

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-MOT-GEN-2022/00505

In the matter between:

HELIOS ORYX LTD

APPLICANT

and

TRUSTCO GROUP HOLDINGS LTD

RESPONDENT

Neutral citation *Helios Oryx Ltd v Trustco Group Holdings Ltd* (HC-MD-CIV-MOT-GEN-2022/00505) [2023] NAHCMD 415
(20 July 2023)

Coram: Schimming-Chase J

Heard: 13 June 2023

Delivered: 20 July 2023

Flynote: Practice – Irregular proceedings – Rule 61 – Requirements – Applicant must identify irregularity with clarity and precision – Applicant must show prejudice if irregularity not addressed.

Practice – Irregular proceedings – What constitutes – Two stage enquiry – Court must first decide whether step irregular – If step irregular, court to

determine whether party prejudiced. Failure to comply with requirements rendering application likely to fail.

Document – Authentication – Rule 63 – Rules dealing with authentication of foreign documents not taking away from power of Court to consider other evidence directed at proof of document signed in a foreign place and to accept such document as being duly authenticated.

Document – Authentication – Purpose of authentication to prove genuineness of document – Genuineness of such documents may also be proved by direct or circumstantial evidence or both.

Practice – Applications and motions – Application to strike out – Not sufficient that matter scandalous, vexatious or irrelevant, it must also be prejudicial – Prejudice meaning that retention would require lengthy and irrelevant responses from innocent party which could side-track main issue or, if left unanswered, be defamatory – Offending paragraphs dealt in the main with facts previously averred relating to the foreign judgment, and that the conduct of Trustco in launching the rule 61 application was dilatory and warranted a special costs order – Allegations not prejudicial on the facts before court.

Costs – Attorney and client costs – Punitive costs not 'traditionally' ordered. The normal rule is that ordinary costs should follow the event and the punitive cost orders are only made when there are special circumstances justifying it – Conduct of Trustco warranting a special costs order.

Summary: The applicant, Helios Oryx Limited launched an application to enforce a judgment and order granted against the respondent, Trustco Group Holdings (Pty) Ltd in the High Court of Justice, Business and Property Courts of England and Wales on 20 January 2021, in Namibia. Trustco filed notice of an irregular proceeding in terms of rule 61, alleging that due to the fact that the board resolution granting the deponent to Helios' founding affidavit authority to institute the application (attached as annexure PC1) to

the founding papers, had not been duly authenticated in terms of rule 128(2) of the rules of court, there was no authority to institute the application, rendering the notice of motion and founding papers nugatory. Trustco's issue with the authentication of the board resolution was that there was no certificate of authorisation from the requisite government authority confirming that the notary who authenticated the signatures on Helios' board resolution was authorised in that country to authenticate the document.

Trustco also filed a notice to strike certain paragraphs of the answering affidavit in the rule 61 application on the grounds that they were irrelevant and/or inadmissible hearsay evidence, in the event that the rule 61 application failed.

Held: Based on the papers before court, it was satisfied that the authentication of signatures on the board resolution was genuine. In any event, and even if there was non-compliance with the rule, there could be no prejudice, as Trustco had personal knowledge of and was involved in the proceedings in England where judgment was granted against it. In fact, Trustco's own executive director confirmed under oath in related proceedings between Helios and Trustco, that the judgment had indeed been granted against Trustco as alleged in the founding papers.

Held: As regards the notice to strike, the averments in the answering affidavit essentially confirmed the granting of the foreign judgment and stated that Trustco's conduct was dilatory and a tactic employed to unnecessarily delay adjudication of the main application.

Held further: These allegations confirmed previous allegations already made by other deponents and was not prejudicial to Trustco in the circumstances. On the facts, it was apparent that Trustco's actions were indeed dilatory and not in compliance with the overriding objective of judicial case management set out in rule 1(3) of the rules of court.

Held further: as regards costs, this case was an instance where Trustco's

conduct, employed merely as a delaying tactic, should be penalised with a special costs order.

