REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 448/2013

In the matter between:

TELECOM NAMIBIA LTD	**APPLICANT**
and	
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA	**FIRST RESPONDENT**
THE MINISTER OF INFORMATION AND COMMUNICATIONS TECHNOLOGY	**SECOND RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**THIRD RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**FOURTH RESPONDENT**

Neutral citation: *Telecom Namibia Ltd v Communications Regulatory Authority of Namibia* (A 448/2013) [2015] NAHCMD 66 (19 March 2015)

Coram: PARKER AJ
Heard: **19 February 2015**
Delivered: **19 March 2015**

Flynote: Practice – Applications and motions – Discovery and inspection in motion proceedings – Application in terms of rule 70(3) – Rule applicable in only exceptional circumstances – Additionally applicant must establish that documents sought to be discovered and inspected are (a) relevant to the matter in question and

(b) proportionate to the needs of the case – 'Relevant to' and 'proportionate to' explained – Where applicant has not established that (a) exceptional circumstances exist, (b) the documents are relevant to the matter in question and (c) the documents are proportionate to the needs of the case the application has failed to discharge onus cast on application must be refused – In the instant case applicant failed to discharge the onus cast on it – Consequently, application dismissed with costs.

Summary: Practice – Applications and motions – Discovery and inspection in motion proceedings – Application in terms of rule 70(3) – Rule applicable in only exceptional circumstances – Additionally applicant must establish that documents sought to be discovered and inspected are (a) relevant to the matter in question and (b) proportionate to the needs of the case – 'Relevant to' and 'proportionate to' explained – Where applicant has not established that (a) exceptional circumstances exist, (b) the documents are relevant to the matter in question and (c) the documents are proportionate to the needs of the case the application has failed to discharge onus cast on application must be refused – Court found that documents sought to be discovered did not have a bearing on, that is were not relevant to, the matter in question – Matter concerned challenge of constitutionality of legislation and subordinate legislation and declaration as to retrospectively or non-retrospectivity of subordinate legislation and as to when and on what respondent may impose levies affecting applicant – Court found therefore that considering the needs of the case the documents are not proportionate to those needs – Court also found that applicant failed to establish that exceptional circumstances exist for rule 70(3) to apply – Consequently, application dismissed with costs.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] The instant proceeding is an interlocutory proceeding in relation to an application that the applicant launched on 9 December 2013 in which it seeks relief in terms of the notice of motion ('main application'). The interlocutory application that was launched by 'notice of application' on 13 March 2014 seeks the relief set out in the 'notice of application'. It is basically an application to compel the first respondent, a statutory regulatory body, to discover and provide the applicant with the documents listed in para 1 of the notice of application. The applicant prays the court to compel discovery and inspection of the documents to enable it to file a replying affidavit in the main application. The first respondent is a State-owned enterprise (SOE), and it has moved to oppose the application. At the commencement of his submission Mr Heathcote SC (with him Ms Van der Westhuizen), counsel for the applicant, informed the court that the applicant was not pursuing discovery of some of the documents.

[2] In his submission, Mr Coleman (with him Mr Maasdorp), counsel for the first respondent, submitted that the instant application 'is an application where the applicant has to show extraordinary circumstances'. I shall come to this submission in due course. Counsel also asks the court 'to make a ruling on which discovery rules are now applicable in the light of the provisions of rule 138 of the rules of court that came into operation on 16 April 2014'. In that regard Mr Coleman argues that rule 28 'does not contain an equivalent of the old rule 35(12) and, therefore, the old rule should not apply'. I do not agree.

[3] I note that rule 35(12) of the repealed rules contains two sentences. The essence and materiality of the first sentence have been captured in the formulation of subrule (1) of rule 28, and the other sentence has been rehearsed in subrule (2) of rule 28 of the rules. Furthermore, rule 35(13) of the repealed rules has been rehearsed in rule 70(3) of the rules.

