

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CIV-ACT-CON-2019/02613

In the matter between:

BAOBAB CAPITAL (PTY) LTD

PLAINTIFF

and

SHAZIZA AUTO ONE (PTY) LTD

DEFENDANT

Neutral Citation: *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* (HC-MD-CIV-ACT- CON-2019/02613) [2020] NAHCMD 290 (10 July 2020)

Coram: **PRINSLOO J**

Heard: 18 June 2020

Delivered: 10 July 2020

Reasons: 16 July 2020

ORDER

1. All three points *in limine* raised by the plaintiff are upheld.

2. The defendant's application is struck from the roll with costs, such cost to be taxed outside the scale as provide for in rule 32(11) and to include the costs of one instructing and one instructed counsel.

Further conduct of the matter:

3. The case is postponed to **30/07/2020** at **15:00** for Status hearing (Reason: Others).

4. The Parties **must** file a joint status report on or before 27 July 2020 setting out the further conduct of the matter.

JUDGMENT

PRINSLOO J

Introduction

[1] The matter before me concerns an application to compel discovery in terms of rule 28(8) of the Rules of Court. Due to the advanced stage of the proceedings the defendant filed its notice of motion in terms of rule 101 read with rule 28(9) and 28(14).

[2] The opponents in this application is Baobab Capital (Pty) Ltd and Shaziza Auto One (Pty) Ltd.¹ The plaintiff instituted action against the defendant for a) an order rectifying an agreement reached between the parties on 8 September 2017 and b) payment in the amount of N\$ 118 468.49, interest and cost.

Background

Case management history

¹ The parties will be referred to as they are in the main action.

[3] For reasons that will become clear later in my judgment it is important to briefly set out the chronology of the judicial case management process in the matter before me.

[4] The matter was case managed by the Honorable Tomassi J, who issued a case planning order on 10 August 2019 directing the parties to file their discovery affidavits and exchange their bundles of discovered documents on or before 14 October 2019. The matter was then postponed until 16 October 2019 for a case management conference. The parties were ordered to file their joint case management conference report by 11 October 2019.

[5] The parties duly filed their joint case management conference report wherein they confirmed that they will file their discovery affidavits on 14 October 2019 as directed, which the parties accordingly did. During the case management conference the court ordered the parties to file their witness statements by 11 November 2019 and their joint pre-trial order by 1 December 2019.

[6] The parties again complied with the directions of the court, except the plaintiff was unable to furnish the defendant timeously with a draft of the proposed pre-trial order. The court was therefore unable to proceed with the pre-trial conference on 4 December 2020 as scheduled and the Managing Judge called for affidavits showing cause why sanctions should not be imposed against the parties. After dispensing with this preliminary issue the court allocated a trial date of 15 – 19 June 2020 on 12 February 2020 and also scheduled a pre-trial status hearing for 1 June 2020.

[7] On 1 June 2020 the court was informed by Mr Naude, the legal practitioner of record for the defendant, that the defendant seeks further and specific discovery in terms of rule 28(8) and the defendant was ordered to file its notice in terms of the said rule by close of business on the same day. The plaintiff was ordered to respond to the said notice in accordance with the Rules of Court and the parties were directed to attend roll call on 12 June 2020.

[8] Mr Naude accordingly filed the notice in terms of rule 28(8) requiring the plaintiff to deliver within ten days, the following documents:

- a) The plaintiff's annual financial statements for the years 2017, 2018 and 2019 respectively, and
- b) The plaintiff's investment portfolio for the years 2017, 2018, 2019 and 2020 respectively.

[9] On 11 June 2020 the plaintiff caused a discovery affidavit to be filed, deposed to by one Mr Jerome Kisting, which discovery only consisted of what was referred to as reduced annual financial statements for 2018 and 2019. Mr Kisting stated that the plaintiff does not have, and never had in its possession or custody the portfolios for 2017 to 2020.

[10] The discovered documents did not include the financial statements of 2017 as requested by the defendant. The documents provided to the defendant were also in a redacted format as the plaintiff blacked out information in the financial statements for 2018 and 2019 which did not relate to the defendant. Discovery of the financial documents, apart from those provided to the defendant, was refused on the basis that it was neither relevant nor germane to the current proceedings.

[11] The trial was set down for hearing to commence on 15 June 2020 at 14h15. At approximately 14h15 the defendant filed a Notice of Motion praying for the following relief:

'Ordering and directing the plaintiff to forthwith comply with the rule 28(8) notice of the defendant dated 1 June 2020, a copy of which is attached hereto as "A", by making available to the defendant:

- 1.1 full and unredacted copies of the financial statements of the plaintiff for the years 2017, 2018 and 2019, which are
- 1.2 properly legible and readable; and
- 1.3 copies of all documents evidencing the plaintiff's investment portfolios for the years 2017, 2018, 2019 and 2020, that it managed on behalf of any special purpose vehicle in accordance with an investment plan and in terms of a management agreement between the plaintiff and such special purpose

vehicle, as contemplated by regulation 29(41) of the regulations promulgated under the Pension Funds Act, Act 24 of 1956.’