ORDER

1. The application in terms of rule 61 is dismissed with costs on an attorney and client scale, such costs to include the costs of one instructing counsel and two instructed counsel, where employed.
 2. The application to strike certain portions of the applicant's affidavit is dismissed with costs on an attorney client scale, such costs to include the costs of one instructing counsel and two instructed counsel, where employed.
 3. Trustco is ordered to deliver its answering affidavit(s) in the main application on or before **4 August 2023**.
 4. Helios is ordered to deliver its replying affidavit(s) in the main application on or before **18 August 2023**.
 5. The matter is postponed to **18 September 2023 at 15:30** for a case management conference.
 6. The parties are ordered to file a joint case management report in terms of rule 71 on or before **13 September 2023**.
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JUDGMENT

SCHIMMING-CHASE J:

[1] The applicant, Helios Oryx Ltd ("Helios"),¹ launched an application in

¹ The applicant is a company duly incorporated in accordance with the company laws of

this court seeking recognition and enforcement of certain paragraphs of an order obtained in the High Court of Justice, Business and Property Courts of England and Wales on 20 January 2021. The foreign judgment is alleged to have been obtained against the respondent, Trustco Group Holdings Ltd (“Trustco”),² for payment in the amount of U\$21 380 334 (“the judgment debt”) and N\$472 059, plus interest on the judgment debt at the rate of 10,5 percent per annum.

[2] Trustco opposed the application and delivered notice of an irregular proceeding in terms of rule 61, followed by an application to strike certain paragraphs of Helios’ answering affidavit in the rule 61 proceedings, deposed to by its legal practitioner of record, Mr Hanno Bossau. As I understand it, the application to strike is to be determined in the event that Trustco is unsuccessful in the rule 61 proceedings.

[3] The nub of the complaint of irregular proceedings is that Helios’ notice of motion and founding affidavit in support of the recognition and enforcement of a foreign money judgment and annexures thereto constitute irregular steps as envisaged by rule 61 because the ‘purported application is non-compliant with the governing rules and applicable law’ on the grounds that Mr Paul Gerard Cunningham, the deponent to Helios’ founding affidavit failed to allege that he is duly authorised to launch the application on Helios’ behalf. In this regard it was alleged that the authority to launch the application is not established because there was improper authentication as envisaged by rule 128(2) of the rules of court, of the signatures to the applicable board resolution attached to Helios founding affidavit.³

[4] The main attack against the resolution of Helios is that there is non-compliance with rule 128(2) which provides that a document executed in any

Mauritius with registered place of business at Level 3, Alexander House, 35 Cyber City, Ebene, 72201, Mauritius.

² A public company duly registered in accordance with the applicable laws of Namibia.

³ It is common cause that the meeting of Helios directors which resulted in the resolution was held in Mauritius which is a country that is not exempted by rule 128(3).

country outside Namibia is (subject to subrule (3)) considered to be sufficiently authenticated for purpose of use in Namibia, if it is duly authenticated in the foreign country by a person authorised to authenticate documents in that foreign country, and a certificate of authorisation issued by a competent authority in that foreign country to that effect accompanies the document.

[5] It is common cause that the resolution in question attached as annexure PC1 to the founding affidavit of Mr Cunningham was 'purportedly' authenticated by one Khouswwant Bheem Singh. According to the seal and terms of the certificate of authentication, Mr Singh is a notary of the city of Port Louis, Republic of Mauritius by lawful authority duly commissioned. Mr Singh certified that the signatures appearing on the written resolution of the directors of Helios dated 6 September 2022 are the true and lawful signatures of Mohammed Ali Joomun and Vishma Dharshini Boyjonauth, who are known to Mr Singh.

[6] Trustco's main issue is with the authentication of Mr Singh's signature which, according to the rule, should be accompanied by a certificate of authorisation by a competent authority that, the person who authenticated the documents (Mr Singh) is authorised as notary to authenticate documents in Mauritius. The fact that Mr Singh is identified as a notary, together with his seal, is not sufficient according to Trustco. The certificate of authorisation by the competent authority should certify, as it were, that a notary public in Mauritius, is duly authorised to authenticate documents in Mauritius. All that the certification does, is certify the authenticity of Mr Singh's signature, and nothing else. Therefore, in the absence of this certification, the resolution is not properly authenticated and not properly before court.

[7] In the result, and due to the absence of proper compliance with rule 128(2), the notice of motion supported by affidavit as to the facts on which Helios relies on for relief is an irregular proceeding, resulting in non-compliance with rule 65, and the absence of a valid and improper application before court.

