

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: DR. WEDER, KAUTA & HOVEKA INC. & ANOTHER // NAMIBIA COMPETITION COMMISSION & 2 OTHERS; DR. WEDER, KAUTA & HOVEKA INC. // NAMIBIA COMPETITION COMMISSION & 2 OTHERS	Case No: HC-MD-CIV-MOT-REV-2022/00355 HC-MD-CIV-MOT-REV-2022/00357 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Heard on: 14 SEPTEMBER 2023 Delivered on: 4 OCTOBER 2023
Neutral citation: <i>Dr. Weder, Kauta & Hoveka Inc. v Namibia Competition Commission</i> (HC-MD-CIV-MOT-REV-2022/00355) [2023] NAHCMD 613 (4 October 2023)	
Order:	
<ol style="list-style-type: none">1. The interlocutory applications are dismissed with costs, including costs of one instructing counsel and two instructed counsel, and the costs are capped in terms of rule 32(11) of the rules of court.2. Counsel and the parties (if unrepresented by counsel) are called upon to attend a status hearing at 08h30 on 18 October 2023 to determine the conduct of the main applications.3. The interlocutory applications are finalised and removed from the roll.	
Reasons:	

PARKER AJ:

Introduction

[1] There are presently two interlocutory applications – interlocutory to two review applications ('the main applications'). For good reason and by agreement between the parties, the main applications were set down and to be heard together. Mr Bhana SC (with him Ms Williams) represents the applicants, and Mr Gotz SC (with him Mr Nekwaya) represents the first respondent, the Competition Commission ('the Commission').

[2] The purpose of the interlocutory applications is said by Mr Bhana to be to seek 'a complete record of two decisions of the Competition Commission' (the first respondent). In that event, I see that the determination of the interlocutory applications turns on an extremely short and narrow compass. It lies in the interpretation and application of the relevant provisions of rules 28, 65, 66, 70 (3) and, tangentially and in parentheses, rule 76.

[3] The discovery rule applicable in the instant proceeding is rule 28 of the rules of court.¹ Rule 28 provides for discovery and rule 70(3) makes rule 28 applicable to discovery in motion proceedings. In motion proceedings, an application for discovery must satisfy the court that exceptional circumstances exist.²

[4] It is important to note this: Unlike the provision in the repealed rule 35(1) of the rules of court where the document sought should be a document merely 'relating to any matter in question' in such action or motion, in rule 28(1), the provision is that the document sought should be 'relevant to the mater in question' and they should be 'proportionate to the needs of the case'. There is a wide and deep yawning gap between the requirements in the repealed rules and the current rules of court. A greater burden is now placed on the applicant who must now establish that the documents he or she requires are documents 'that are not only relevant to the matter in question' but also 'that (they) are proportionate to the needs of the case', and not merely that they are documents 'relating to any matter in question'. These are onerous and peremptory requirements.

¹ *Telecom Namibia Ltd v Communication Regulatory Authority of Namibia* 2015 (3) NR 747 (HC) para 5.

² *Loc cit.*

[5] It follows inevitably that the authorities in South African cases on rule 35(1) of the repealed rules as to the requirement relating to general discovery are of no assistance when interpreting and applying rule 28(1) of the rules of court. Furthermore, as a matter of course, South African authorities on the repealed rule 53 are also irrelevant in the instant proceedings.

[6] On the meaning of 'relevance' GD Nokes in his work *An Introduction to Evidence* states:

'Thayer (*A Treatise on the Law of Evidence*), 12 ed Reprinted 1948) asserted that the law furnishes no test of relevancy; and more than half of a century later framers of a draft code in the United States declared that relevant evidence means evidence having any tendency in reason to prove any material fact....these American pronouncements can be adopted.'³

[7] Thus, the applicants bear the burden of satisfying the court that the documents they now seek are not only relevant to that matter in question, that is, the main applications, but also that they are proportionate to needs of the case concerned.

