

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING APPLICATION FOR LEAVE TO FILE A FURTHER AFFIDAVIT**

Case no: HC-MD-CIV-MOT-POCA-2020/00429

In the matter between:

THE PROSECUTOR-GENERAL APPLICANT

and

RICARDO GUSTAVO	FIRST DEFENDANT
TAMSON TANGENI HATUIKULIPI	SECOND DEFENDANT
JAMES NEPENDA HATUIKULIPI	THIRD DEFENDANT
SACKEUS E EDWARDS TWELITYAAMENA SHANGHALA	FOURTH DEFENDANT
BERNARDT MARTIN ESAU	FIFTH DEFENDANT
PIUS NATANGWE MWATELULO	SIXTH DEFENDANT
NAMGOMAR PESCA NAMIBIA (PTY) LTD	SEVENTH DEFENDANT
ERONGO CLEARING AND FORWARDING CLOSE CORPORATION	EIGHTH DEFENDANT
JTH TRADING CLOSE CORPORATION	NINETH DEFENDANT
GREYGUARD INVESTMENTS CLOSE CORPORATION	TENTH DEFENDANT
OTUAFIKA LOGISTICS CLOSE CORPORATION	ELEVENTH DEFENDANT
OTUAFIKA INVESTMENTS CLOSE CORPORATION	TWELFTH DEFENDANT

FITTY ENTERTAINMENT CLOSE CORPORATION	THIRTEENTH DEFENDANT
TRUSTEES OF CAMBADARA TRUST	
T118/11 MAREN DE KLERK	FOURTEENTH DEFENDANT
OLEA INVESTMENTS NUMBER NINE	
CLOSE CORPORATION	FIFTEENTH DEFENDANT
TRUSTEES OF OMHOLO TRUST T118/11	
MAREN DE KLERK	SIXTEENTH DEFENDANT
ESJA HOLDING (PTY) LTD	SEVENTEENTH DEFENDANT
MERMARIA SEAFOOD (PTY) LTD	EIGHTEENTH DEFENDANT
SAGA SEAFOOD (PTY) LTD	NINETEENTH DEFENDANT
HEINASTE INVESTMENT (NAMIBIA) (PTY) LTD	TWENTIETH DEFENDANT
SAGA INVESTMENT (PTY) LTD	TWENTY-FIRST DEFENDANT
ESJA INVESTMENT (PTY) LTD	TWENTY-SECOND DEFENDANT

and

JOHANNA NDAPANDULA HATUIKULIPI	FIRST RESPONDENT
SWAMMA ESAU	SECOND RESPONDENT
AL INVESTMENTS NO FIVE CLOSE CORPORATION	THIRD RESPONDENT
OHOLO TRADING CLOSE CORPORATION	FOURTH RESPONDENT
GWAANIILONGA INVESTMENTS (PTY) LTD	FIFTH RESPONDENT

Neutral Citation: *The Prosecutor-General v Gustavo* (HC-MD-CIV-MOT-POCA-2020/00429) [2023] NAHCMD 682 (26 October 2023)

CORAM: SIBEYA J

Heard: 2 October 2023

Delivered: 26 October 2023

Flynote: Applications – Application for leave to file a further affidavit – Rule 66(2) of the Rules of the High Court – The need for an explanation that negates *mala fides* or culpable remissness on the part of the applicant for leave to file further affidavits, the

interests of justice, and the exercise of the discretion judicially – No prejudice must be caused to the opposite party which cannot be remedied by an appropriate costs order – Application for leave to file an affidavit granted.

Summary: In this application, the PG seeks to report on the status of the extradition proceedings or intended extradition proceedings. She also seeks leave to file further affidavits to place on record the rule-compliant Icelandic affidavits, which were received after her affidavits in the restraint application had been filed. The defendants opposed the said application.