[8] Trustco alleges that it is prejudiced by the aforementioned state of affairs because:

(a) if the relief sought in the application is not granted, Trustco would be required to put up answering papers to fatally defective and *ab initio* irregular founding papers, and unnecessarily incur costs in that regard with limited, if any, prospects of recovery;

(b) it is in the interests of justice and the attainment of the overriding objective of the rules of court that these issues be determined upfront to avoid Trustco incurring unnecessary legal costs and to avoid wasting of judicial time and resources;

(c) Helios' disorderly and irregular procedural conduct further undermines the attainment of the overriding objective of the rules of court provided for in rule 1(3);

(d) material non-compliance with the rules of court, which are set in place for the orderly conduct of proceedings and the enjoyment of parties' rights in terms of the provisions of Article 12 of the Namibian Constitution in itself constitutes prejudice and conduces to an infringement of Trustco's aforementioned rights.

[9] In the alternative, and in the event that Trustco does not succeed in its rule 61 application, then and in that event, an application to strike certain paragraphs of the answering affidavit of Helios in the rule 61 application deposed to by Mr Bossau, is brought ,as being irrelevant and/or vexatious and, in any event, containing inadmissible hearsay evidence.

[10] As regards the prejudice relating to the conditional application to strike, Trustco alleges that it is prejudiced by the inclusion of the paragraphs sought to be struck given the irrelevant inadmissible and vexatious nature of the allegations and annexures so impermissibly introduced.

[11] Helios' opposition to Trustco's rule 61 application is summarised as follows:

(a) it is not appropriate to challenge the authority of a deponent by alleging irregular proceedings, unless the deponent has not even made a bare assertion that he or she has been authorised to depose to an affidavit in the proceedings. Therefore, in instances where the deponent states that he or she is duly authorised and this is disputed, the deponent may deal with the question in reply, or even correct it retrospectively. In this regard Trustco not only followed an inappropriate procedure to challenge the authority, but purposely did so, in order to avoid answering the merits of the main application;

(b) there is substantial compliance with rule 128. The founding affidavit of Mr Cunningham, inclusive of annexures, was commissioned by David Lloyd Fawcett, a notary public of London, England. Rule 128(2), and subrule (2) does not apply to the United Kingdom. In any event, Mr Singh is a notary public, and notary publics are authorised by virtue of their position, to authenticate documents;

(c) the purpose of the authentication of a document is to satisfy a court that a document in question is a genuine document and that the person who is said to be a signatory to the document has indeed signed the document;

(d) the foreign judgment sought to be enforced is common cause between the parties. A bona fide litigant would not raise a dispute about the authentication of a document that it knows to be common cause. In fact, Trustco has specific knowledge of the judgment obtained against it and of Mr Paul Cunningham's authority, given that the judgment sought to be enforced by Helios against Trustco was obtained in the United Kingdom and Trustco participated in those

proceedings. In fact, it unsuccessfully sought to overturn that judgment on appeal;

(e) the point relating to Mr Cunningham's authority is taken in bad faith because in proceedings brought by Helios against a wholly owned subsidiary of Trustco (as guarantor) to recover the same debt embodied in the judgment,⁴ a director of Trustco, Mr Floors Abrahams, sought on affidavit to make out the case that Mr Cunningham was no less than the 'controlling' mind of the Helios Group at large;

(f) thus, in the event of non-compliance with rule 128 which is denied, there can be no prejudice to Trustco as the judgment is indisputably common cause between the parties.

[12] As regards the application to strike out, Helios points out that the affidavit of Mr Bossau refers to the proceedings mentioned above, and the allegation of inadmissible hearsay cannot be sustained in the circumstances. Furthermore, it is pointed out that rule 70(4) contemplates three grounds to which an application to strike may be made; namely where an averment is scandalous, vexatious or irrelevant, and a court will not strike out material from an affidavit unless it is satisfied that the applicant will be prejudiced in the conduct of his or her case. Reliance was placed on the decision of *Vaatz v Law Society of Namibia*.⁵

[13] Furthermore, it was argued that the offending paragraphs in the answering affidavit simply convey that the foreign judgment sought to be enforced is common cause and that its authenticity cannot be disputed. Further, that Trustco does not really set out what its prejudice is, nor which of the paragraphs alleged to be irrelevant are irrelevant, or which contain hearsay evidence.