[8] I find that the notice of motion filed on 2 August 2022 under Case No. 2022/00355 indicate that the applicants elected to approach the court in terms of rule 65 of the rules of court. It is the same with the notice of motion under Case No. 2022/00357, filed on 29 July 2022. Thus, the applicants brought both applications in terms of rule 65 and not rule 76 of the rules of court. The applicants were entitled to make that election, so we are told by the Supreme Court.⁴ Having made that election, the applicants were not entitled to the procedural largesse granted by rule 76 of the rules of court. The applicants waived their procedural right under rule 76.⁵

[9] Therefore, what they are entitled to is their procedural right under rules 28 and 65. In that event, under rule 28, they must satisfy the court that the documents sought are not only relevant to the review application concerned but are also proportionate to the needs of the case concerned.

[10] Unlike the applicant who has brought a review application under rule 76, the applicants

³ GD Nokes *Introduction to Evidence* 4 ed (1967) at 82.

⁴ *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority* 2019 (3) NR 859 (SC).

⁵ Para 38.

in Case No. 2022/00355 and Case No. 2022/00357 are not entitled to any record – complete or incomplete – as aforesaid. The fact that the applicants filed notices in terms of rule 76(6) matters tuppence. The applicants' effort is met with the maxim *ex nihilo nihil fit*. It is labour lost.

[11] The respondents acted wrongly in blindly following the applicants as regards the notices and acting in response to those notices. Those wrongful acts do not bind the court. The court would be perpetuating an illegality if it were to accept the misreading of the rules by both the applicants and the respondents. I shall, therefore, not waste my time considering any reference to rule 76.

[12] Doubtless, the applicable rule on discovery in the applications must be rule 28. It follows irrefragably that the applicants bear the onus of establishing to the satisfaction of the court that the documents sought are not only relevant to the matter in question, but also that they are proportionate to the needs of the case in hand.⁶ The respondents bear no burden – none at all – to establish to the satisfaction of the court that the documents are not relevant to the matter in question and are not proportionate to the needs of the case concerned. Therefore, to succeed, the applicants must establish to the satisfaction of the court that the documents sought are not only relevant to the matter in question but are also proportionate to the needs of the case concerned. Accordingly, in respect of the two applications, I shall consider whether the applicants have established to the satisfaction of the court that the documents they seek are relevant to the matter in question and are proportionate to the needs of the case concerned.

Case No. 2022/00355

[13] The matter in question is the applicants' challenge of the lawfulness and validity of the Commission's decision of 9 May 2022 to reopen an investigation into the relationship between the first applicant, Dr Weder, Kauta & Hoveka Inc. ('WKH'), and the second applicant, the Preferred Land Development Holding (Pty) Ltd ('PLDH'), concerning property transfers at Osona Village Property development near Okahandja ('Osona').

[14] The needs of the case are proof that-

(a) the Commission acted unlawfully and irrationally when it 're-initiated' into the property

⁶ *Telecom Namibia Ltd v Communication Regulatory Authority of Namibia* footnote 1 loc cit.

transfers at Osona when the Commission 'appears to have come to its decision in 2020 that there was no contravention of the Competition Act.

(b) the 'WKH Form 4 and Form 5 notices are so 'facially incomprehensible' that WHK cannot be expected to make sense of the demand for documents and information from WKH.

[15] I have considered the matter in question as laid out in the notice of motion and referred to in para 13 above and the needs of the case as set out in para 14 above. Having done that, I do not see in what manner the documents sought are relevant to the matter in question. Similarly, I do not see in what way the documents sought have any tendency in reason to prove any material facts in the main application, considering what the applicants must prove, as laid out in para 14 above.

[16] Consequently, I conclude that the applicants have failed to establish that the documents sought are relevant to the matter in question and are proportionate to the needs of the case, within the meaning of rule 28 of the rules of court, as discussed in paras 3-7 above. The ineluctable conclusion is that the applicants have failed to discharge the onus cast on them by rule 28(1), as discussed above, and so they cannot succeed. I proceed to consider Case No. 2022/00357.