The PG contends that the further affidavit which she intends to file will update the court on the steps taken to cause the extradition of the directors of the 17th to the 22nd defendants (foreign directors) to Namibia; the developments in the criminal investigation over the past two years, which she states, caused the delay to finalise the extradition proceedings.

The defendants contend that the PG failed to establish exceptional circumstances for the leave sought to be granted. The defendants further contend that the PG does not explain why her application is filed out of time. They argue that the PG has failed to answer to their averment that the law of Iceland does not permit the extradition of its citizens to another country. They contend that, in the absence of a possibility of extradition, a further affidavit will take the matter nowhere. The defendants state that the PG failed to explain the reasons why she had not launched the formal extradition proceedings.

Held: that the determination of the success or otherwise of the intended extradition request cannot be finally determined in these proceedings. This is so for the reason that there is no time frame set within which an extradition request must be made. This, however, does not provide the PG with the comfort to sit idle without realising her intention to extradite the foreign directors. It is in the interest of the parties involved, the defendants included, and the interests of justice that the criminal proceedings and the restraint proceedings are finalised within a reasonable time and without undue delay.

Held that: the PG provided a satisfactory explanation to nullify suggestions of *mala fides* or culpable remissness on her part for not putting the information sought to be produced before court earlier or filing this application at an early stage. Coupled with the established principle that the primary objective of the court's discretion is to serve the interests of justice, the court found that the interests of justice in this matter supports the application by the PG to update the court on the progress of the extradition request. This, the court found, will avoid a situation where the court is seized with outdated information, whose correctness may be put into question, to determine an issue between the parties. That can surely not be in the interests of justice.

Application for leave to file an affidavit granted.

ORDER

1. The applicant is granted leave to the file the further affidavit of Olyvia Martha Imalwa, together with that of Andreas Kanyangela and Erna Van der Merwe within 10 days of this order;
 2. The applicant must pay the 17th to the 22nd defendants' costs of this interlocutory application, such costs to include costs of one instructing and two instructed counsel, subject to rule 32(11).
 3. The matter is postponed to 16 November 2023 at 08:30 for a status hearing.
 4. Parties must file a joint status report on or before 13 November 2023.
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RULING

SIBEYA J:

Introduction

[1] Traditionally, three sets of affidavits are permissible in our law in motion proceedings. These are the founding affidavit, the answering affidavit and the replying affidavit. In the main application for a restraint order sought in terms of the Prevention of Organised Crime Act 29 of 2004 ('POCA') against the 17th to the 22nd defendants, the aforesaid traditional affidavits have been filed.

[2] The applicant, however, seeks leave from the court to file her further affidavit supported by the affidavits of Mr. Andreas Kanyangela and Ms. Erna Van der Merwe with annexures attached thereto, within 10 days of the order of court. The applicant further seeks costs against parties who oppose the application.

[3] The application is opposed by the 17th to the 22nd defendants. It is this application that the court is seized with.

Parties and representation

[4] The applicant is the Prosecutor-General ('PG') and she is the applicant in the main application for a restraint order.

[5] The 17th to 22nd defendants are the only ones that oppose the application for leave to file further affidavits. The 17th to 22nd defendants are strictly speaking the only defendants in this matter and they shall be referred to as 'the defendants'.

[6] For clarity, POCA defines a defendant as a person against whom a prosecution for an offence has been instituted and includes a person who is charged or is to be charged with an offence, and where it appears to the court that reasonable grounds exist for believing that a confiscation order may be made against such person.¹

¹ Section 17(1) of POCA.

[9] The applicant is represented by Mr Trengove, SC while the defendants are represented by Mr Heathcote, SC.

Background

[10] The defendants are Namibian registered entities whose directors are Icelandic nationals, residing outside Namibia ('the foreign directors'). In the founding affidavit deposed to by the PG in November 2020, in the main restraint application against all the defendants and the respondents mentioned therein. She stated that she intended to extradite the foreign directors of the 17th to the 22nd defendants. The defendants filed their answering papers and the PG replied thereto in July 2021.