[12] In support of the application an affidavit was deposed to by Mr Naude, the defendant’s instructing counsel. To his founding affidavit Mr Naude attached the discovered reduced financial statements as well as correspondence dated 15 June 2020 exchanged with Ms Vermeulen, the legal practitioner of record of the plaintiff.

[13] During the hearing on the afternoon of 15 June 2020 plaintiff’s counsel indicated that they did not have the opportunity to properly read and consider the application and requested time to do so and to contemplate their options in dealing with the application. As a result of the application filed by the defendant the trial could not commence and had to be adjourned to enable the parties to file their answering and replying papers. The application was then set to be heard on 17 June 2020.

Points in limine

[14] The plaintiff raised three points in limine in its answering papers, ie a) Mr Naude’s lack of authority to launch the application and depose to the founding affidavit, b) failure to fully comply with the provisions of rule 32(9) and (10) and c) that the defendant failed to launch its application in accordance with the provisions of rule 28 of the Rules of Court

[15] It has been held in *Ondonga Traditional Authority v Elifas*² that if the authority of an applicant to institute the proceedings is challenged or raised at the onset of proceedings it would be incompetent for the court to determine anything else without first deciding the issue of the applicant’s authority, as a result the court will firstly deal with the issue of lack of authority.

Lack of Authority

² (HC-MD-CIV-MOT-EXP- 2017/001340 [2017] NAHCMD 142 (15 May 2017).

[16] Mr Naude deposed to an affidavit in support of the defendant's application. In the first two paragraphs of the defendant's founding affidavit Mr Naude stated as follows:

1. 'I am the legal practitioner of record of the defendant in this matter.
2. The facts set out in this declaration are true and correct and fall within my personal knowledge, unless it appears otherwise from the context, in which case I verily believe such information to be true and correct.'

[17] Hereafter, Mr Naude launched into his reasons for the application and it is common cause that nothing was further said in the remainder of the affidavit that would denote authority to bring the application on behalf of the defendant.

[18] In the plaintiff's answering papers the deponent to the answering affidavit, Ms Monde Matengu, took issue with the founding affidavit deposed to by Mr Naude wherein he failed to, firstly, allege that he is authorised to launch the application on behalf of the defendant and secondly, that he is authorised to depose to the founding affidavit in support of the application.

[19] It was conceded by Ms Matengu that Mr Naude is the defendant's legal practitioner, but she submitted that this is of no assistance to the defendant as there is no general power of attorney and in any event no power of attorney was filed of record authorising Mr Naude to launch the application on behalf of the defendant. In addition thereto no confirmatory affidavit was deposed and filed on behalf of the defendant.

[20] In the defendant's replying papers Mr Naude submitted that he was fully and duly authorised on behalf of the defendant when he launched the current application and filed his founding affidavit in support of the application based on such authority.

[21] Mr Naude also attached to his replying affidavit a resolution³ of the defendant that authorises Mr QE Ockhuizen, in his capacity as duly authorised sole director of the company, to sign a power of attorney and any documents and to do all

³ Filed as "AN1" to the replying affidavit.

necessary acts to give effect to the said resolution. In addition thereto, Mr Naude attached a special power of attorney granting him and a number of other directors from the firm authority to defend the current action on behalf of the defendant and anything incidental thereto. Further to this the defendant filed a supporting affidavit of Mr Ockhuizen simultaneously with the replying affidavit.

[22] Mr Naude further maintains in his replying affidavit that Mr Ockhuizen was personally in court on 15 June 2020 when the instructed counsel discussed the various issues surrounding the launching and the hearing of the application with the presiding judge and submits that it must therefor be clear that the application was launched on behalf of the defendant with the necessary consent and authority.

[23] Mr Naude further submitted that the objection to his lack of authority to have launched the application is insincere and contrived and technical in nature and should thus be dismissed.

Summary of the arguments advanced by the respective counsel

[24] Mr Barnard, instructed counsel for the defendant, argued that the failure to establish the authority to launch the application at the commencement of the said application, is not a defect fatal to the institution of such proceedings. It can be condoned, upon the subsequent compliance with the particular rule requiring the filing thereof at a later stage.

[25] Counsel referred the court to *Pinkster Gemeente van Namibia (previously SWA) v Navolgers van Christus Kerk van SA and Another*.⁴

[26] In the *Pinkster Gemeente* matter Hannah J, writing for the full bench, followed what was held in *Baek & Co. S.A (Pty) Ltd v Van Zummeren and Another*⁵ instead of *S.A. Milling Co. (Pty) Ltd v Reddy*.⁶

⁴ 1998 NR 50 (HC) at 54B.

⁵ 1982 (2) S.A. 112 (W).

⁶ 1989 (3) S.A 431 (E).

[27] In the *S.A Milling* matter the court held that an objection by the opposing litigant precludes ratification of the unauthorised institution of proceedings by the purported agent because the opposing party, by objection, acquires a right to move for the dismissal of the application on the ground of locus standi.

[28] However in the *Baeck* matter the court follows *Garment Workers' Union of the Cape and Another v Garment Workers' Union and Another* 1946 AD 370 wherein the court concluded that ratification of the unauthorised act of bringing application proceedings does retrospectively operate to cure the original lack of authority.

[29] Mr Barnard further referred to the *Baeck* judgment, followed by Hannah AJA, where the following was stated:

'If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach. Indeed, it is not disputed that the applicant could start again on the same basis, supplemented as needs be, to establish the authority of Keller.'

