

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

IN THE HIGH COURT OF NAMIBIA

Case Title: RUDOLPH WOLDEMAR WINCKLER vs STANDARD BANK NAMIBIA LTD	Case No: CASE NO: HC-MD-CIV-ACT-CON-2018/03324
	Division of Court: MAIN DIVISION
Heard before HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 2 December 2021
	Delivered: 9 December 2021
Neutral citation: <i>Winckler v Standard Bank Namibia Ltd</i> (HC-MD-CIV-ACT-CON-2018/03324) [2021] NAHCMD 584 (9 December 2021)	

Having noted non-appearance on behalf of the Plaintiff/Respondent and **DANIELLE LUBBE-RETIEF**, on behalf of the 9th Defendant/ Applicant and having read the pleadings for **HC-MD-CIV-ACT-CON-2018/03324** and other documents filed of record:

Ruling:

1. The applicants application condonation for his non-compliance with paragraph 1 of the Court Order dated 26 June 2021 is hereby condoned;
2. The respondent is ordered to discover and make available to the applicant a full copy of the respondent's claim admitted to proof in the insolvent estate of the Faanbergh Winckler Development Trust (Master's reference W26/2019), **within 5 (five) court days from the date of the order directing it to do so.**
3. Costs. Such costs to include the cost of one instructing and one instructed counsel, to be limited to Rule 32(11).

Further conduct of the matter:

4. The case is postponed to **03/02/2022** at **15:00** for Status hearing (Reason: Specific discovery and transfer of the matter to roll of Prinsloo J).
5. Joint status report must be filed on or before 31 January 2022.

Reasons for orders:**Introduction**

[1] The applicant in this matter is Rudolf Woldemar Winckler, an adult male and the 9th defendant in the main action. The respondent is Standard Bank Namibia Limited a public company with limited liability registered in terms of the applicable banking laws of Namibia.

[2] The applicant filed an application on notice of motion seeking the following relief:

- a) condonation for the applicant's non-compliance with paragraph 1 of the Court Order dated 26 June 2021¹;
- b) an order directing the respondents to discover and make available to the applicant a full copy of the respondent's claim admitted to proof in the insolvent estate of the Faanbergh Winckler Development Trust (Master's reference W26/2019), within three days from the date of the order directing it to do so.

[3] The respondent does not oppose the application for condonation and indicated that it would abide by the court's decision in this regard. The respondent however strongly opposes the applicant's application compelling it to discover the documents in question.

Background

[4] The respondent issued summons on 21 August 2018. The respondent sued the trustees of the Faanbergh Winckler Development Trust as first and second defendants, together with 10 other defendants. And claimed against the third, fourth, fifth, sixth, ninth and tenth defendants jointly and severally, one paying the other to be absolved for, amongst others, the following relief:

- a) Payment of the sum of N\$ 67 742 683.20.
- b) Payment of interest at the rate of 11.50% per annum on the amount N\$ N\$ 67 742 683.20 calculated from 16 July 2018 to the date of payment.

[5] The defendants defended the matter on 19 October 2018.

¹ Parties shall file their joint pre-trial report on or before 10 August 2021.

[6] The respondent filed a notice to amend its particulars of claim in April 2019 and the defendants objected thereto. The application to amend was heard on 15 September 2019 and the court on 8 November 2019 allowed the amendments.

[7] There was however a further development at the time as Faanbergh Winkler Development Trust, Trust number T371/10, was placed in final sequestration on 8 November 2019 by order of court under case number HC-MD-CIV-MOT-GEN-2019/00345. This development impacted on the further conduct of the matter at the time, which resulted in a number of postponements and only on 24 September 2020 did the respondent file its amended particulars of claim.

[8] The amended particulars of claim referred to Faanbergh Winkler Development Trust as the second defendant and in his plea to the amended particulars of claim the applicant pertinently pleaded that the Faanbergh Winkler Development Trust, Trust number T371/10, was placed in final sequestration.