[11] The defendants brought an application for referral to oral evidence and cross-examination, and to argue *in limine* the dismissal of the restraint application. After the hearing, the application for referral and cross-examination was refused on 30 March 2022. The defendants filed an application for leave to appeal to the Supreme Court, which was heard, and dismissed on 22 September 2022. The defendants then petitioned the Chief Justice. On 24 November 2022, the Supreme Court issued an order dismissing the defendants' petition with costs.

[12] In a joint status report dated 5 December 2022, the PG informed the court that she intended to apply for leave to file a supplementary affidavit in order to, *inter alia*, set out facts of the progress in the extradition process. The envisaged interlocutory application for leave to file further affidavits was subsequently filed and is the subject of this matter.

[13] In this application, the PG seeks to report to the court on the status of the extradition proceedings or intended extradition proceedings. She further seeks leave to file further affidavits to place on record the rule-compliant Icelandic affidavits deposed to in November 2021, which were received after her affidavits in the restraint application had been filed. As stated, the defendants oppose the said application.

[14] It is further worth mentioning that the restraint application brought by the PG against the first to the sixteenth defendants and the respondents was finalised on 17 May 2023.

The PG's case

[15] The PG contends that the further affidavit which she intends to file will update the court on the steps taken to cause the extradition of the foreign directors to Namibia; the developments in the criminal investigation over the past two years, she states, caused the delay to finalise the extradition proceedings.

[16] The PG states further that the other purpose of the affidavit is to seek leave for rule-compliant affidavits to be filed regarding the extraction and translation of documents already filed. These documents, she states, constitute electronic communications extracted from the defendants' holding company based in Iceland in accordance with a request for mutual legal assistance. She states further that the rule-compliant affidavits relating to the emails were not available at the time that she deposed to the affidavits in the restraint application and she relied on the Icelandic authorities to provide the rule-compliant affidavits regarding the emails. She states further that she opted to file her reply in the restraint application and thereafter make the request for the said rule-complaint affidavits, and file the evidence once obtained. She states that she does not seek to introduce any additional emails but only to provide rule-compliant evidence of emails already filed on record, and which rule-compliant evidence was not available at the time of filing the replying affidavit.

[17] She contends that the joining of criminal cases under case number CC 06/2021 (Namgomar) and CC 07/2021 (Fishcor) contributed to the delay to finalise the extradition request as this increased the information to be included in extradition request. This is against the backdrop that once an indictment is submitted in support of the extradition request it cannot be amended to include new offences. She further explains that there have been related mutual legal assistance requests to Angola.

[18] The PG contends that the defendants failed to appreciate that it is in the nature of restraint applications that related criminal investigations and trial proceedings continue with restraint proceedings. She argues that restraint proceedings are, therefore, not ordinary motion proceedings as they relate to ongoing criminal investigations.

[19] The PG states that the formal extradition request is yet to be made to Iceland, therefore, there is still no response denying the request. She further states that while Icelandic law generally forbids the extradition of Icelandic citizens, she was advised that there may be an exception when a formal extradition request is received.

[20] The PG argues further that the defendants are Namibian registered companies and this court has jurisdiction over them, regardless of the extradition of the foreign directors. She contends that although the foreign directors would likely have to be extradited to Namibia, the legal consequence of the potential extradition is a question to be determined at the hearing of the restraint application. She emphasised that both the criminal investigation and the extradition process are ongoing.

[21] The PG further contends that the defendants will suffer no prejudice if her application for leave to file a further affidavit is granted. This, she argues, is because the defendants will be afforded an opportunity to answer to the averments in the affidavit and any dispute between the parties will be determined at the hearing of the restraint application.

The defendants' opposition

[22] In an answering affidavit deposed to by Mr Ingvar Juliusson on behalf of the defendants, he states, *inter alia*, that the PG failed to establish exceptional circumstances for the leave sought to be granted. The defendants contend that the PG does not explain why her application is filed out time.