[30] Mr Barnard submitted that due to the fact that the *Pinkster Gemeente* matter is a full bench decision this court is bound by the said decision and that in terms of this decision the deficiency of Mr Naude's authority can be cured by ratification having retrospective operation. Counsel further submitted that Mr Ockhuizen, sole director of the defendant, was in court on the first day of trial when the manner in which to conduct the application was discussed by counsel and the trial judge and would have raised objection if the legal practitioner of record had no authority to launch the application.

[31] Mr Jones, instructed counsel for the plaintiff, argued to the contrary that the defendant did not make out a case for the relief sought in the application before this court as the deponent to the founding affidavit failed to positively allege that he has the requisite authority to launch the application.

[32] Mr Jones argued that in motion proceedings the applicant must disclose its cause of action in the founding papers, which include the requirement that the deponent to the founding affidavit must positively allege that he or she has the requisite authority to launch the application. In addition thereto the defendant in *casu* is a private company and as such an artificial person and an artificial person can only take decisions by the passing of resolutions.

[33] He referred the court to the *Standard Bank Namibia Limited v Nekwaya*⁷ matter wherein the court found that an applicant who brings proceedings on behalf of a juristic person must state in the founding affidavit that he or she is authorised to bring such an application on that legal persona's behalf, failing which the court will conclude that the proceedings are not authorised and the deponent is acting on his or her own frolic.

[34] Mr Jones further took issue with the fact that the averments regarding authority were only made in the replying affidavit and only at this stage did the defendant file a resolution and power of attorney as well as a confirmatory affidavit setting out the purported authority to launch the application.

[35] Mr Jones argued that launching of the application can be ratified provided that the averments regarding authority were made in the founding affidavit. In the instance where an objection to the authority to bring the application is raised then such authority can be provided in the replying affidavit on condition. In this regard the court was referred to *Shopleft Namibia (Pty) Ltd v Paulo and Another*⁸ where the court considered the position as set out in *Otjondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*,⁹ which will be discussed here under.

Discussion

⁷ (HC-MD-MOT-GEN-2020/00089) [2020] NAHCMD 122 (26 March 2020).

⁸ (LC 7/2010) [2010] NAHC 29 (26 March 2010).

⁹ Unreported judgment of this Court, Case LC 1/2009 delivered on 22 July 2009).

[36] The plaintiff is challenging Mr Naude's authority to launch the application and/or the capacity to depose to the founding affidavit.

[37] It is trite that an applicant must make out his case in the founding affidavit and explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. The deponent must state that he or she had been authorised to bring the application in that representative capacity and if possible produce his source or proof of such authority. Alternatively the principal must file a confirmatory affidavit confirming such authorisation.¹⁰

[38] In *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk*¹¹ the court made a distinction between a case where the litigant is a natural person who institute proceedings and where he is doing so on behalf of a juristic person. The Court held that in the case of a natural person, where a notice of motion is complete and regular on the face of it and purports to be signed by an attorney, the court may presume, in the absence of anything that shows that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, that the attorney has been authorised. The court however stated that in the case of an artificial person evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.¹²

[39] The court in *Mall (Cape)* matter stressed the need to treat each case according to its own merits in deciding whether sufficient evidence has been placed before it¹³.

¹⁰ *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020) referring to *Naholo v National Union of Namibia Workers* 2006 (2) NR (659) (HC); *South West Africa National Union v Tjonzongoro and Other* 1985 (1) SA 376 (SWA); *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799; *JB Cooling and Refrigeration CC v Dean Jacques Willems t/a Armature Winding and Other* (A 76/2015 [2016] HAHCMD 8 (20 January 2016); and *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

¹¹ 1957 (2) SA 347 (C).

¹² At 351 D-H.

¹³ At 352 A-B.

[40] The Court found that the words '*duly authorised to make this affidavit*' constituted sufficient evidence that the company authorised the institution of the proceedings.¹⁴

[41] In the matter in casu there is no minimal evidence to show that the defendant authorised the application. Mr Naude simply states that he is the legal practitioner of record for the defendant and the facts deposed to falls within his personal knowledge. There is nothing from the founding papers before me on which this Court may find that the defendant, an artificial person, knows about this application.

[42] The argument by Mr Barnard that Mr Ockhuizen was sitting in court during the proceedings and could sound his objection should he have one, does not hold water. It is improbable that a client, who is duly represented by a senior counsel would jump up in court and object to an application that is under discussion between counsel and the court.

[43] Mr Naude is an extremely experienced legal practitioner and to date proffered no explanation for his failure to set out in the founding papers his authority to launch the application and to depose to the founding affidavit. At this stage I must pause and state that authorisation to depose to the founding affidavit is important but not the main issue. The main issue is the launching of the application and the prosecution thereof which must be authorised¹⁵. The failure to depose to the issue of authority is an elementary mistake that might have far reaching implications in an application of this nature.

[44] In addition to Mr Naude's failure to make any averments regarding his authority to launch the application, the defendant further fails to file a confirmatory affidavit of the sole director Mr Ockhuizen, in spite of his apparent presence in court and his availability to do so. He also failed to file the defendant's resolution. One must ask the question that, if Mr Ockhuizen was present all along, why did he then not depose to the affidavit instead of Mr Naude?

