

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

RULING

CASE NO: HC-NLD-CIV-ACT-CON-2019/00178

In the matter between:

**AHMAD TAREK GOUDA
TAREK ABDELSALAM GOUDA
PLAINTIFF**

**FIRST PLAINTIFF
SECOND**

And

**TAMER IBRAHAIM MOHAMED HASSAN
ALPHA MEDICAL LABORATORY CC
ERF NINE ONE NIL OSHAKATI CC**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Neutral citation: *Gouda v Hassan* (HC-NLD-CIV-ACT-CON-2019/00178) [2021]
NAHCNLD 86 (14 October 2021)

Coram: Rakow J

Heard: 11 October 2021

Delivered: 14 October 2021

ORDER

1. The plaintiff's application for further discovery in terms of Rule 28 (8) is hereby dismissed.
2. The plaintiff is ordered to pay the defendant's costs in terms of rule 32(11) for this application.
3. The matter is postponed **to 8 November 2021 at 14:15** for Status hearing.
4. A joint status report to be filed on or before **03 November 2021**.

RULING

RAKOW J

Introduction

[1] Summons was issued in the present matter and the first defendant defended the action. The parties proceeded to judicial case management and the parties exchanged pleadings. On 1 October 2020, plaintiff dissatisfied with first defendant's discovery, applies to this Court for an order compelling the first defendant to file further discover in terms of Rule 28(8).

[2] The plaintiff requested the following documents to be discovered:

2.1. Copies of the CC1 and CC2 documents in respect of second and fourth defendants.

2.2 Financial Statements of second, third and fourth Defendants.

2.3 The previous 6-month bank statements of Second, Third and Fourth Defendants.

2.4 Any and all tax records for second, third and fourth defendants.

2.5 The previous 6-month municipal accounts for second, third and fourth defendants.

2.6 Copies of any loan agreements, overdraft facilities etc. of second, third and fourth defendant.

2.7 Minutes of any meeting of the members of second, third and fourth defendant.

2.8 Correspondence exchanged between plaintiffs and first defendant.

2.9 Copies of the title deeds in respect of second, third and fourth defendant.

[3] This is an application before the court however for ease of reference this court will address the parties as they are cited in the main action. The plaintiff in this matter is the plaintiff and the respondent is the first defendant. Where the plaintiff and the first defendant are referred to collectively they will be referred to as “the parties”.

[4] The plaintiff herein is represented by Mr J. Greyling and the first defendant is represented by Mr S. Aingura.

Background

[5] After the exchange of pleadings the plaintiff was disgruntled with the discovery made by the first defendant. The plaintiff held the opinion that there are documents in the possession of first defendant that he ought to discover. The defendant objected to the discovery on the basis that: the said documents are privileged and/or arose between legal practitioner and client and/or arose after litigation was contemplated and/or was drafted, written or obtained for the purposes of or by way of preparation for the pending case and/or was written without prejudice and/or was drafted, written or obtained for the purposes of obtaining the advice of our legal practitioners in regard to the pending case or to enable our legal advisors to defend and/or institute the said case.

Plaintiff's case

[6] The plaintiff's claim is premised upon an alleged agreement entered into between second plaintiff, for and on behalf of first plaintiff, and first defendant regarding the sale of member's interest. First plaintiff further filed an alternative claim for the objective value of first defendant's performance, which objective value was fixed without the benefit of the documents as sought in plaintiffs notice in terms of Rule 28(8).

[7] First defendant denies the existence of the agreement as referenced in the particulars of claim, first defendant further denies the objective value of first plaintiff's alternative claim. Plaintiffs contend in their founding and replying affidavit that they require the documentation to file witness statements and/or amend the particulars of claim.

[8] The plaintiffs states that the purpose of the documents so requested are to prove the objective value of the alternative claim alternatively to amend the objective value of the claim should it transpire from the documentation that the value is more or less than the claimed amount, they further state that they require the documentation to prove the reciprocal value of the various members interest held by the parties in the various CC.

[9] Plaintiffs are adamant that the documents would also assist to prove that the reasonable value of first plaintiff's member's interest, at that time, amounts to the claimed amount. They contend that the minutes of the meetings between the various CC's would also assist them to prove their contentions as contained in paragraph 8 of the particulars of claim, which first defendant has denied. First defendant further contends that the power of attorney assigned by first plaintiff is forged and/or fabricated.