[4] Rule 138, which Mr Coleman referred to in his submission, should not be read in isolation. It is an aspect of the canons of interpretation of legal instruments that

individual provisions of a particular legislation, for example, should not be read in isolation. An individual provision should be read intertextually with other relevant provisions of the particular legislation in order to arrive at the correct interpretation of the individual provision. Therefore, in the instant proceeding, rule 138 should be read intertextually with rule 3(6) and rule 70(3) of the rules.

[5] The interlocutory application to compel discovery was issued from the office of the registrar on 13 March 2014, as I have said previously, and the rules of court came into operation on 16 May 2014. Reading rule 3(6) intertextually with rule 138(a), as I should, and recalling what I have said in para 3, above, concerning rule 35(12) and (13) of the repealed rules and rule 28(1) and (2) and rule 70(3) of the rules, I rule in words of one syllable that the discovery rules applicable in the instant proceeding is rule 28 of the rules. Rule 28 provides for discovery rules generally and rule 70(3) makes rule 28 applicable to discovery in motion proceedings; but in motion proceedings an applicant must satisfy the court that exceptional circumstances exist. (*Kauaaka and Others v St Phillips Faith Healing Church* 2007 (1) NR 276) I, accordingly, accept Mr Coleman's submission on the point. In addition to that, the applicant must satisfy the twin requirements prescribed in rule 28(1), namely, that the documents required are documents '*that are relevant* to the matter in question' and '*that are proportionate* to the needs of the case'. (Italicized for emphasis)

[6] In this regard it is important to note that unlike the provision in the repealed rule 35(1) 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 matter 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 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, as aforesaid.

[7] All this leads inevitably to the conclusion that the authorities in South African cases on rule 35(1) of the repealed rules as to the requirement of relating to therein are of no assistance when interpreting and applying rule 28(1) of the rules of court.

[8] On the meaning of 'revelance' G D Nokes in his work *An Introduction to Evidence*, 4th ed. (1967) at p 82 states:

'Thayer (*A Treatise on the Law of Evidence*, 12th ed Reprinted 1948) asserted that "the law furnishes no test for 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.'

Having adopted these pronouncements, I hold that the words 'relevant to the matter in question' in rule 28(1) of the rules denote documents having any tendency in reason to establish the matter in question.

[9] In the instant case, the matter which the applicant has called on the first respondent (and the rest of the respondents) to meet is what is set out in the notice of motion. In this regard, it is trite that an applicant must make out his or her case in its founding papers and that such papers are a combination of pleadings and evidence; and an applicant cannot merely set out a skeleton case in the founding papers and then fortify this in reply. (*Transnamib Ltd v Inacor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (SWA) Ltd and Another Intervening* 1994 NR 11)

[10] Thus, in the instant proceeding the matter in question is, as I have said previously, as set out in the notice of motion in the main application. It is -

'(a) that the Regulations Regarding Administrative and Licence Fees for Service Licences No 311 of 2012 ("the Regulation"), published by Government Gazette No 5037 on 13 September 2012, be declared unconstitutional and/or null and void, alternatively, and in the event of being found, that section 23 of the Communications Act, 8 of 2009 (together with the Regulation) be declared unconstitutional and/or null and void.

(b) In the alternative to prayer 1 above, declaring:

(i) that the Regulations Regarding Administrative and Licence Fees for Service Licences No 311 of 2012, published by Government Gazette No 5037 on 13 September 2012 do not operate retrospectively; and

(ii) that regulatory levies imposed by the aforesaid Regulations can only be imposed against the applicant in respect of turnover generated from 13 September 2012 and beyond.'

[11] Paragraph 1 of the notice of motion is a constitutional challenge aimed at impugning the constitutionality of a statutory provision. There are two alternative prayers to para 1: the first (in para (i)) seeks an order declaring that the aforementioned regulations do not operate retrospectively; and the second seeks an order declaring that the regulatory levies imposed by the aforementioned regulations can only be imposed against the applicant in respect of turnover generated by the applicant – significantly, not by the first respondent – from 13 September 2012 and beyond. This is the sum total of 'the matter in question' in the main application.