¹⁴ Also see *Otjzondou Mining v Purity Manganese* 2011 (1) NR 298; *Wlotzkasbaken Home Owners Assoc v Erongo Regional Council* 2007 (2) NR 799, (HC), para 13; *Serengetti Tourism (Pty) Ltd t/a Etosha Mountain Lodge v Baard* (A 276/2014) [2016] NAHCMD 117 (21 April 2016).

¹⁵ *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G – H para [19].

[45] After the defendant was alerted to the deficiencies in its application through the objections raised in the answering papers, defendant's counsel sprang to action and filed every possible document that was supposed to be filed when the application was launched. This included a supplementary affidavit deposed by Mr Ockhuizen, impermissibly so I might add, together with the replying affidavit in an attempt to fortify the position of Mr Naude. The supplementary affidavit was however filed without leave of court and accordingly this court will not have regard to it.

[46] Mr Barnard submitted that where authority is challenged in the answering affidavit the defendant may file the resolution and/or power of attorney in reply which would ratify the launching of the application. Mr Barnard relies in this regard on the *Pinkster Gemeente* matter. It was argued that it is crystal clear from the reading of the additional documents filed together with Mr Naude's replying affidavit that he is duly authorised to launch the application and that the objection of the plaintiff in this regard is fanciful and without merits.

[47] Mr Naude indeed stated in the replying affidavit that he was duly authorised to launch the application (and filed a resolution) and according to the *Mall (Cape)* matter and the *Otjozondu Mining* and the *Wlotzkasbaken Home Owners Assoc* matter, had Mr Naude made the averment in the founding affidavit that would have been sufficient and permissible.

[48] Mr Barnard strongly relies on the *Pinkster Gemeente* matter to support the defendant's argument that lack of authority can be ratified even if the averment was not made in the founding affidavit. The court in that matter found that the applicant may be allowed to attach a resolution showing authority if doing so will lead to a straight forward resolution of the disputed locus. It would appear that the court justify this view on the basis that the question of authority to bring an application ultimately concerns the question of costs, and that once it is shown that the person who brings an application on behalf of another has authority that other person will be liable for an adverse cost award.¹⁶

¹⁶ *Supra* at 55 H-I.

[49] The court in the *Pinkster Gemeente* matter was however very clear on the fact that this should not be seen as a relaxation of the general rule that an applicant must make out his case in the founding affidavit. It was only in very limited circumstances that the introduction of a new matter would be permitted in a replying affidavit when it should have been included in the founding affidavit. It therefore does not absolve the applicant from making sure to raise the authority to depose to affidavits in founding papers.

[50] The *Standard Bank* matter to which Mr Jones referred the court to stands in contrast with the *Pinkster Gemeente* matter and appears to be the preferable position and on all fours with the matter before me. In that matter the applicant also failed to make the necessary averment in the founding affidavit and admitted to not making that very important allegation and then proceeded to file a supplementary affidavit in direct response to the attack launched by the 1st respondent on the issue of authority. The applicant also admitted that it did not make the important allegation in its founding affidavit, hence the need to file the supplementary affidavit. The applicant filed the supplementary affidavit without leave of court.

[51] A distinction must be drawn between matters where authority to launch the application is averred in the founding affidavit and objected to by the opposing party and those matters where absolutely no averments are made regarding authority. In the former instance the principles as set out in *Otjzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*¹⁷ applies. In the *Otjzondjupa Regional Council* matter Muller J (as he then was) sets out the principles as follows:

(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorization has been placed before Court;

(b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;

(c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;

(d) Each case will in any event be considered in respect of its own circumstances; and

¹⁷ (LC 7/2010) [2010] NAHC 29 (26 March 2010).

(e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that it is the applicant who is litigating and not some unauthorised person on its behalf.'

[52] Masuku J stated as follows in the *Standard Bank* matter:

'[11] It is a matter of note that the applicant did not address this issue at all in its founding affidavit and thus could not, in reply, place proof of the authority as no authority whatsoever, was alleged. It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the applicant did not make out a case for the authority in the founding papers, nor did or could it do so in reply as that opportunity never came.' (My underlining)

[53] And further

[18] Authorisation of proceedings is a serious matter, and is not just an idle incantation required for fastidious reasons. The court must know, before it lends its processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.

[19] Once this is not stated in the founding affidavit, the only conclusion that may be reached is that the proceedings are not properly authorised and that inevitably, is the applicant's fate in these proceedings. It is accordingly unnecessary to consider the other issues raised by the 1st respondent in his notice.

[20] The learned authors Herbstein & Van Winsen¹⁸ say, 'The necessary allegations must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit and will order any matter appearing in it that should have been in the supporting affidavits to be struck out.' This is the law even in this Republic as propounded in what has become known as the *Stipp* principle.¹⁹

¹⁸ *Ibid* at 439-440.

¹⁹ *Stipp and Another v Shade and Others* Case 2007 (2) NR 627 (SC) at 634 para 29 - 31.

[54] I fully associate myself with this court's judgment in the *Standard Bank* matter and must reach the same conclusions as my Brother and whereas there are no allegation that the current proceedings are authorised, the proceedings cannot be allowed to continue.

