

IN THE HIGH COURT OF NAMIBIA

Case Title: POPULAR DEMOCRATIC MOVEMENT (PDM) vs MINISTER OF LAND REFORM & 8 OTHERS	Case No: HC-MD-CIV-MOT-REV-2018/00457
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE GEIER	Date reserved: 04 August 2020
	Delivered on: 19 August 2020
Neutral citation: <i>Popular Democratic Movement (PDM) v Minister of Lands</i> (HC-MD-CIV-MOT-REV-2018/00457) [2020] NAHCMD 363 (19 August 2020)	
IT IS ORDERED THAT: 1. The Rule 76(6) application filed on 30 October 2019 is struck. 2. The applicant is to bear the resultant costs.	
Following below are the reasons for the above order:	
<p>[1] The applicant in this application has launched a review application, which remains pending.</p> <p>[2] As happens frequently in such applications the initial skirmishes often relate to the ‘discovery’ of the record in which case – more often than not – such applicants then seek to compel the production of further documents believed to be in the possession of the decision-maker relevant to the decision or proceedings sought to be reviewed.</p> <p>[3] For purposes of compelling the production of such further documents application is then made to the Court in terms of Rule 76(6) of the Rules of Court.</p> <p>[4] If a dispute arises as to whether any further documents should be discovered the</p>	

parties may approach a managing judge in chambers in terms of Rule 76(8) who must then give directions for the dispute to be resolved.

[5] This is precisely what the parties in this instance did.

[6] The Court responded by directing by which date the applicant was to deliver the intended Rule 76(6) application.¹ The Court also regulated the subsequent exchange of papers.²

[7] A date was set for the hearing of the matter and the exchange of heads of argument was regulated as well.

[8] Due to the Covid 19 pandemic the scheduled hearing could not proceed and the parties were requested - in accordance with the 'Revised Road Map, dated 4 May 2020, for the High Court of Namibia, whilst the State of Emergency persists' - to consider waiving their right to oral argument and to have the matter determined on the papers only, which they did.

[9] From the so-exchanged heads of argument it then appears that the first respondent, in his answering papers to the Rule 76(6) application, raises the issue of the applicant's non-compliance with Rules 32(9) and (10) of the Rules of Court. This *in limine* issue was then also canvassed by counsel for all parties in their heads and so requires determination.

[10] Counsel argued this point as follows :

For the first respondent:

'Point in limine

The applicant non-compliance with rule 32(9) & (10)

7. The first respondent submit that the applicant has failed to comply with rule 32 (9) and (10) and on such failure alone the application must be dismissed with costs.

¹ The Court had to afford the applicant two opportunities to do so, the first by Order of 18 September 2019 and the second on 16 October 2019.

² See for instance the Court Order of 16 October 2019.

8. The applicant in its papers contend that it was not required to comply with rule 32 (9) & (10) of the rules of Court in that the court directed it to file its application in terms of a court order. The applicant's contention is wrong. The court order merely grants the applicant an opportunity to file its application, such an application ought to be brought in full compliance of the rules of Court. The order does not explicitly nor impliedly exempt the applicant from complying with the rules of court in instituting its application to compel discovery. The application to compel is an interlocutory application and the applicant must comply with Rule 32 (9) & (10). Failure to comply with this rule is fatal to the applicant's application.³

For the applicant

'APPLICANT NOT REQUIRED TO COMPLY WITH RULE 32 (9) AND (10)

6. The First Respondent in his answering affidavit for the Rule 76 (6) application states that the Applicant failed to comply with Rule 32 (9) and (10) of the rules of the High Court. Rule 32 (9) and (10) reads 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 subrule (9) without disclosing privileged information.'

7. The purpose of rule 32(9) and (10) was clearly enunciated by Masuku J in the matter of *Bank Windhoek Limited v Benlin Investment CC*⁴, wherein he said as follows:

"[17] It must be mentioned and pertinently so, that rule 32 (9) and (10) are not merely incidental rules. They actually go to the core of the edifice that should keep judicial case

³ *Mukata v Apollus 2015 (3) NR 695 (HC)* where in the following was held: [6] It is undisputed that the plaintiff did not comply with rule 32(9) and (10) of the rules. Considering the use of the words 'must' in rule 32(9) and (10) and the intention of the rule-maker as set out in rule 1(2) concerning the overriding objective of the rules (see *International University of Management v Torbitt and Others (LC 114/2013) [2014] NALCMD 6*), * I conclude that the provisions of rule 32(9) and (10) are peremptory, and non-compliance with them must be fatal. I, therefore, accept Mr. Jacobs' submission that the summary judgment application is fatally defective because the plaintiff has failed to comply with rule 32(9) and (10). Consequently, the application is struck from the roll. see also Parker C, *Administrative Law: Cases & Materials*, p 289.