[23] Mr Juliusson deposed that the PG is aware that the Icelandic authorities had already on 19 February 2021, refused her extradition request. She has failed to produce any evidence that the extradition proceedings have commenced against the foreign directors. The indictment of the defendants was finalised on 21 April 2021, but still no formal extradition request was made to Iceland. Mr Juliusson states further that the PG contends that the investigating team is still in the process to establish the whereabouts of the foreign directors, while the company secretarial documents that she relied on reveal the business and residential addresses of the foreign directors.

[24] The defendants contend that the PG has failed to answer to their averment that the law of Iceland does not permit the extradition of its citizens to another country. The defendants contend that in the absence of a possibility of extradition, a further affidavit will take the matter nowhere. The defendants contend that the PG failed to explain the reasons why she had not launched the formal extradition proceedings.

[25] The defendants contend further that the PG offers no explanation why the emails were not authenticated timeously considering that the authenticity thereof was raised in notice to strike out filed on 25 August 2021. The authentication was unjustifiably delayed and thus prejudiced the defendants who are entitled to an expeditious handling of their matter, contend the defendants. The defendants contend further that the authentication certificate was signed on 11 November 2021, and no explanation is advanced by the PG why she waited for over 15 months before she could bring this application.

[26] The defendants further argue that the PG failed to update the court of the events that she claims delayed the filing of the formal extradition request as well as the delay to file this application at the time that the said events claimed occurred.

Arguments

[27] It was argued by Mr Trengove that the PG proffered a reasonable explanation for the delay to make a formal extradition request for the foreign directors to be extradited

to Namibia. He submitted, *inter alia*, that the related ongoing criminal investigation; the joining of the criminal cases of Namgomar and Fishcor; the related mutual legal assistance request to Angola; and the failed interlocutory application and the subsequent petition brought by the defendants, contributed to the delay to file this application and to make the extradition request.

[28] Mr Trengove further argued that not only did the defendants challenge the PG to explain the delay to make the extradition request, but it is in the interests of justice that the PG updates the court on the status of the extradition proceedings and explain the said delay.

[29] Mr Heathcote argued the contrary. In his words, the PG has made no effort to launch the formal extradition request since 2020. He submitted further that it is unreasonable for the PG to rely on the interlocutory application brought for referral to oral evidence and cross-examination as one of the explanations for the delay to bring this application as she could have brought the application before the application for referral to cross-examination was filed.

[30] Mr Heathcote further argued that the PG deliberately decided to delay this application until the final determination of the application for cross-examination. He argued further that it appears that from 27 August 2021 to 23 November 2022, the PG kept as a secret the fact that she had information that she sought to give to the court but decided to wait, and this is the information that she now wants to put forward although she had it all along. He argued that the issue of the electronic mails being non-rule compliant did not feature in the application for referral to cross-examination. This, Mr Heathcote submitted, constitutes willful default on the part of the PG for which she must bear the consequences. He relied on *Meriderien Financial Service (Pty) Ltd v Ark Trading*² for his argument.

[31] Mr Heathcote submitted that the PG failed to sufficiently explain the delay to launch this application and he invited the court to exercise its discretion judicially and

² *Meriderien Financial Service (Pty) Ltd v Ark Trading* 1998 NR 74 (HC) 76.

refuse her application. He further argued that the defendants are prejudiced by this application as they are entitled to speedy finalisation of the matter while this application seeks to achieve the opposite. The defendants, he further pointed out, defended the matter and are thus incurring legal costs to their prejudice, the longer this saga drags on.

Filing of further affidavits

[32] It is settled law that three sets of affidavits mentioned above, in para 1, are permitted in motion proceedings. Rule 66(2) of the Rules of this Court, however, provides that:

‘The applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in subrule (1)(b), deliver a replying affidavit and the court may in its discretion permit the filing the filing of further affidavits.’