[55] Under normal circumstances I would not have considered the remainder of the legal points raised by the defendant, however due to the unique circumstances of this case I feel duty bound to discuss the rest of the points in limine. However before I do I would like to touch on one more issue that Mr Jones alluded to in his heads of argument and that is the issue of legal practitioners deposing to affidavits.

[56] In a fresh and recent judgment of *Minister of Urban and Rural Development v Witbooi*²⁰ Masuku J remarked as follows in this regard:

[38] [One] cannot help but wonder whether all legal practitioner has locus standi to move such an application with the evident involvement of the concerned client.

[39] That is a practice that needs to be nipped in the bud in this jurisdiction as some practitioners are hell bent on willy-nilly deposing to affidavits that their clients ought to have deposed to. In some cases, especially in those relating to condonation, where this is practice is rife, the question arises in some instances whether the client even know about the application at all. Some of these application initiated and deposed to by legal practitioners may be necessitated by the natural instinct of self-preservation and survival.

[40] Our courts have spoken times without number regarding the impermissibility of legal practitioners deposing to affidavits in matters where they appear on behalf of their clients.'

[57] The court in the above matter also referred to *Prosecutor-General v Paulo and Another*²¹ wherein Angula DJP expressed strong views against legal practitioners who depose to affidavits in their names and discouraged the filing of affidavits on behalf of a client and stated that this practice should only be resorted to in exceptional circumstance where the party to the proceedings is, for compelling reasons, unable to depose to an affidavit. The learned DJP further expressed the

²⁰ (HC-CIV-MOT-GEN-2019/00225 [220] NAHCMD (9 July 2020).

²¹ 2017 (1) NR 178 (HC) at 184 para 16.

view that such reasons must be disclosed in the affidavit deposed to by the legal practitioner.

[58] In the matter before me as indicated earlier no explanation was proffered for Mr Naude filing the affidavit instead of Mr Ockhuizen on behalf of the defendant and from my reading of the papers there was also no exceptional reason why Mr Ockhuizen did not depose to the founding affidavit.

[59] Mr Naude did exactly what the DJP warned against, namely attempting to astride two horses at the same time, that is being a witness and also a legal practitioner at the same time. If Mr Naude allowed his client to depose to the founding affidavit and then as the legal practitioner of record filed a confirmatory affidavit he would not have found himself in the position he now does where the plaintiff raises an objection to the issue of authority.

[60] It would not have resolved the remainder of the issues raised but at least there would have been one less issue to argue and determine. Ultimately legal practitioners in this jurisdiction should heed to the direction given by our courts or face the consequences thereof.

Failure to fully comply with rule 32(9) and (10)²²

[61] The issue regarding compliance with rule 32(9) and (10) was touched on in the founding affidavit of Mr Naude.

[62] Mr Naude stated that he attempted to engage the plaintiff for purposes of amicably resolving the bringing of the application through a letter in terms of rule 32(9). Mr Naude stated that he dispatched a letter to the plaintiff's legal practitioners

²² Rule 32 regulates interlocutory matters and applications for directions read 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 amicably resolved as contemplated in sub rule (9) without disclosing privileged information.'

on the morning of 15 June 2020 and that the plaintiff's legal practitioner responded to the correspondence during the course of the morning of the 15th.

[63] Mr Naude submitted that the defendant complied with rule 32(9) but conceded in his replying affidavit that he did not cause a separate certificate in terms of rule 32(10) to be filed with the Registrar due to the extreme urgency with which the application had to be presented to the court and the counsel of the plaintiff. Mr Naude goes on to submit that although the certificate in terms of rule 32(10) was not filed at the time of launching the application he made the averment in the founding affidavit that 'it is clear from the response that the plaintiff showed no interest to amicably resolve the issues arising from this application.'²³

[64] A certificate in terms of rule 32(10) dated 17 June 2020 was filed together with the replying affidavit.

[65] In her answering affidavit, Ms Monde Matengu took issue with Mr Naude's averment that he duly complied with the provisions of rule 32(9) and (10). The deponent submitted that the defendant was not entitled to launch its application in terms of rule 28 without compliance with rule 32(9) and noted that importantly Mr Naude failed to file the report in terms of rule 32(10) and submitted that under the circumstances defendant was precluded from launching the application.

Discussion

[66] I have difficulty in understanding why legal practitioners appear to have such difficulty in complying with rule 32(9) and (10) six years after the inception of the new Rules. Yet time and again legal practitioners fail to comply with this rule and a multitude of excuses would be proffered for the non-compliance.

[67] There is a plethora of cases which clearly crystallized the importance and the need for compliance with rule 32(9) and (10) and I do not intend to list these cases.

²³ Para 18 of the Founding affidavit.

[68] This court has previously indicated in no uncertain terms that this specific rule was not included in the Rules of Court to create a pitfall for the parties.²⁴ It was included in the rules to avoid the ever increasing number of interlocutory applications that are serving before our courts. This rule is absolutely in line with the overriding objectives of the rules of court in order to encourage parties to resolve issues amicably.

[69] The defendant takes the position that there was due compliance with rule 32(9) as the plaintiff was engaged via correspondence prior to launching the application.