[10] Plaintiffs further contend that in terms of section 56 of the Closed Corporations Act, Act 26 of 1988 that they are entitled to the documents so requested from first defendant. They further indicate that first defendant's contention that they file a separate application to request the documentation is not tenable.

[11] The plaintiffs concede that the documents that are privileged need not be discovered, however the grounds of the claim to privilege must be clearly stated unless they appear from the nature of the documents themselves. They further indicate that first defendant has failed to clearly state the grounds for the privilege in his supplementary affidavit and/or opposing affidavit.¹ They further submit that since the respondent indicated in his opposing affidavit that the documents are public documents and can be obtained at any office, they may not allege that the said documentation is privileged.

[12] The plaintiff submits that the first defendant opposes the production of the documents on the basis that the requested documents bear no relevance to the “crisp issues in dispute. They proceeded to cite the case of *Kanyama v Cupido*², where the Honorable Court held the following with regards to relevance, which this court cites with approval:

‘It is trite law the relevance is determined from the pleadings and not extraneously therefrom. Hence a party may only obtain inspection of documents relevant to the issues on the pleadings.’

First Defendant’s case

[13] It was first defendant’s submissions that the duty to discover materially lies in respect of material in a litigant’s possession which are relevant to the cause and which the other party intends to use at trial. The document and/or evidence sought must therefore be relevant.

[14] He further submits that the documents sought to be discovered must directly or indirectly enable either party to advance his own cause or to damage the cause of his adversary.³ In addition to relevance, the documents sought to be discovered must be proportionate to the needs of the case. The requirement that the documents

¹ *J & M Casino Consulting CC v United Africa Group (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/01344) [2019] NAHCMD 289 (07 August 2019).

² *Kanyama v Cupido* 2007 (1) NR 216 at p 220 par 15.

³ *Kanyama v Cupido* 2007 (1) NR 216 (HC) paragraphs 14 and 15.

must be both relevant and proportionate to the needs of the case is peremptory and accordingly a litigant seeking to compel discovery must establish that the documents sought are not only relevant to the matter in question but also proportionate to the needs of the case and not merely that they are documents relating to any matter in question.⁴

[15] The Court is entitled to reject discovery demands if the aforesaid onerous and peremptory requirement are not met.

[16] The first defendant contends that the plaintiffs do not allege in their founding affidavit that the documents demanded are relevant to the cause and are proportionate to the needs of the case. He further contends that the plaintiffs do not allege that the documents demanded will advance their case, or will be damaging to the first defendant's case.

[17] First defendant states that the plaintiffs does not explain the basis on which they are not able to file witness statements on the case pleaded. Neither is an explanation given with specific details as to how each and anyone of the demanded documents will assist the plaintiffs in their case as pleaded. The first defendant holds the opinion that the plaintiffs bring this application in order to amend their particulars of claim in order to introduce a new cause of action and by doing so is an indication that the documents are not relevant to the cause (now before Court) and that they are not proportionate to its needs.

[18] In conclusion first defendant submitted that the plaintiffs have failed to discharge its onus, alternatively that the application be dismissed on the basis that the document's required are not relevant to the cause and /or proportionate to its needs.

The legal principles applicable to discovery

⁴ *Telecom Namibia Ltd v Communications Regulatory Authority of Namibia and Others* 2015 (3) NR 747 paragraph 6. See also paragraphs 6 and 7 where Parker observed that as a result of the Namibian Rule imposing two requirements of relevance and proportionality, South African Authorities on the subject matter are to be approached with caution.

[19] Rules 28(1) and 28 (8) makes provision for discovery and further discovery respectively, which provides that:

‘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.

28(8) If a party believes that there are, in addition to documents, analogues or digital recordings disclosed under subrule (4), other documents including copies thereof or analogues or digital recordings which may be relevant to any matter in question in the possession of any other party and which are not repetitive or a duplication of those documents, analogue or digital recording already discovered –

(a) the first named party must refer specifically to those documents, analogues or digital recordings in the report in terms of rule 24 on Form 11; and

(b) the managing judge must at the case management conference give any direction as he or she considers reasonable and fair, including an order that the party believed to have such documents, analogues or digital recordings in his or her possession must –

(i) Deliver the documents, analogues or digital recordings to the party requesting them within a specified time; or

(ii) state on oath or by affirmation within 10 days of the order that such documents, analogues or digital recordings are not in his or her possession, in which case he or she must state their whereabouts, if known to him or her.’ (Own emphasis)

[20] 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*⁵ by Silungwe J has been widely accepted and applied by our courts. In the case of *Rellams (Pty) Ltd v James Brown & Hamer Ltd*⁶ also referred to by Silungwe J it was held that, which this court cites with approval that:

⁵ *Kanyama v Cupido* 2007 (1) NR 216 (HC) para 14.