[9] During replication the respondent pleaded as follows:

'2.1. Plaintiff admits that the Faanbergh Winckler Development Trust ("the Trust") was sequestered on 8 November 2019 subsequent to the sequestration of the Trust the first meeting of creditors took place on 22 January 2020 and the plaintiff's claim of N\$ 36 502 901.62 was admitted in the insolvent estate of the Trust. The minutes of such meeting are annexed hereto marked SB1.

2.2. It is an expressed term of annexure C1 to the amended particulars of claim, that any admission of proof of claim by the plaintiff in the insolvent estate of the Trust, as between the ninth defendant and the plaintiff is deemed, to be acknowledgment of indebtedness in the amount for which such claim is admitted to proof.

2.3. In the premise ninth defendant is deemed to have acknowledged his indebtedness to the plaintiff in the amount of N\$36 502 901.62, pursuant to subparagraph 2.1 and 2.2, supra.'

[10] The reference to annexure "C1" is a reference to the suretyship signed by the applicant.(the 'surety').

[11] Clause 9.2 of this suretyship reads as follows:

"9.2 The admission to proof of a claim by the Bank in the insolvent estate or liquidation or judicial management of the Debtor shall be deemed, as between the Surety and the Bank, to be an acknowledgement of indebtedness in the amount for which such claim is admitted to proof."

[12] At issue is the fact that clause 9.2 of the suretyship provides that the claim shall be deemed, as between the applicant and the respondent, to be an acknowledgment of indebtedness in the amount of the claim.

[13] The proceedings at the Offices of the Master of the High Court on 22 January 2020, which were specifically pleaded in replication, is therefore of specific significance to the application at hand.

Arguments advanced on behalf of the parties

I will refer intermittently to the words 'submit' and 'argue' and their derivatives in the course of this judgment, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

On behalf of the applicant

[14] Mr Diedericks argued that it is imperative for the applicant to obtain a copy of the claim by way of discovery to assess whether the claim falls within the ambit of the suretyship, and if the claim is based on the same agreement relied upon by the respondent in the current proceedings (with reference to annexure "A" to the respondent's particulars of claim).

[15] Mr Diedericks argued that the court must have regard to the minutes of the meeting at the Offices at the Master of the High Court it reflects the claim of the respondent (Standard Bank) which was regarded as admitted and proven, which reads as follows:

'Claim 1 (Standard Bank) – **Admitted and Proven**- Surety & co principle debtor for the loan advanced to Faanbergh Winckler Trust by Standard Bank (Principle debt in the name of Faanbergh Winckler Trust and Serve Investment Five Zero, Papallona Investments and Merensky Investment signed suretyship for Faanbergh Winckler Trust as Co Principle debtors)'

[16] Mr Diedericks argued that the claim proven with the Master does not include the applicant as it was limited to three sureties only. As a result the applicant is not recorded as a surety for purposes of the claim admitted and proven before the Master. However, so counsel argued, on the basis of that admission of the claim the respondent maintain that the applicant's suretyship that he is deemed to have acknowledge indebtedness.

[17] Mr Diedericks further argued that if that is the basis on which the respondent relies then the applicant is entitled to see the documents that comprises of the claim admitted by the Master and submitted that the position of the applicant is that because the respondent alleges that he attracts liability on the deeming provision he is entitled to receive the claim proven with the Master.

[18] Mr Diedericks argued that this document is relevant and proportional with reference to the pleadings. Counsel disagrees with the opposing party who maintains that the application for specific discovery is out of place in the current proceedings as it relates to the expungement application of the claim and submitted if one has regard to the pleadings it is clear that the document(s) concerned is of fundamental importance to the applicant's defence to the respondent's claim.

On behalf of the respondent

[19] Mr Kauta submitted that the application is an abuse of court process. Counsel argued that the applicant brought an application in terms of rule 28(14) and not in term of rule 76. In this regard Mr Kauta argued that if the applicant was not satisfied with the decision of the Master his recourse would have been in terms of s Section 151² of the Insolvency

Act 24 of 1936. However the applicant has inordinately delayed reviewing the Master's decision admitting the respondent's claim and the delay is fatal to the applicant.