[70] This correspondence needs to be unpacked in order to determine whether the defendant did indeed comply with rule 32 (9).

[71] On the morning of 15 June 2020 (the intended first day of trial) a letter was drafted on behalf of the defendant addressed to the plaintiff. For purposes of this ruling I will only refer to the second to last paragraph of the letter, which states as follows:

‘The hearing of this matter is currently standing down until 14h15 this afternoon. We address this letter to you in terms of rule 32(9) so that you can have an opportunity before this juncture to consider ways in which we can amicably resolve the intended application. We point out that the defendant is entitle to the discovery and that it demands and that the easiest manner in which to avoid the application, would be to simply provide us with the documents or in the format as we request.’

[72] If one have regard to the wording of the letter it is clearly framed as an ultimatum and when reading between the lines it is clear that the defendant demands the discovery and if the plaintiff does not comply (immediately) then it will bring this application, which by implication would derail the trial that was due to start at 14h15 that same day.

²⁴ *Namibia Airports Company vs IBB Military Equipment and Accessory Supplies Close Corporation* (HC-MD-CIV-ACT-OTH-2017/01488) [2019] NAHCMD 496 (30 October 2019).

[73] This court made its position very clear when Masuku J in *Bank Windhoek Limited v Benlin Investment CC*²⁵ stated the following with regards to the exchange of letters in superficial compliance with rule 32(9):

[16] The writing of letters provides a very easy way of being shallow in consideration of issues, dismissive in approach and polarized in engagement. This becomes so even if there are matters that may be canvassed, even if not eventually settled in full or at all. The face to face engagement on such issues brings such cursory and perfunctory approach to a screeching halt. After the meeting, you understand your case better as that of your opponent, which assists the resolution or approach to the live issues going forward. This benefit must not be lost behind the veil of avoiding active engagement by the mere superficial exchange of letters.'

[74] The defendant was paying mere lip service to rule 32 (9) and one can surely not say that the defendant sought an amicable solution by writing a letter in the tone that it did and within the time frame set for the plaintiff.

[75] To add insult to injury the defendant then failed to file its 32(10) report before launching the application and the explanation advanced for its failure is '*due to extreme urgency with which the application had to be presented to the Honorable Judge and the plaintiff's legal practitioner*'. Under these circumstances there can be no urgency pleaded as it is self-created and the defendant is merely being opportunistic.

[76] Interestingly enough the defendant's legal practitioner was able to upload the application at 14h15 that same afternoon but was only able to upload the report in terms of rule 32(10) two days later, for reasons that are not clear and unknown to this court.

[77] Rule 32(10) does not allow an applicant in an interlocutory application the discretion to file its report detailing its efforts to settle the matter after the launch of the application. The rule is set out in peremptory terms directing that the details of the steps taken to have the matter amicably resolved must be filed with the Registrar before instituting the proceedings.

²⁵ (HC-MD-CIV-CON-2016-03020) [2017] NAHMD 78 (15 March 2017) para 16.

[78] The defendant's legal practitioner stated in his replying affidavit as follows:

'*Ex abundante*, I attach hereto a separate "certificate" in terms of the provisions of rule 32(10), certifying the outcome of my attempts to resolve the issues in this matter amicably. In the event it is not accepted that what I recorded in paragraph 18 of my founding declaration amounted to substantial compliance with the provisions of rule 32(10), I respectfully pray that this Honourable Court accepts my current certificate as sufficient compliance with such subrule.'

[79] The statement in the founding affidavit that a letter was directed to the plaintiff's legal practitioner and a response thereto was received, which was attached to the founding affidavit, in my view does not constitute substantial compliance with rule 32(10), taking into account the *Bank Windhoek* matter referred to above.

[80] I am therefor of the considered view that the defendant did not fully comply with rule 32(9) and (10) as required by the Rules of Court and the point in *limine* raised with regard to this point should succeed.

The defendant failed to launch its application in accordance with the provisions of rule 28 of the Rules of Court

[81] The defendant's application was also brought in terms of the provisions of rule 101(1). On behalf of the defendant it was argued that it was not necessary as a prerequisite to the validity of this application that the defendant had to proceed through the various proceedings contemplated by the separate sub-paragraphs of rule 28.

[82] Rule 101(1) provides as follows:

'(1) Where it appears convenient so to do the presiding judge may at any time make an order with regard to the conduct of the trial as to him or her seems just and may thereby vary any procedure laid down by these rules.' (My underlining for emphasises)

[83] Mr Barnard argued that rule 101 is categorized under Part 10 of the Rules of Court, which part specifically bears the heading 'TRIAL'. He argued that the phrase 'at any time' therein encompasses interlocutory proceedings prior to or during the first day of trial. Counsel argued that the phrase 'any procedure laid down by these rules' includes the seeking of discovery immediately prior to or during the time for which the matter has been set down for hearing. Counsel therefor invited the court to conclude that the purported non-compliance with rule 28, which the plaintiff's counsel argued led to the invalidity of the current application, was incorrect.

[84] Mr Jones argued on behalf of the plaintiff that the defendant cannot leap from rule 28 procedure on the day of trial to rely on rule 101. He challenged the defendant to show where it filed Form 12 (Notice to inspect documents in terms of rule 28(11)).