⁴ *Helios Oryx Limited v Elisenheim Property Development Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02288) [2022] NAHCMD 499 (23 September 2022).

⁵ *Vaatz v Law Society of Namibia* 1990 NR 332 at 334J-335B.

[14] Finally, Helios seeks a punitive costs order against Trustco for the unnecessary and *mala fide* technical objections raised against a judgment that it well knows was granted against it, given that it participated in the proceedings. It is submitted that this point was taken simply to delay the proceedings, and contravenes the provisions of rule 1(3) that discourages the bringing of unnecessary interlocutory applications. On the facts, it is submitted that a case is made out for mulcting Trustco with a costs order on an attorney client scale.

[15] Having summarised the assertions of both parties in this matter, I proceed to consider whether or not a case has been made out for the irregular proceeding as asserted by Trustco.

[16] Before doing so, I express my agreement with counsel for Helios' contention that in general, it is not appropriate to challenge the authority of a deponent by alleging irregular proceedings, except of course, where there are no allegations at all regarding authority, and that such objection should be made on affidavit in order to enable proper dealing with, or correction of the issue relating to authority. A number of authorities deal with this issue, I cite only one Namibian authority being *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd*,⁶ where the following was stated:

[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*⁷ applies. In the *Otjzondjupa Regional Council* matter Muller J (as he then was) sets out the principles as follows:

⁶ (*Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* HC-MD-CIV-ACT- CON-2019/02613) [2020] NAHCMD 290 (10 July 2020).

⁷ *Otjzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others* (LC 7/2010) [2010] NAHC 29 (26 March 2010).

“(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 authorisation 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

(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.”

[17] Mr Cunningham in his founding affidavit pertinently stated regarding authority that:

‘I am an adult male director of the applicant and I am duly authorised to depose to this affidavit on behalf of the applicant. A copy of the director’s resolution confirming such authority is enclosed and marked as “PC1” for ease of reference. I am advised that the original director’s resolution will be handed to the Honourable Court at the hearing of this matter.’

[18] Trustco’s issue is that Mr Cunningham did not state that he was authorised to institute the application in his founding affidavit. All he stated was that he was duly authorised to depose to the affidavit, and specific reference was made to the Board resolution attached as ‘PC’1, which Trustco submits is not properly authenticated in terms of rule 128, and therefore, not before court. The Board resolution states that the current directors of Helios resolve that the company brings an application in the High

Court of Namibia wherein the company seeks an order in the following terms:

‘1. Declaring:

1.1 Paragraph 2; and

1.2 Paragraph 6 insofar as it refers to the interests on the judgment debt referred to in paragraph 2 of the final summary judgment granted by Sir Michael Burton GBE in the High Court of Justice, Business and Property Court of England and Wales, Commercial Court and dated 20 January 2021 granted in favour of the company / applicant (as claimant) and against the borrower / respondent (as defendant) enforceable and executable against the borrower.’

and further that:

‘... Paul Gerard Cunningham be and is hereby authorised to settle and sign the founding affidavit as well as any other affidavit documents or power of attorney and is hereby authorised to do so things sign all such documents (including any amendments to such documents) and take all such action as may be necessary or reasonably required or desirable to institute and/or pursue the enforcement application and to prosecute same and proceed to final determination thereof.’

[19] Trustco’s argument is that, as the board resolution is not sufficiently authenticated, it falls to be set aside, and therefore, on those grounds, Mr Cunningham is not authorised to institute the proceedings. It was submitted that that authorisation to depose to an affidavit is irrelevant and does not establish authority to launch legal proceedings. Reliance was placed on the following dictum of the Supreme Court of South Africa in *Ganes and Another v Telecom Namibia Limited*,⁸ where the following was stated⁹

‘In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of

⁸ *Ganes and Another v Telecom Namibia Limited* 2004 (3) SA 615 (SCA).

⁹ *Ibid* at 624 G-H.

the proceedings and the prosecution thereof which must be authorised.'

[20] As I understand the argument of counsel for Trustco, the reason why authority was not raised in an answering affidavit is due to the invalidity ab initio of the resolution for failure to properly authenticate. On that basis, counsel's attack is on the validity of the resolution itself and not on whether or not Mr Cunningham was duly authorised and as such it is proper to bring the application in terms of rule 61 due to a non-compliance of the rules of court.