[33] The Supreme Court in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*,³ remarked as follows at para 95:

[95] On the assumption that its conclusion (that the amplified papers fell foul of the peremptory provisions of s 110) was wrong and that it had a discretion in law to allow the amplified papers as prayed for, the court proceeded to examine the evidence to assess whether it should exercise its discretion in favour of the appellants. It reminded itself that, in deciding whether or not to allow the amplified papers, it had to apply the principles evident from the following quotation:

“If a party to an application files and serves certain affidavits and files additional affidavits before the other party has replied to them because there was not enough time to complete all of the affidavits before a fixed time or because new matter has been discovered or for any other good reason, a court will not reject the additional affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits. If there is an explanation that negatives mala fides or culpable remissness as the cause of the facts or

³ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2013 (3) NR 664 (SC) para 95.

information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed. But there must be a proper and satisfactory explanation as to why it was not done earlier and, what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.”⁴

[34] Masuku J in *Du Plessis NO v Minister of Mines and Energy*⁵ had occasion to consider a similar application for leave to file further affidavits and remarked as follows at paras 19 and 21:

[19] Although expressed in respect of a different type of case, i.e. provisional sentence, the following remarks uttered in *Milne NO v Fabric House (Pty) Ltd*⁶ are apposite. The court remarked as follows:

“In my view it is neither necessary nor desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that basically it is a question of fairness to both sides. This, on the one hand it is right that a plaintiff should have his speedy remedy of the procedure of a provisional sentence; and if a third set of affidavits is introduced, where is the line to be drawn? On the other hand justice may require that a defendant be allowed to place certain further information before the Court. The Court will weigh all the facts and do what it thinks fair to both sides.”

...

[21] ... the judgment of *Amedee v Fidele and Others*,⁷... consists of a fairly good summary of the relevant principles applicable. The learned Judge stated the following in that case:

[79] Flowing from the above and other authorities, the legal position can therefore be summarised as follows:

- (i) Allowing the filing of further affidavits is not a right that a party has, but an indulgence from a Court in the exercise of its discretion;

⁴ Cilliers et al, Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa 5th ed vol 1 at 434 – 435.

⁵ *Du Plessis NO v Minister of Mines and Energy* (HC-MD-CIV-MOT-GEN-2022/00076) [2023] NAHCMD 533 (31 August 2023) paras 19 and 21.

⁶ *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) p 65A.

⁷ *Amedee v Fidele and Others* (20/9529) [2021] ZAGPJHC 837 (20 December 2021).

- (ii) Rule 5 (6) (e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A Court, as arbiter, has the sole discretion whether to allow the affidavits or not. A Court will only exercise its discretion in this regard where there is good reason for doing so.
- (iii) The material sought to be raised in the supplementary affidavit must be relevant to the issues for determination of the main claim or application;
- (iv) In exercising its discretion, the Court will do so with a measure of flexibility, taking into account all the facts of the case and in further consideration of what is fair to the parties.
- (v) Leave to file further affidavits, out of sequence, may be allowed, for example, where there was something unexpected in the applicant's replying affidavits or where a new matter was raised, or where the information/evidence was not available when the founding affidavits were filed and before answering affidavits could be filed. Even then, the party seeking to supplement his affidavit must give a satisfactory explanation which negatives *mala fides* or culpable remissness as to why the information could not be put before the Court at an earlier stage.
- (vi) In *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & Others Case No: JR2296/12* at para [5] Legrange J held that:

“Pleadings are intended, amongst other things, to identify the nature and perimeters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party’s case is canvassed. In the case of the review application an applicant has the added advantage that a weak founding affidavit can be completely replaced or augmented by a supplementary affidavit. It is at that point of the applicant’s preparation that it must focus its mind to the merits of its case. It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when the heads of argument are prepared. Still less should it consider the supplementary affidavit as anything less than its final statement of its grounds of review. There may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of their case could not have been aware of, or where there is some other justifiable reason why a material issue is omitted . . .” and

(vii) When considering whether to allow the filing of further affidavits, prejudice is not the test, and it is incumbent on the applicant to establish exceptional circumstances which render it fair to permit the filing of the additional affidavit.”