[85] Mr Jones urged the court not to disregard the process as set out in rule 28(1) to (11) and argued that the defendant is not entitled to launch the application before court if the provisions and the steps set out in rule 28 has not been complied with. Counsel argued that the position regarding discovery remained unchanged since the pre-trial conference and the subsequent allocation of trial date five and a half months ago. Counsel further argued that if there had been compliance with rule 28(9)²⁶ and (10)²⁷ the financial statements demanded by the defendant would have been handed to the managing judge as contemplated in sub rule (10).

Discussion

[86] The question that begs an answer in respect of this point in limine is whether the defendant can rely at this stage of the proceedings on rule 101(1) if the defendant failed to comply with the provisions of rule 28 during the judicial case management.

²⁶ (9) If a party believes that the reason given by the other party as to why any document, analogue or digital recording is protected from discovery is not sufficient, that party may apply in terms of rule 32(4) to the managing judge for an order that such a document must be discovered.

²⁷(10) The managing judge may inspect the document, analogue or digital recording referred in sub rule (9) to determine whether the party claiming the document to be protected from discovery has a valid objection.

[87] Before I proceed to answer this question I wish to refer to the new publication by the Honorable Judge President PT Damaseb *Court-Managed Civil Procedure of the High Court of Namibia, Law, Procedure and Practice*²⁸ wherein the learned Judge President divided the judicial case management process into four different phases.

[88] Phase 1 of the judicial case management process relates to the case planning conference and the roadmap set out by the court in its case plan and the exchange of pleadings. Phase 1 ends with the close of pleadings as directed by the case plan order and culminate in the parties making discovery.²⁹

[89] Phases 2 commences with the case management conference and the objective of phase 2 is:

‘[to] resolve all the outstanding disputes; complete discovery; to define the ambit of the dispute and to require the parties to start gathering in earnest the evidence they need to be fully informed of the case of the opponent.

Expected outcome: During phase 2 the parties must exchange witness statements and all discovered documents. Phase 2 must ideally end with the parties submitting to the managing judge a report which identifies the issues not in dispute; the issues that remains in dispute; any objections to pleadings, anticipated amendments and additional discovery required.³⁰

[90] Further at para 8-022 the learned Judge President states as follows:

‘The most crucial consideration during phase 2 is to ensure that the parties complete discovery and commence trial preparation in earnest. If a party feels that the documents that ought to have been discovered have not been, it is during this phase that the necessary procedural right must be exercised to obtain discovery. It is also during this phase that the parties must seek inspection and examination and actively explore settlement discussions. It is also the most opportune phase for the amendment of pleadings in light of the discovery that has taken place.’

²⁸ 1st ed 2020.

²⁹ Para 8-016 at 200.

³⁰ Para 8-019 at 200.

[91] It is an interesting exercise to fit the facts of the matter before me into the phases as proposed by the Honorable Judge President and to see what the result would be. In order to do so it is necessary to take cognisance of the following facts:

- a) In terms of the chronology of the judicial case management process the parties filed their discovery affidavits as far back as 14 October 2019.³¹
- b) In terms of the plaintiff's First Schedule Part A of its discovery affidavit it listed two documents under numbers 14 and 15 as '*Namfisa Certificate dated 30 September 2015 to Plaintiff*' and '*Namfisa Certificate dated 30 September 2015 to Boabab Capital (Pty) Ltd*' respectively. These certificates were issued in terms of regulation 29 of the Pension Fund Act.³²
- c) A special plea was filed on 13 September 2019 wherein the defendant pleaded that the plaintiff lacked authority to enter into a loan agreement with members of the public as part of its business. It was pertinently pleaded against the background of the legislative landscape of provisions of sections 1 and/or 1(d) and/or 1(n) of the Namibia Financial Institutions Supervisory Authority Act.³³

[92] Keeping the dates as set out above in my mental spectacle I consider Mr Barnard argument that:

- a) The plaintiff did not replicate to the special plea and that the absence of the replication meant that every component of the special plea was denied through a bare denial, without specifying the particulars of the basis upon which it was denied. Therefore, by not having filed a replication, the plaintiff left the door open to itself to raise any defences to the provisions of the special plea during the trial in the matter.

³¹ A further discovery was filed on behalf of the plaintiff on 12 November 2019.

³² 24 of 1956.

³³ 3 of 2001.

- b) The plaintiff discovered its registration certificates in terms of the Pension Funds Act and it is apparent that the plaintiff will rely on the Pension Fund Act and the Regulations promulgated in terms of such Act in support of its unspecified defence to the special plea.
- c) With reference to a case which is not relevant to the current proceedings there was replication wherein the plaintiff contended that the loan made to the defendant was an ad hoc loan not capable of being defined as part of its financial services.

[93] Phase 2 was completed when the case management conference was held on 16 October 2019. The fact that the plaintiff did not replicate to the special plea was clear in September 2019 and hereafter the discovery process was concluded during October 2019 alternatively November 2019, as the plaintiff filed a further discovery affidavit on 12 November 2019. In the parties joint case management conference report dated 9 October 2019 wherein the parties had the opportunity to deal with the control and scheduling of further discovery, including the inspection and production of documents,³⁴ no mention was made of further discovery required by the defendant.