[21] As previously stated, Trustco's issue is that there was no certificate of authorisation by a competent authority in the foreign country (Mauritius) accompanying Mr Singh's authentication certificate certifying, that he is authorised in Mauritius to authenticate documents. In this regard, counsel for Trustco argued that the fact that Mr Singh is a notary, does not mean automatically that by virtue of that office, he is authorised to authenticate documents in Mauritius.

[22] Counsel for Helios argued that the resolution is indeed properly authenticated by Mr Singh, who in his confirmation certificate affirms that he is a notary by lawful authority duly commissioned and signified further by his seal of office. Further, that Mr Singh's signature and designation as notary in Mauritius are confirmed by a certificate issued by the Supreme Court of Mauritius, by Judge C Greenwell and apostilled in terms of the Hague Convention of 5 October 1961 (*Convention de la Haye du 5 Octobre 1961 (Appostille Convention)*). Further, it was submitted that the suggestion by Trustco that there is no proof that a notary in the Republic of Mauritius is authorised to authenticate documents is unsustainable, because the dictionary definition of notary refers to a person who is legally authorised to administer oaths, attest, and certify documents - and the documents attached to Mr Singh's certificate illustrate that he is a duly appointed notary in Mauritius. There is no other possible designation for a notary.

[23] Lastly, Helios seeks costs on an attorney client scale against Trustco

for its conduct in launching this interlocutory application. It was submitted that this was merely a delaying tactic, given Trustco's own knowledge of the proceedings launched and judgment obtained against it in England, which Helios seeks to enforce in the main application.

[24] I deal firstly with the issue of authentication, which Trustco submits renders Helios' entire application nugatory. It is correct that the Board resolution was executed in Mauritius and requires authentication in Mauritius by, *inter alia*, a person authorised to authenticate documents in terms of rule 128 (2)(b). Also a certificate of authorisation issued by a competent authority in that foreign country to that effect must accompany the document. There is no issue with the certificate of Mr Singh. However, the certificate emanating from the Supreme Court of Mauritius does not certify that Mr Singh, as notary, is authorised by virtue of his position to authenticate documents in Mauritius. All that this certificate, signed by a Judge of Mauritius authenticates, is the signature of Mr Singh, a Notary of Port Louis in Mauritius.

[25] In *Ex Parte Kamwi*¹⁰ Masuku J held that:

[51] ... It is important to mention that the requirement for authentication, is not an idle or pedantic one. It serves a useful purpose, namely, to verify the identity and signature of the person indicated in the document and which no person in Namibia would be in a position to positively identify and confirm. This is to avoid the possibility of hirelings in foreign countries, signing fraudulent documents and having them placed before our courts for purposes of deciding matters, thus pulling wool over the court's eyes.'

[26] In *Chopra v Sparks*,¹¹ it was held that the court's power to condone

¹⁰ *Ex Parte Kamwi* (HC-MD-CIV-MOT-EXP-2019/00141) [2020] NAHCMD 152 (7 May 2020). See also *Van Wyk v Matrix Mining (Pty) Ltd* (HC-NLD-CIV-MOT-EXP-2020/00013) [2020] NAHCNLD 109 (19 August 2020) at paras 25 - 26.

¹¹ *Chopra v Sparks* 1973 (2) SA 352 (D) at 357 C; See also Damaseb, P. Court Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice at 312, in the context of the provisions contained in rule 128.

non-compliance with the rules, on good cause shown gives the court power to condone non-compliance with the rule requiring authentication as the provisions of the rule are not peremptory. As the rule is not cast in peremptory terms, substantial compliance with the rule would be a sufficient basis for condonation.

[27] I am not convinced by the argument that the absence of a certification that a notary of Mauritius is by that position, duly authorised to authenticate documents in Mauritius, renders the authentication of Helios' Board resolution irregular, as it were. In this regard, Mr Cunningham alleges pertinently that he is authorised to depose to the affidavit and he attached annexure PC1, which he confirmed under oath to be the resolution granting authority. This affidavit was commissioned by David Llyod Fawcett, a notary public duly admitted and practicing in England and Wales. Mr Fawcett also separately identified the board resolution (annexure PC1) as follows:

'This is the annexure marked PC1 referred to in the affidavit of Paul Gerard Cunningham.'

