

SCHEDULE A

Filed by:

JOOS AGENBACH ATTORNEY & Managing Judge: Hon. MR JUSTICE SIBEYA

NOTARY

Hearing Date: 28 September 2021 at 14:00

Legal Practitioner for 17th to 22nd **Roll Type:** Status Hearing

Defendants

2nd Floor, 37 Schanzen Road

Windhoek

IN THE HIGH COURT OF NAMIBIA

(Main Division)

Case No. HC-MD-CIV-MOT-POCA-2020/00429

In the application of

THE PROSECUTOR-GENERAL

APPLICANT

against

RICARDO JORGE GUSTAVO

FIRST DEFENDANT

TAMSON TANGENI HATUIKULIPI

SECOND DEFENDANT

JAMES NEPENDA HATUIKULIPI

THIRD DEFENDANT

SACKEUS EDWARDS TWELITYAAMENA SHANGHALA

FOURTH DEFENDANT

BERNHARDT MARTIN ESAU

FIFTH DEFENDANT

PIUS NATANGWE MWATELULO

SIXTH DEFENDANT

NAMGOMAR PESCA (NAMIBIA) (PTY) LTD

SEVENTH DEFENDANT

ERONGO CLEARING AND FORWARDING CC

EIGHT DEFENDANT

JTH TRADING

NINTH DEFENDANT

GREYGUARD INVESTMENT CC

TENTH DEFENDANT

OTUAFIKA LOGISTICS CC

ELEVENTH DEFENDANT

OTUAFIKA INVESTMENT CC

TWELFTH DEFENDANT

FITTY ENTERTAINMENT CC

THIRTEENTH DEFENDANT

TRUSTEES OF CAMBADARA TRUST

FOURTEENTH DEFENDANT

OLEA INVESTMENT NUMBER NINE CC

FIFTEENTH DEFENDANT

TRUSTEES OF OMHOLO TRUST

SIXTEENTH DEFENDANT

ESJA HOLDING (PTY) LTD

SEVENTEENTH DEFENDANT

MERMARIA SEAFOOD NAMIBIA (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 against

NDAPANDULA JOHANNA HATUIKULIPI

FIRST RESPONDENT

SWAMMA ESAU
AL INVESTMENT NO FIVE CC
OHOLO TRADING CC
GWAANILONGA INVESTMENTS (PTY) LTD

SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

**NOTICE OF APPLICATION TO STRIKE OUT
(Rule 58 (1))**

KINDLY TAKE NOTICE that the 17th to 22nd defendants will apply on a date to be directed by the managing judge in terms of Rule 58(4), for the striking out of certain paragraphs from the applicants' founding affidavit and replying affidavit (fully particularised below) on the grounds that the allegations contained therein:

- (a) contains inadmissible hearsay evidence.
- (b) The replying affidavit impermissibly seek to introduce new allegations which should have appeared in the founding affidavit
- (c) If the allegations and/or paragraphs sought to be struck out in both founding affidavit and replying affidavit of Martha Olivia Imalwa, are not struck , their presence will violate 17th to 22nd defendant's substantive and procedural fair trial rights as guaranteed in Article 12 of the Constitution.

KINDLY FURTHER TAKE NOTICE that the 17th to 22nd defendants will be prejudiced in the conduct of their defence in the main application if this application is not granted.

A. AD FOUNDING AFFIDAVIT OF MARTHA OLIVIA IMALWA

1. Affidavits of Johannes Stefansson (inclusive of annexures) *in toto*.¹

1.1. Johannes Stefansson is a primary witness in the main application

1.2. Johannes Stefansson will not come to testify at the criminal trial, or the probability that he will come to Namibia to testify at the criminal trial is so slim, that it would constitute a breach of 17 - 22 defendant's rights if the applicant is entitled to rely on his evidence for purposes of determining the main application.

1.3. The affidavit also contains inadmissible hearsay, which is also, irrelevant, and scandalous, and if permitted to remain as evidence to be taken into account by the Court in the main application, will deprive the 17 -22 defendants of a fair trial in the main application.

B. AD REPLYING AFFIDAVIT OF MARTHA OLIVIA IMALWA

2. Paragraphs 34 (inclusive of sub – paragraphs) in toto, as the well as the documents described as emails in those paragraphs.

2.1. The PG impermissibly relies on such evidence introduced for the first time in the affidavit of Abraham Nikolous Ihalua.

2.2. the documents were in possession of the PG when the main application was served. The documents were accordingly deliberately kept back when the founding affidavit was signed.

2.3. The documents were executed outside Namibia without complying with Rule 128 of Rules of Court. In that,

¹ Annexure KPC1 pp 636 – 655; pp 1883 – 1908.

2.3.1. The emails are documents executed in any country outside Namibia.

2.3.2. They are not duly authenticated for the purpose of use in Namibia.

2.3.3. They are not accompanied by a certificate of authorisation issued by a competent authority in that foreign country to that effect.

2.4. The emails attached to the affidavit of Abraham Nikolous Ihalua are allegedly translated without complying with rule 126 of Court.

2.5. In terms of the certificate accompanying the alleged translations, parts of the documents "shown to me were in English. Those parts have been left unaltered."

2.5.1. The translations are not accompanied by reliable versions complying with the Computer Evidence Act.

2.5.2. The translation does not disclose which parts of the documents "shown to me" were in English and left unaltered.

2.5.3. The documents were - on the face of the numbering contained on them - picked and chosen from a number of other documents, without the other documents being disclosed or discovered or provided to the court for proper context. All this in reply, which threatens 17-22 defendants fair trial right in the main application.

3. Affidavit of Abraham Nikolous Ihalua *in toto*. Alternatively, paragraphs 8 to 18 (inclusive of annexures referred in the paragraphs:

3.1. The affidavit contains new evidence or material.

3.2. The PG must make her case and produce all the essential evidence in the founding affidavit. She did not. The documents are also not linked to a particular allegation in the answering affidavit. It is just a bunch of impermissible paper.

3.3. The evidence is first brought to light by the PG in replying affidavit who knew of it at the time when his founding affidavit was prepared.

4. Paragraph 6 of Abraham Nikolous Ihalua's affidavit (inclusive of annexures "ANI1" – "ANI13").

4.1. These documents irrelevant and prejudicial to 17 -22 defendants' case in the main application as the warrants of arrest against the persons named in the warrants, relate to charges against them in their personal capacities, and are irrelevant to the requirements of the restraint order sought in the main application in terms of the provisions of POCA.

4.2. Attaching these warrants are also vexatious and frivolous, as well as prejudicial, as the P.G. knows they are only executable in Namibia.

4.3. They do not constitute an answer to the dispute between the parties about the presence - or not - of the 17 -22 defendants in the envisaged criminal trial.

5. Paragraphs 7 to 8 Abraham Nikolous Ihalua's affidavit (inclusive of annexure "ANI4" to "ANI19").

5.1. The paragraphs impermissibly contain new evidence or material.

5.2. Annexure "ANI14" to "ANI19" do not comply with the requirements of Rule 128 of Court. In that,

5.2.1. The annexures are documents executed in any country outside Namibia.

5.2.2. They are not duly authenticated for the purpose of use in Namibia as required in terms of rule 128(2) of Court.

5.2.3. They are not accompanied by a certificate of authorisation issued by a competent authority in that foreign country to that effect.

5.3. In terms of the certificate accompanying the alleged translations, “parts of the documents shown to me were in English. Those parts have been left unaltered.”

5.4. The translation does not disclose which parts of the documents “shown to me” were in English and left unaltered.

DATED at WINDHOEK on this 25th day of August 2021



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