[94] In October 2019 the defendant already knew there was no replication and that the plaintiff was registered in terms of the Pension Fund Act and if it is indeed as apparent as the defendant wants to make out that the plaintiff will rely on the Pension Funds Act, then why not follow the procedure as set out in rule 28 before the pre-trial conference?

[95] No explanation is advanced by the defendant as to why the application for further and specific discovery was only raised for the first time on 1 June 2020, in spite of the fact that the discovery process had to be concluded at the end of phase 2 (case management conference).

[96] The Honourable Judge President referred to the period between the case management conference and the pre-trial conference as phase 3 which should be

³⁴ Rule 25(2)(g).

devoted to ridding the case of all unresolved issues before the pre-trial conference takes place. He refers to it as the 'trouble-shooting phase'.

[97] In para 8-031 the learned Judge President describes phase 3 as follows:

'Objective: The objective of phase 3 is to ensure that all outstanding matters which may compromise the trial dates when granted are resolved and to clearly define what is genuinely in dispute between the parties.

Expected outcome: Phase 3 must culminate in clearing all outstanding and unresolved issues and presenting the managing judge with a list of factual and legal issues which are genuinely in dispute and a list of those material facts which are not disputed and do not require specific proof at trial.'

[98] The defendant had an opportunity for a second bite to the cherry in phase 3, the period between the case management conference and the pre-trial conference, to resolve the issue of further discovery but failed to do so. The joint pre-trial order also failed to make provision for trial particulars in terms of rule 26(6) (l).³⁵

[99] There was no change in the position of the case from 12 February 2020 when the matter was allocated a hearing date until 1 June 2020 when the pre-trial status hearing was held and where the issue of further and specific discovery was raised for the first time. The defendant had months to prepare for the trial in this matter and I find it hard to believe that the issue of further discovery only rose two weeks before the trial date.

[100] What is utterly disturbing is the defendant's attitude that it can flout the judicial case management process specifically with regards to rule 28 and opportunistically want the court, on the first day of trial vary procedures in terms of rule 101(1) to encompass an interlocutory proceeding that should have been dealt with already at the latest by the third phase of the judicial case management process.

Costs

³⁵ 26(6) (l) particulars required and necessary for trial and the party giving trial particulars must identify by name, job title, address and telephone number of all factual witnesses who assisted in the preparation of the particulars and further identify and describe all documents that the receiving party has relied on to assist him or her in preparing the particulars.

[101] The last issue that I need to touch on is the issue of costs.

[102] It would be clear from my extensive discussion of the facts of this matter that the case was set down for trial which was scheduled to commence on 15 June 2020 and on the morning of the trial this application was launched.

[103] I have noted that there is a disturbing trend of legal practitioners launching interlocutory applications on the morning of the trial. This inevitably result in the exchange of papers and hearing of the interlocutory application, and depending on the nature of the application the week will be over by the time the application is heard.

[104] This would result in the loss of a whole week reserved for trial for the specific matter, and as a consequent the matter would need to be allocated a new trial date. A new trial date which is in short supply I must add. Further, one should bear in mind that the trial date that was lost because of the interlocutory hearing would have been allocated **months** before the trial and after having received a new trial date the parties must yet again wait a few months for the matter to be heard.

[105] Instead of finalising a matter once the long awaited trial date arrives, an interlocutory issue raised at the eleventh hour will halt the trial in its proverbial tracks. It is therefore clear that adherence to the applicable court rules and in this instance the rules regulating judicial case management, cannot be overemphasised because strict compliance would prevent last minute interlocutory applications like the one before me.

[106] Rule 1(3) sets out the overriding objectives of the Rules which objectives have been referred to in many cases but it appears that it is necessary to refer to the objectives yet again as legal practitioners and parties appear to have become complacent and seems to be of the view that these objectives do not apply to them. I can do no better than to reiterate the relevant rule as follows:

'(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by –

(a) ensuring that the parties are on an equal footing;

(b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;

(c)

(d) ensuring that cases are dealt with expeditiously and fairly;

(e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes; and

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.' (My underlining)

[107] I am therefor of the considered view that the defendant completely disregarded the overriding objectives of the rules and I need to emphasise that legal practitioners must understand that last minute interlocutory applications which could have and should have been dealt with during the judicial case management process will not be tolerated, and if so launched it will not result in the form of a cheap postponement.

[108] Bringing such an application in this manner instead of an application for postponement as provided for in the rules will call for a punitive cost order barring exceptional circumstances.

Order

[109] In light of the discussion above my order is as follows:

1. All three points *in limine* raised by the plaintiff are upheld.
2. The defendant's application is struck from the roll with costs, such cost to be taxed outside the scale as provide for in rule 32(11) and to include the costs of one instructing and one instructed counsel.

Further conduct of the matter:

3. The case is postponed to **30/07/2020** at **15:00** for Status hearing (Reason: Others).
4. The Parties **must** file a joint status report on or before 27 July 2020 setting out the further conduct of the matter.

J S Prinsloo
Judge

APPEARANCES

PLAINTIFF:

JP Jones assisted by
Instructed by Ellis Shilengudwa Inc
Windhoek

DEFENDANT:

T Barnard
Instructed by Dr Weder Kauta Hoveka.
Windhoek