[28] Trustco's counsel still takes issue with the affidavit because annexure PC1 was not executed in the United Kingdom but in Mauritius. To my mind, I am satisfied that the board resolution, annexure PC 1, is a genuine document.

[29] That said, and even if the document was not sufficiently authenticated, and there was a case to be made out in terms of rule 61, I hold the view that Trustco suffers absolutely no prejudice in the result. This is mainly because of Trustco's own knowledge of the proceedings in England that foreshadowed the application to recognise the foreign judgment.

[30] This is apparent from the action proceedings in *Helios Oryx Limited v Elisenheim Property Development Company (Pty) Ltd.*¹² This matter, serving

¹² *Helios Oryx Limited v Elisenheim Property Development Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02288) [2022] NAHCMD 499 (23 September 2022).

before Lady Justice Prinsloo, involves the conclusion of a written Facilities Agreement between Helios and Trustco (as lender and borrower, respectively) on or about 29 December 2016 in London. At the time of concluding the Facilities Agreement, the same parties concluded a Guarantee Agreement in terms of which Elisenheim Property Development Company (Pty) Ltd, a company duly incorporated in terms of the applicable company laws of Namibia, guaranteed Trustco's performance to Helios. Helios accordingly sued Elisenheim. During these proceedings, Trustco made application to compel discovery which was dismissed, resulting in the judgment of the court, cited above.

[31] At paragraph 32 of the judgment of Justice Prinsloo, Mr Floors Abrahams, the executive director of Trustco, deposed to the affidavit in support of the application to compel discovery and is stated in the judgment to have alleged that consequent to the alleged breach by Trustco of the Facilities Agreement, Helios instituted action proceedings against Trustco (based on the Facilities Agreement) in the High Court of Justice, Business and Property Courts of English and Wales. On 20 January 2021, that court granted summary judgment against Trustco and simultaneously dismissed Trustco's counterclaim against the plaintiff.

[32] This is the exact same judgment that is sought to be enforced in the main application.

[33] When counsel for Trustco was queried on this issue during argument, it was submitted that prejudice still existed for Trustco, because of the time and legal costs it would involve to ascertain that this was indeed the self-same judgment sought to be enforced, which could have been avoided if there was proper authentication. This argument is without merit. Trustco cannot be said to have no knowledge of this judgment, nor can it be said to suffer any prejudice in the above circumstances. And therefore, the rule 61 must fail. It must also be mentioned that significant legal costs were expended for this rule 61 application.

[34] This brings me to the strike-out application. It is true that the court has marked its disapproval with legal practitioners deposing to affidavits in matters which they appear.¹³

[35] The requirements for when the court will strike out material in an affidavit were explained in *Vaatz v Law Society of Namibia*¹⁴ as follows:

‘Scandalous matter - allegations which may or may not be relevant, but J which are so worded as to be abusive or defamatory.

Vexatious matter - allegations which may or may not be relevant, but are so worded as to convey an intention to harass or annoy.

Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.’

[36] It was also held¹⁵ that even if the matter complained of is scandalous or vexatious or irrelevant, the court will not strike out such matter unless the respondent would be prejudiced in its case if such matter were allowed to remain. In this regard, this court held that the phrase prejudice does not mean that the innocent party’s chances of success will be reduced if the court allows the offending allegations to stand. It is substantially less than that, and how much less will depend on the circumstances of the case. If retaining the alleged offending matter it would have the result of side-tracking the innocent party from the main issue or defame them, such manner that is prejudicial to the innocent party, then it must be struck. If a party is required to deal with scandalous or vexatious matter, the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed, the retention of such matter would therefore be prejudicial to the innocent party.¹⁶

¹³ *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (18 April 2017) at paras 54 - 55.

¹⁴ *Supra* at 334J-335B.

¹⁵ *Supra* 334 H.

¹⁶ *Supra* 335G-H.

[37] The strike out application is directed against paragraphs 10-14 and 15-17 of the answering affidavit deposed to by Mr Bossau in the rule 61 application, on the basis of relevance and containing inadmissible hearsay evidence, and paragraphs 19, 20.1-20.9, 21, 27 and annexure AA3 on the basis that the allegations are irrelevant.