Case No. 2022/00357

[17] The matter in question (that is the main application) is laid out succinctly in para 45 of the founding affidavit. The challenge by judicial review is that the 'Form 5 Summons' that the Commission served on the applicant is materially different from the statutory Form 5 that is provided under s 33(4) of the Competition Act 2 of 2003 ('Competition Act') and rule 16(2) of the Rules Made under the Competition Act, 2003. The Form serves as a notice to a person who was required by the Commission to furnish a specified information to the Commission and to appear before the Commission to give evidence or to produce a specified document to assist the Commission in the carrying out some investigations.

[18] The grounds of review under Case No. 2022/00357 are that the Commission -

(a) failed to give the applicant notice of the Commission's decision to investigate the applicant;

- (b) failed to explain the subject matter and purpose of its investigation; and
- (c) acted in bad faith because it was 'incorrectly threatening the applicant with criminal sanction'.

[19] I do not see in what way the documents sought are relevant to the matter in question, as explained in para 17 above, that is, considering the relief sought in the notice of motion.⁷ In my view, the documents sought are not relevant to the matter in question. Consequently, I find that the applicant has failed to establish that the documents sought are relevant to the matter in question.

[20] The needs of the case are proof that-

- (a) Form 5 is not statute compliant;
- (b) the applicant was entitled in terms of the Competition Act to be given explanation about the subject matter and purpose of the investigation, but it was not given such explanation; and
- (c) the Commission acted mala fide in threatening the applicant with criminal sanction.

[21] I do not see in what manner the documents sought are proportionate to the needs of the case which are set out in para 20 above, and the applicant has failed to show in what manner the documents are proportionate to the needs of the case. Consequently, I hold that the applicant has failed to discharge the onus cast on it by rule 28(1) of the rules of court, as discussed above, and so it cannot succeed.

Conclusion: Case No 2022/00355 and Case No. 2022/00357

[22] Based on these reasons, I find that the applicants have failed to make out a case for the relief sought in the interlocutory applications. Indeed, if the applicants were minded being honest with themselves, it would graciously admit that because of their misreading of rule 65 and rule 76, they failed to satisfy the requirements of rule 28 (1) of the rules of court.

⁷ *Telecom Namibia Ltd v Communication Regulatory Authority of Namibia* footnote 1 para 8.

[23] At first brush, I would have said that these are interlocutory applications where rule 32(11), providing capped costs, should not apply. But for the following reasons, the costs should be capped. First, the applicants, with respect, misread the applicable rules and acted in accordance with their misreading of the applicable rules. The respondents, too, misread the rules, and by so misreading the rules led the applicant on into an abyss of the instant untenable and frivolous interlocutory applications. The respondents failed to draw the attention of the court to the fact that since the applicants elected to bring the main applications under rule 65, they had waived their procedural right under rule 76. If the respondents had appreciated that fact, we would not be in the situation where there has been a series of clearly avoidable illegal missteps respecting the rule 76(6) notices.

[24] Unfortunately, although one year has passed since the main applications were instituted, the real issues in dispute between the parties remain unresolved. It need hardly saying that such delay does not conduce to the attainment of the overriding objectives of the rules of court provided in rule 1(3) of the rules of court. That in itself is inimical to due administration of justice.

[25] In the result, I order as follows:

1. The interlocutory applications are dismissed with costs, including costs of one instructing counsel and two instructed counsel, and the costs are capped in terms of rule 32(11) of the rules of court.
2. Counsel and the parties (if unrepresented by counsel) are called upon to attend a status hearing at 08h30 on 18 October 2023 to determine the conduct of the main applications.
3. The interlocutory applications are finalised and removed from the roll.

Judge's signature:

Note to the parties:

Not applicable.

Counsel:	
Applicants	First Respondent
A R Bhana SC (with him K Williams) Instructed by Nambahu & Associates, Windhoek	A Gotz SC (with him E Nekwaya) Instructed by Kangueehi & Kavendjii Inc., Windhoek