) limited to one instructing and two instructed counsel. I take the view that in an interlocutory application even where the court in its discretion decides to allow costs above the limit, three instructed counsel is unjustified.

[69] I therefore make the following order:

1. The main relief (general discovery) is denied.

2. Only specific discovery is allowed: first to sixth applicants are ordered to make discovery in the manner contemplated in rule 28(4) of the Rules of

[26] Either side has engaged three instructed counsel.

the High Court, within 20 days of this order, of the documents and information set out in annexure 1 of Mr Koosie Ferreira's affidavit in the discovery application.

2.1 The discovery sought in respect of the SACU Treaty, the SA DTI and AMIE deliberations and discussions is denied.

3. Rules 28(5), (6) and (8) to (15) shall apply to the discovery made in terms of paragraph 1 of this order;

4. The first to sixth respondents are ordered to pay third respondent's costs, jointly and severally the one paying the other to be absolved, to include the costs of instructing and two instructed counsel.

5. The matter is postponed to **25 November 2014 at 14h15** for status hearing and the parties directed to seek further directions on the future conduct of the matter.

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P T Damaseb

Judge President

APPEARANCES

APPLICANT:	D Unterhalter SC
	M du Plessis
	N Bassingthwaighte
Instructed by:	Ellis Shilengudwa Inc
Third Respondent:	J J Gauntlett SC
	R Totermeyer SC
	FB Pelser
Instructed by:	Theunissen, Louw & Partners