[12] Considering the matter, with respect, I fail to see how the requirements of art 18 is invoked in support of the interlocutory application where may be the matter does not concern an application to review the acts of the first respondent, and, in which event, the applicant would have been entitled to the records relating to the doing of such acts, as Mr Coleman submitted. For this reason, I do not think the Basu 'doctrine of gradual and stealthy encroachment' on constitutional rights (see Acharya Dr Durga Basu, *et al*, *Commentary on the Constitution of India*, 8th ed (2007), p 901), referred to the court by Mr Heathcote, is of any assistance on the point under consideration.

[13] The applicant says the documents are relevant; the first respondent says they are not and that the applicant requires the documents not to enable it to reply to the answering affidavit but to make an alternative case. I must signalize the point that the first respondent bears no onus to show that the documents are irrelevant. It is the applicant which must establish to the satisfaction of the court three things, namely,

that the documents are relevant to the matter in question, that they are proportionate to the needs of the case and also that exceptional circumstances exist for the rule on discovery to apply in this motion proceeding. In the absence of such satisfaction the applicant cannot succeed.

[14] I have carefully considered the matter, which I have indicated previously, I have also pored over the founding papers and the answering papers (in the main application). Having done that, I come to the inevitable conclusion that the applicant has failed to establish that the documents required have 'any tendency in reason to prove any material fact' in the matter in question, or that have 'appreciable probative value' in the determination of the matter in question (see *Black's Law Dictionary*), 3rd Pocket ed). By a parity of reasoning, I also find that the applicant has failed to establish to the satisfaction of the court that the documents required are proportionate to the needs of the case which, as I have said more than once, is primarily a challenge that certain provisions of the legislation and the subordinate legislation are not Constitution compliant, and, in the alternative, declaratory orders. The needs of the case are what are required to make a case, considering the nature of the matter and the circumstances of the case, that is, the exigencies of the case.

[15] In the instant case, as I have said previously, the applicant does not require any of the documents to be able to show that certain provisions of the legislation or the subordinate legislation (ie the regulations) made thereunder are unconstitutional or in order to persuade the court to declare that the aforementioned regulations should not operate retrospectively or to declare that the regulatory levies imposed by the aforementioned regulations can only be imposed against the applicant in respect of turnover generated from 13 September 2012 and beyond by the applicant. On this basis, I conclude that the documents required are not proportionate to the needs of the case. By a parity of reasoning, I do not find that exceptional circumstances exist, and none was shown by Mr Heathcote to exist, which would call for discovery in the present motion proceeding, that is, for rule 70(3) of the rules to apply.

[16] Based on these reasons, I conclude that it is reasonable and safe to refuse the interlocutory application on the basis that the applicant has failed to discharge the onus cast on it in order to succeed.

[17] One last word; Mr Coleman submitted that the applicant gave no notice as required by the repealed rule 35(12); nor did it apply to the court to condone such failure before the applicant delivered the interlocutory application. I have said previously that the rules of court (that came into operation 16 April 2014) apply to the present proceeding, and so, it is rule 32(9) and (10) of the rules that apply; and rule 32(9) and 910) are peremptory and non-compliance with these rules is fatal. (*Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015) (Unreported))

[18] Despite *Mukata*, I decided to hear this interlocutory application because the point was not raised when hearing of the application was set down; and, more important, Mr Coleman did not raise it in reference to rule 32(9) and (10). If counsel had done that, it would have prompted the court to ask both counsel to address the court on the issue. Based on these reasons, I do not think it would have been fair to have refused to hear the interlocutory application.

[19] In the result, I make the following order:

> The application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

C Parker
Acting Judge

APPEARANCES

APPLICANT :	R Heathcote SC (assisted by C E Van der Westhuizen) Instructed by Shikongo Law Chambers, Windhoek
FIRST RESPONDENT:	G Coleman (assisted by R Maasdorp) Instructed by AngulaColeman, Windhoek
SECOND RESPONDENT:	No appearance
THIRD RESPONDENT:	No appearance
FOURTH RESPONDENT:	No appearance