⁴ *HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78.*

management standing tall and strong. The two subrules fully resonate with and give live expression to the overriding and core values of judicial case management as found in rule 1 (3) and stated in the following terms:

“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 –

... .

(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;

... .

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.” (Emphasis added).’

8. The Applicant submits that it was not required to comply with rule 32(9) and (10) for the following reasons:

8.1 Rule 76 (8) already has a dispute mechanism in place where parties to a dispute can approach the honourable judge for directives so as to solve the dispute.

8.2 Rule 32 (9) and (10) also seeks to facilitate the resolution of issues in disputes justly and speedily, however due to the nature of the present application parties approached the managing judge in chambers as per rule 76 (6).

8.3 Applicant further submits that as per the interpretation of the court order, of which court order is authoritative in nature, the court order directs the applicant to file its application in terms of rule 76(6), as such and by virtue of the direction provided by the honourable court we submit that rule 32(9) and (10) is of no application.

9. Rule 76(6) to Rule 76(8) reads as follows:

‘(6) If the applicant believes there are other documents in possession of the respondent, which are relevant to the decision or proceedings sought to be reviewed, he or she, must within 14 days from receiving copies of the record, give notice to the respondent that such further reasonably identified documents must be discovered within five days after the date that notice is delivered to the other party.

(7) The party receiving a notice in terms of subrule (6) must make copies of such additional documents available to the applicant for inspection and copying and the respondent must supplement the record filed with the registrar within three days after the applicant is given

access to the additional documents.

(8) If a dispute arises as to whether any further documents should be discovered the parties may approach the managing judge in chambers who must give directions for the dispute to be resolved.'

10. Rule 76 (8) provides for dispute resolution, should there be a need for discovery of further documents. Parties in terms of the rule, are to approach the judge in chambers for directions on how the dispute can be solved. As such, the current dispute does not fall within the scope of Rule 32 (9) and (10).

11. Parties accordingly attended to the chambers of the managing judge in the matter and it was resolved that a hearing shall be held where parties are to file heads of arguments in the application in terms of rule 76 (6). Same was recorded by court order of 16 October 2019 which reads as follows:

'The applicant is hereby granted the opportunity to deliver its Rule 76 (6) application on or before 30 October 2019.'

12. The first respondent in his heads of argument indicated that the court order issued by the Honourable Geier, J merely grants the applicant an opportunity to file its intended application. However, it is trite that court orders are authoritative in nature and a such non-compliance with court orders may result in sanctions being imposed. Having read and interpreted the aforementioned court order and the reading thereof it is clear that the court had already ordered that the applicant file its application. No amicable solution could be sought by way of rule 32 (9) and (10) in an instance where the court has ordered a party to proceedings to file a certain application.

13. The interpretation and reading of the court order is indicative of the dispute resolution mechanism as provided for in rule 76 (8). Because there was a dispute between the parties to the proceedings in terms of rule 76 (6), a chamber meeting was held with the managing judge of which a direction to file the necessary papers was ordered for the dispute to be solved.

14. The well-established principles governing the interpretation of a court orders were expounded in *Firestone South Africa (Pty) Ltd v Genticuro AG*⁵ and more recently endorsed in *Eke v Parsons*:⁶

⁵ 1977 (4) SA 298 (A).

⁶ [2015] ZACC 30.

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

15. In respect of an order that is "clear and unambiguous", *Firestone* enunciated:

'If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it.....[N]ot even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it.'

16. In this instance Rule 32(9) and (10) which seeks for amicable resolutions in matters, is of no relevance or application in the present matter as bringing the application was the only way in which the dispute could be resolved. And it was to this effect that the court provided directions on, of which same was made an order of court.

17. It was by virtue of the direction given by Honourable Justice Geier that the Notice in terms of Rule 76 (6) was brought and as such no compliance with rule 32 (9) and (10) was not necessary. This direction was issued as a result of the respondent's unwillingness to disclose the requested documentation or to explain the reasons for non-compliance.'

[11] For purposes determining the main aspects as raised in this *in limine* dispute I need to do little more than to refer to the squarely applicable judgment of this Court delivered in *Standard Bank of Namibia Limited v Nekwaya* (HC-MD-CIV-ACT-CON-2017/01164) [2017] NAHCMD 365 (01 November 2017) – to which neither counsel referred me to – and in which – ironically – also a legal practitioner - employed at AngulaCo Inc - was involved.