[35] I agree with the above legal position regarding the approach to applications for leave to file further affidavits.

Application of the law to the facts

[36] The PG explains that she intends to update the court on the status of the extradition request. It is a fact that she informed the court in November 2020 that she intends to extradite the foreign directors, hence she seeks leave to file the affidavit to proffer such explanation. She explained that the joining of the Namgomar criminal case and the fishcor case increased the information to be included in the extradition request and thus, contributed to the delay. This cannot be said to be farfetched considering that the extradition process is linked to the ongoing criminal investigation and the restraint proceedings and further that once the indictment is filed in support of the extradition request it cannot be amended. Restraint proceedings are, therefore, not ordinary motion proceedings given the fact that they are intertwined with other proceedings.

[37] The defendants contended with all force and might that Iceland does not extradite its citizens to any country and granting the leave sought by the PG will be academic. In the answering affidavit deposed by Mr Juliusso on behalf of the defendants, they aver that the failure by the PG to inform the court of the factual extradition situation is misleading and requires her to explain. To this, the PG replied that she is yet to file a formal extradition request and, therefore, cannot concede that Iceland will refuse the extradition request which they are yet to receive.

[38] I hold the view that the determination of the success or otherwise of the intended extradition request cannot be finally determined in these proceedings. I say so for the reason that there is no time frame set within which an extradition request must be made. This, however, does not provide the PG with the comfort to sit idle without

realising her intention to extradite the foreign directors. It is in the interest of the parties involved, the defendants included, and the interests of justice that the criminal proceedings and the restraint proceedings are finalised within a reasonable time and without undue delay.

[39] The PG's contention that the defendants' failed application to cross-examine her contributed to the delay of the matter as she could not update the court upon becoming aware of every event relating to extradition, appears to be reasonable. This, in my considered view, finds support from the fact that the defendants sought leave to cross-examine her on the request for extradition of foreign directors and the related preparation. I find that it is sound for the PG to have waited for the outcome of the application for referral to cross-examination before she could report on the progress made or the causes for the delay thereof, as such could have been the subject of cross-examination had the defendants' said application succeeded. To bring this matter to a close, soon after the defendants' application for referral to cross-examination was disposed of on 24 November 2022, she, in a joint status report filed by the parties dated 5 December 2021, informed the court of her intention to file this application. The promptness of notifying the court of the said intention counts in her favour.

[40] In respect to leave to file rule-compliant affidavits, the PG contends with no real contestation that she intends to introduce nothing new but simply rule-compliant affidavits regarding the authentication and translation of emails already filed of record. The defendants contend that the PG failed to explain why the authentication was not carried out earlier. The PG indisputably stated that she depended on the Icelandic authorities to provide her with the rule-compliant affidavits which were not available at the time of filing her replying affidavit. I find this explanation to be reasonable in accounting for the delay to file the affidavit and to launch this application. This explanation nullifies suggestions of *mala fides* or culpable remissness for not putting such documents earlier before court. This is in line with *Rally for Democracy (supra)*.

[41] I agree with the principle set out in *Meridien (supra)* cited by Mr Heathcote that willful default by a party may result in the court declining to grant the indulgence sought

by such party. This matter is, however, not at par with the facts of that matter. It is distinguishable to the present matter as in *casu*, the PG proffered a reasonable explanation, in my view, for withholding the present application as she depended on the Icelandic authorities to provide her with rule-compliant affidavits which were not available when she filed her replying affidavit.

[42] One critical factor to be considered in this application is the prejudice that may be caused to the defendants if the application is granted. I find that if the application is granted, the defendants will be afforded an opportunity to answer to the averments contained in the affidavit. I find, therefore, that no real prejudice will be suffered by the defendants which may not be met by an appropriate costs order.