[38] The basis of the strike out application as argued by Trustco, is that the offending paragraphs seem to traverse the merits of the main application by accusing Trustco of engaging in 'clearly dilatory defences' and raising 'technical objections'. I understand from the contents of Mr Bossau's affidavit that it simply conveys that the foreign judgment in the High Court of Justice sought to be enforced is common cause and that its authenticity cannot be disputed. I do not understand what is irrelevant and more importantly, I do not understand the prejudice given Trustco's own knowledge of the judgment that is sought to be enforced. Trustco does not even explain what prejudice it suffered due to the relevant common cause facts being averred.

[39] In respect of its hearsay objections to paragraphs 10 to 14, Trustco does not identify which portions of paragraphs 10 to 14 constitute inadmissible hearsay evidence. Helios in its founding papers provided a first-hand account of Trustco's participation in proceedings which resulted in the English judgment sought to be enforced. Further, Trustco's participation in these proceedings have been established by the affidavit of Andrew Richard Quick of Stevenson & Bolton LLP who were the legal representatives of Helios in the proceedings instituted by Helios against Trustco in the High Court of Justice, Business and Property Court of England and Wales, which resulted in the foreign judgment and order sought to be enforced.

[40] As regards paragraphs 15 and 16 of Mr Bossau's affidavit which are alleged to be irrelevant and/or vexatious and/or contain inadmissible hearsay evidence, all that paragraph 15 does is to assert that Trustco is not being *bona fide* by disputing a judgment that it well knows to be authentic.

Paragraph 16 asserts the conduct of Trustco through its subsidiary Eisenheim Property Development Company (Pty) Ltd in related proceedings before Prinsloo J referred to above.

[41] I do not see how this assertion is irrelevant nor is it vexatious. It is also not hearsay evidence for the reasons advanced above. I further do not see how these paragraphs prejudice Trustco in any way given its own knowledge, and for this reason the application to strike must also fail.

[42] Lastly, I deal with the issue of costs. Costs ordinarily follow the event, and both parties were ad idem that costs should not be capped in terms of rule 32(11). Helios specifically seeks costs on an attorney client scale against Trustco on the grounds of the *mala fide*, dilatory and vexatious nature in which the litigation is being conducted.

[43] For a party to be saddled with an order for costs on an attorney and client scale, such party would most probably have acted or conducted itself *mala fide* . . . Normally, such a party would have been capricious, brazen and/or cowboyish in its approach to the litigious process and not have cared what the consequences of its acts or actions would be on the process and/or the other side.¹⁷

[44] It is clear that the rule 61 procedure as well as the strike out procedure brought by Trustco was an unnecessary and overly technical objection to proceedings which Trustco was involved in from the outset and which Trustco made averments about that were dealt with in a judgment of this court. The application was ill-considered, and to my mind, served only to tactically delay the matter. Rule 1(3) of the High Court rules makes it clear that the overriding objective of the High Court rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practical by *inter alia* saving costs by amongst others

¹⁷ See *Lazarus v The Government of the Republic of Namibia (Ministry of Safety and Security)* (I 3954/2015) [2017] NAHCMD 348 (1 December 2017) at para 21, and the authorities there collected.

limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a course or matter. (Emphasis supplied)

[45] Trustco did not comply with the overriding objective as prescribed by rule 1(3). Although the court should not willy nilly grant attorney client cost orders, it is apparent that the conduct of Trustco in this matter warrants a mark of disapproval through a special costs order.

[46] In light of the above I therefore make the following order:

1. The application in terms of rule 61 is dismissed with costs on an attorney and client scale, such costs to include the costs of one instructing counsel and two instructed counsel where, employed.
2. The application to strike certain portions of the applicant's affidavit is dismissed with costs on an attorney client scale, such costs to include the costs of one instructing counsel and two instructed counsel, where employed.
3. Trustco is ordered to deliver its answering affidavit(s) in the main application on or before **4 August 2023**.
4. Helios is ordered to deliver its replying affidavit(s) on or before **18 August 2023**.
5. The matter is postponed to 18 September 2023 at 15:30 for a case management conference.
6. The parties are ordered to file a joint case management report in terms of rule 71 on or before **13 September 2023**.

EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT:

J Babamia SC

Instructed by HD Bossau & Co.

Windhoek

RESPONDENT:

R Totemeyer, with him, D Obbes

Instructed by PD Theron & Associates

Windhoek