⁶ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

'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."

[21] In *Kanyama v Cupido*⁷, 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.'

[22] Prinsloo J, in the matter of *J & M Casino Consulting CC v United Africa Group (Pty) Ltd*⁸, stated that:

'Respondent also claims confidentiality in respect of some documents and that the documents relate to a third party, not cited as a party to the proceedings and are therefore privileged information and for reasons stated⁹ cannot be disclosed. The reasons advanced by the respondent cannot be sufficient to constitute privilege. The respondent must clearly indicate the reason(s) for such privilege'. (Own emphasis)

Application of the law to the facts

[23] I will begin in assessing the nature of the claim as tendered by the plaintiff in its particulars of claim, in order to determine relevance of the documents sought to

⁷ Supra, note 5 para 15.

⁸ *J & M Casino Consulting CC v United Africa Group (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/01344) [2019] NAHCMD 289 (07 August 2019), para 23 at page 10.

⁹ Confidential company documents and documents of the third party.

be discovered. The plaintiffs claim is based on an alleged settlement agreement where an offer was made to the plaintiff by the first defendant to buy the shareholding of plaintiff in second defendant. Plaintiff in turn accepted this offer however same did not materialise. There was no letter of undertaking received from the first defendant. The plaintiff claims specific performance in this regard.

[24] In the alternative first plaintiff sought damages in the amount of N\$ 3 000 000 000 which he claims is an objective, fair and reasonable award to place him in the same position as if first defendant complied with his reciprocal obligations and if so awarded, first plaintiff tenders his portion of member's interest held in second defendant to first defendant.

[25] With the above mentioned I believe that I have encompassed all the claims in the particulars of claim of which the discovery is sought. The further motives that arise are merely set out in the application for discovery and thus do not form part of the initial claim as set out in its particulars.

[26] I agree with Prinsloo J¹⁰, when she stated that with regard she agrees that in determining relevance when it comes to reasonably supposing that the discovery of documents in issue may and not must directly or indirectly enable a party to advance his or her or its own case or damage that of his or her or its opponent. A party to a proceeding must fully discover in order for the whole truth to surface, by so doing, helping in the just determination of the case. Discovery also assists in bringing out the real issues in dispute between the parties, which in the result will narrow the said issues. This will avoid parties arguing over issues that could have been resolved and/or narrowed in the circumstances were full disclosure was made.

[27] The list of documentation to be discovered in this court's view do not assist the plaintiffs in their claims as they currently stand pleaded before the court. I must agree with the sentiments as expressed by the first defendant that the plaintiffs do not explain the basis on which they are not able to file witness statements on the

¹⁰ *J & M Casino Consulting CC v United Africa Group (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/01344) [2019] NAHCMD 289 (07 August 2019) para 19, page 9.

case pleaded. Neither is an explanation given with specific details as to how each of the demanded documents will assist the plaintiffs in their case as pleaded.

[28] I agree in totality with the defendant when they state that the plaintiffs are on a fishing expedition to formulate a new cause of action and this court cannot allow the plaintiffs to use this platform to formulate new cause of actions. The documents as requested are not relevant to the cause and thus in terms of rule 28(8) are not proportionate to its needs.

[29] It is thus evident that the plaintiff failed to discharge the onus in respect of the issue of relevance or that the discovery is proportionate to its cause.

Costs

[30] On the issue of costs the plaintiffs requested that they be granted a cost order not capped by Rule 32 (11).

[31] However I see no reason why I should deviate from rule 32 (11) to order costs above the set threshold for either party. No special circumstances exists for the court to make such a ruling. In the result the costs is awarded to the first defendant in terms of rule 32(11).

Conclusion

[32] Therefore in light of the aforementioned discussion this court is of the view that the plaintiff failed to make out a proper case warranting the granting of the relief which it seeks.

[33] I therefore make the following order:

1. The plaintiff's application for further discovery in terms of Rule 28 (8) is hereby dismissed.
2. The plaintiff is ordered to pay the defendant's costs in terms of rule 32(11) for this application.

3. The matter is postponed **to 8 November 2021** at **14:15** for Status hearing.
4. A joint status report to be filed on or before **03 November 2021**.

E Rakow
Judge