[43] In view of the conclusions made above, I find that the PG provided a satisfactory explanation to nullify suggestions of *mala fides* or culpable remissness on her part for not filing or not putting the information sought to be produced before court earlier or filing this application earlier. Coupled with the established principle that the primary objective of the court's discretion is to serve the interests of justice,⁸ I find that the interests of justice in this matter support the request for the PG to update the court on the progress of the extradition request. This, I find, will avoid a situation where the court is seized with outdated information, whose correctness may be put into question, to determine an issue. That can surely not be in the interests of justice. In any event it appears, as stated earlier, that even the defendants sought an update on the extradition when they stated that the PG must explain the factual position of the extradition.

[44] As I draw curtains of this judgment to a close, I agree with Mr Heathcote that this is a matter that calls on the court to exercise its discretion judicially and not capriciously. Having considered the findings made herein above, the explanations made by the PG, the conclusion that the defendants will have an opportunity to answer to the averments made by the PG in the affidavit sought to be introduced, I am inclined to exercise the discretion in favour of granting the application.

⁸ *Prosecutor-General v Paulo and Another* 2017 NR 178 (HC) para 21. See also: *Gqwetha v Transkei Development Corporation Ltd and Others* [2006 \(2\) SA 603](#) (SCA) 609H-I, 611I-612B; 614J 615B, 615E F.

Conclusion

[45] In view of the finding and conclusions reached herein above, I am of the considered view that the PG succeeded to put up a case for the court to exercise its discretion in favour of granting the application. I, therefore, hold the view that, this is a matter where I should invoke the discretionary powers of the court and permit the PG to file a further affidavit as applied for in accordance with the provisions of rule 66(2).

[46] In the same vein, the defendants will have an opportunity to answer to the averments contained the affidavits sought to be filed, and this will equip the court with ample and recent information to determine the issues raised by the parties.

Costs

[47] It is settled law that costs follow the result. In *casu*, the PG sought an indulgence from the court and, as found above, provided an explanation that negates *mala fides* or culpable remissness on her part. The defendant engaged counsel to consider the PG's application and will most likely retain counsel to answer to the contents of the affidavit(s) that the PG seeks to file. It is inevitable that in all these instances the defendants incur legal costs. However, opting to oppose the application was a decision made by the defendants out of choice and their failure to succeed should not benefit them by an award of costs fully spent on such opposition.

[48] In my view, considering that the PG sought an indulgence from the court, and in the exercise of my discretion, there is no reason why the PG should not pay the costs of the defendants in this matter limited to interlocutory applications relating only to leave to file further affidavit for the inconvenience caused to the defendants.

[49] This being an interlocutory application that turns around a limited issue, I am of the considered view that rule 32(11) finds application to the matter and, therefore, the

award of costs should be capped in terms of the said rule. The costs to be awarded to the defendants will, therefore, be subject to rule 32(11).

Order

[50] In view of the foregoing findings and conclusions, I make the following order:

1. The applicant is granted leave to file further affidavit of Olyvia Martha Imalwa, together with that of Andreas Kanyangela and Erna Van der Merwe within 10 days of this order;
2. The applicant must pay the 17th to the 22nd defendants' costs of this interlocutory application, such costs to include costs of one instructing and two instructed counsel, subject to rule 32(11).
3. The matter is postponed to 16 November 2023 at 08:30 for a status hearing.
4. Parties must file a joint status report on or before 13 November 2023.

O S SIBEYA
JUDGE

APPEARANCES

APPLICANT: W TRENGOVE, SC
Assisted by Dr. S Akweenda
Instructed by the Office of the Government Attorney

SEVENTEENTH TO TWENTY-SECOND

DEFENDANTS: R HEATHCOTE, SC
Assisted by E Nekwaya
Instructed by Joos Agenbach Legal Practitioners, Windhoek