[20] Mr Kauta submitted that the applicant is attempting in a roundabout way to obtain the relevant document for purposes of bringing an expungement application and contrary to rule 28(14) which provides for an application to compel production of any document or tape recording in the possession of another party or under his or her control, relating to any matter in question in the proceeding in term of which the application is brought.

[21] Mr Kauta argued that the applicant's application does not meet the two requirements in rule 28(1), i.e that documents required are relevant to the issues in question and proportionate to the needs of the case.

[22] Mr Kauta concluded by submitting that the applicant's application for specific discovery is neither to advance his cause or to damage the cause of the respondent. The applicant's admitted purpose is to expunge an admitted claim in circumstances where the expungement of the claim is not serving before this court in these proceedings.

The applicable legal principles and application to the facts

[23] The parties are in agreement regarding the crystalized principles relating to discovery and as a result I intend to just briefly refer to the applicable legal principles.

[24] The rule that regulates discovery is rule 28, which provides as follows:

"28. (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."

[25] The test is prima facie relevance and relevance is determined with reference to the issues raised in the pleadings.

[26] The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale Du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 referred to in *Kanyama v Cupido*³ by Silungwe J has been widely

² **151 Review**

Subject to the provisions of section *fifty-seven* any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section *one hundred and twelve*. [S. 151 amended by s. 44 of Act 99 of 1965.]

³ 2007 (1) NR 216 (HC) para 14.

accepted and applied by our courts.

[27] In the case of *Rellams (Pty) Ltd v James Brown & Hamer Ltd*⁴ also referred to by Silungwe J it was held that:

'After remarking that it was desirable to give a wide interpretation to the words a document relating to any matter in question in the action, Brett LJ stated the principle as follows:

"It seems to me that every document relates to the matter in question in the action in which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

[28] In *Kanyama v Cupido*⁵, Silungwe J held that:

'It would appear reasonable to suppose that each of the documents in issue prima facie contains information that may either directly or indirectly, enable the defendant either to advance his own case or to damage the case of his adversary, to wit, the plaintiff.'

[29] Mr Kauta is of the view that document concerned is neither prima facie relevant nor can the relevance be determined from the pleadings.

[30] I must disagree with Mr Kauta in this regard. It is my understanding of argument before me that the proving and acceptance of the respondent's claim with the Master, in line with clause 9.2 of the suretyship agreement, 'triggers' the deeming provision.

[31] That then raises the question if the claim in respect of the applicant's suretyship agreement was one of those that were accepted by the Master as proven. From the minutes of the proceedings held on 22 January 2020 the Chair Person specifically listed three sureties as co-principal debtors. The applicant was not among those so listed. The n what 'triggered' the deeming provision?

[32] I agree that if a party is aggrieved with the decision of the Master or the Chair Person then a rule 76 review process can be followed but if the applicant is not listed as a co-principle debtor in respect of the claim proven, what would he take on review?

[33] This is an oversimplification of the process however it also clearly show that it is not just a case of seeking a

⁴ 1983 (1) SA 556 (N) at 564A.

⁵ Supra, note 5 para 15.

document that for purposes of expungement of the claim proven with the Master. That is in my view irrelevant at this point in time.

[34] It is my considered view that the application by the applicant is both relevant and proportionate and is founded in the pleadings and therefore the applicant's application must succeed.

[35] In respect of the application for condonation I have considered the explanation of the applicant and is of the view that a reasonable explanation was advanced for his failure to actively take part in the formulation of the proposed pre-trial order. It is reasonable of a defendant to insist on the proper formulation of all the issues and in the matter in casu the applicant will not be able to do so unless he is in possession of the relevant documents which will impact on his defence. I am of the view that the applicant must succeed in his application for condonation as well.

[36] My order is as set out above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant/Applicant
Mr P Kauta of Dr Weder, Kauta and Hoveka Inc	Mr J Diedericks Instructed by Daniellé Lubbe Attorneys