[12] The salient aspects determined in the *Nekwaya* case – as already apparent from its flynote, which I quote - where the following :

' ... the regulation of a procedure - or a facet thereof - by a court, would generally, never absolve the parties from complying with the rules of court, in so far as such rules may still have a bearing on such interlocutory procedure even if such proceedings had been regulated to some extent, as was the case in this instance and that the direction, which the case managing judge had given, would always have to be seen and to be the interpreted with regard to- and within the

context of the rules of court.

Court accordingly holding further that also the applicant in the directed re-instatement application, was also always obliged, to again, comply with the requirements set by Rules 32(9) and (10) before its delivery.

As the compliance with High Court Rules 32(9) and (10) was peremptory for all interlocutory applications - application for re-instatement accordingly also struck due to the applicant's non-compliance with Rules 32 (9) and (10).'⁷

[13] When it comes to the consideration of the remainder of the arguments relied on for the 'brazen' refusal to comply with the requirements set by Rules 32(9) and (10) the following can also be said immediately :

- a) An application for the discovery of further documents – whether in terms of Rule 76 of the Rules of Court or any other rule relating to discovery - is an interlocutory application as it regulates a procedural issue only;⁸
- b) Rules 76(6) and 76(8) are applicable to reviews specifically;
- c) These rules regulate a procedural issue relating to discovery in reviews and the procedures and rulings, arising from such issues, are interlocutory issues resulting in interlocutory rulings;
- d) It is also clear from these rules that if a dispute arises as to whether any further documents are to be 'discovered' the parties may approach the Court for 'directions';
- e) Rule 32 of the Rules of Court – inclusive of Rules 32(9) and (10) – however governs 'interlocutory matters' and 'applications for directions';
- f) Rules 76(6) and 76(8) must surely be read in conjunction with Rule 32 as Rule 32

⁷ Compare *Standard Bank of Namibia Limited v Nekwaya op cit* at [20] to [29].

⁸ See for instance : *Standard Bank of South Africa Limited v The Competition Commission of South Africa* 2018 JDR 0893 (CAC); (165/CACMar 18) [2018] ZACAC 3 (22 June 2018) at [10] – [11], *General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122 (GP), at paras [111] to [112], *Competition Commission of South Africa v Standard Bank of South Africa Limited*; *Competition Commission of South Africa v Standard Bank of South Africa Limited*; *Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* (CCT158/18; CCT179/18; CT218/18) [2020] ZACC 2; 2020 (4) BCLR 429 (CC) (20 February 2020) at [218] and [220] See also : Herbstein & Van Winsen *The Civil Practice of High Courts of South Africa* 5th Ed at 1210 at "Orders for discovery or production of documents" are interlocutory in nature and form and of the kind not appealable at all. Harms: *Civil Procedure in the Supreme Court* at T15 makes plain that "discovery orders" are "instances of rulings".

is the Rule which also governs applications for 'directions';

g) It so emerges that the requirements imposed by Rules 32(9) and (10) are squarely applicable to any directions issued in terms of Rule 76(8);

h) The applicant has not complied with the requirements imposed by Rules 32(9) and (10).

[14] It so appears that the remaining grounds, on which the applicant's deliberate election not to comply with Rules 32(9) and (10) are based, must be rejected as the applicant, clearly had to comply with these rules.

[15] The compliance with the said rules, in my view, remains in any event relevant – now more so than ever – particularly as the parties are now in a most favourable position to re-assess each other's cases in regard to the sought additional discovery, in view of the heads of argument already exchanged. The rules require that the parties engage each other – meaningfully - before the launching of any interlocutory proceeding: the 'table for such an engagement is now optimally laid'. I encourage the parties to utilise this opportunity.

[16] The inevitable fate that however befalls an applicant in such scenario – and thus also the applicant in this case – and the case law is clear on this⁹ – is – that the applicant's Rule 76(6) application – in the absence of compliance with Rules 32(9) and (10) - is to be struck with costs.

[17] Such orders are accordingly made.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	

⁹ See for instance *Mukata v Apollus* 2015 (3) NR 695 (HC at [6], *CV v JV* 2016 (1) NR 214 (HC) at [10] – [11], *Bank Windhoek Ltd v Benlin Inv CC* 2017 (2) NR 403 (HC) at [7] – [8] and *Standard Bank of Namibia Limited v Nekwaya op cit* at [28].

Applicant	Respondent
M.N Angula <i>of</i> AngulaCo Inc.	G Narib (with him E.S Shifotoka) <i>Instructed by</i> Government Attorney