

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING ON LEAVE TO AMEND**

**Case no:** HC-MD-CIV-ACT-DEL-2022/00801

INT-HC-AMDPLEA-2023/00414

In the matter between:

**ALTA VAN WYK**

**FIRST PLAINTIFF**

**GERHARD VAN WYK JR**

**SECOND PLAINTIFF**

**MICHELLE VAN WYK**

**THIRD PLAINTIFF**

**LIANI VAN WYK**

**FOURTH PLAINTIFF**

and

**HARVEY ERIC BOULTER**

**FIRST DEFENDANT**

**SX INVESTMENTS ONE (PTY) LTD**

**SECOND DEFENDANT**

**Neutral citation:** *Van Wyk v Boulter* (HC-MD-CIV-ACT-DEL-2022/00801) [2024]

NAHCMD 102 (11 March 2024)

**Coram:** SIBEYA J

**Heard:** 16 February 2024

**Delivered:** 11 March 2024

**Flynote:** Interlocutory – Amendment of pleadings – Plaintiffs sought to amend their particulars of claim – The defendants opposed the intended application – Court found that the proceedings are still at infancy stage and no prejudice will be caused to the defendants which cannot be cured by a costs order – The issue of non-joinder was not properly raised as a ground for lack of *locus standi* by the plaintiffs, and can still be raised as a special plea – Intended amendment upheld – The plaintiffs are ordered to compensate the defendants for wasted costs and any prejudice caused.

**Summary:** The plaintiffs sued the defendants for damages, loss of support and maintenance emanating from the death of late Mr van Wyk and the alleged termination of employments contracts. The plaintiffs brought an application to amend their particulars of claim. The defendants objected thereto on the grounds, inter alia, that the plaintiffs failed to cite the executor of the estate of the late Mr van Vyk, while reliance is placed on the said estate in the particulars of claim. It was further contended by the defendants that the exception filed earlier by the defendants destroys the plaintiff's application to amend as same is not cured by the amendment. The defendants further contend that the plaintiffs' failure to particularise the specific defendant referred to in the notice to amend further makes the notice to amend objectionable.

*Held* – The issue of non-joinder of the executor of the estate of the late Mr van Wyk was not raised in the answering papers of the defendants and is, therefore, tantamount to trial by ambush to raise such a central issue only in arguments. The court further found that non-joinder can be raised as a special plea, thus the defendants are not closed out of court but still has room to raise it when they file their plea.

*Held that* – The hearing of an application to amend should not degenerate into a hearing of an exception particularly, where the exception is arguable.

*Held further that* – Given the inter-relationship between the defendants, the plaintiffs were justified to refer to the defendants in the manner that they preferred.

*Held* – The objections raised against the application to amend lack merit, therefore the application for leave to amend the particulars of claim is granted.

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## ORDER

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1. The plaintiffs' application for leave to amend their particulars of claim, as set out in their notice of intention to amend in terms of rule 52 dated 16 June 2023, is granted.
2. The plaintiffs must file their amended particulars of claim on or before 18 March 2024.
3. The plaintiffs, must jointly and severally, the one paying the other to be absolved, pay the defendants' taxed costs for opposing the application, capped in terms of rule 32(11).
4. The matter is postponed to 28 March 2024 at 08h30 for an additional case planning conference.
5. Parties must file their joint case plan on or before 25 March 2024.

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## RULING ON THE APPLICATION FOR AMENDMENT

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SIBEYA J:

Introduction

[1] Presently submitted to this court for determination is an opposed application to amend the particulars of claim filed. The question primarily requiring the court's answer is this – have the plaintiffs made out a case for the relief that they seek?

#### Parties and their representation

[2] The plaintiffs are Ms A van Wyk; Mr G van Wyk; Ms M van Wyk and Ms L van Wyk. They are all adult persons.

[3] The first defendant is Harvey Eric Boulter, an adult businessman, a shareholder and director of the second defendant, whose place of residence is Farm Kaross 237, Kamandjab, Namibia. The first defendant will be referred to as 'Mr Boulter'.

[4] The second defendant is SX Investments One (Pty) Ltd, a company duly incorporated according to the laws of the Republic of Namibia, with its principal place of business situated at Farm Kaross 237, Kamanjab, Namibia. The second defendant will be referred to as 'SX'. Where it is necessary to refer to the first and second defendants jointly, they shall be referred to as 'the defendants'. Where reference is made to both the plaintiffs and the defendants, they shall be referred to as 'the parties'.

[5] The plaintiffs are represented by Mr van Vuuren while Mr Namandje and Mr Amoomo appear for Mr Boulter and SX, respectively.

#### Background

[6] The plaintiffs issued summons against the defendants for a wide range of claims, including, but not limited to damages and claims for loss and support. The defendants, after defending the matter, raised exceptions that the particulars of claim are vague and embarrassing to such an extent that the defendants cannot plead thereto.

[7] The plaintiffs, in an attempt to correct the particulars of claim, ran into trouble by not adhering to the timelines granted by the court to file the specific papers in line with the proposed amendment. The plaintiffs then filed a condonation application, which was met with resistance by the defendants, just as the case in this current application before court. The court pronounced itself in this instance and allowed the plaintiffs to file the papers by uplifting the bar operating against them. The plaintiffs proceeded to file the amendment application which is again, as stated above, met with much resistance from the defendants.

#### The plaintiffs' case and arguments

[8] The plaintiffs contend that the amendments to be made to the particulars of claim are aimed at clarifying certain aspects and may be categorised as follows:

- a. Clarifying the representative capacity of the first defendant *apropos* the second defendant, a juristic entity and the first defendant's *alter ego*;
- b. Clarifying the temporal extent of harm in respect of which contractual damages are claimed;
- c. Clarifying the nature and extent of the contractual claim of unlawful dismissal, by or on behalf of the second defendant;
- d. Clarifying the first defendant's liability in causing harm through the unlawful killing of the deceased; and
- e. Commensurate amendments to the prayers.

[9] The plaintiffs contend that the first defendant raises issues to frustrate the process of amending the particulars of claim. The plaintiff then, pound for pound, dealt with all objections from both defendants, which the court will not repeat in this judgment.

However, the overall point that stands out is that the plaintiff avers that the objections raised by the defendants are unnecessary as the defendants can still plead to the allegations raised by the plaintiff in the particulars of claim that they seek to amend.

[10] It is further the plaintiffs' case that this matter is at infancy stage and there is no prejudice to be suffered by the defendants if the court grants the plaintiffs leave to amend. It is further the plaintiff's case that the defendants' respective pleas have not even been filed, thus, it does not really change the circumstances of the case.

[11] Mr van Vuuren argued that it appears that the defendants rely on the content of their exceptions filed before in this matter to challenge the amendments sought. Such exceptions were however not raised in their answering affidavits. He insisted that the court is only seized with what is filed in the interlocutory application and the exceptions are not part thereof.

#### The first defendant's case and arguments

[12] The first defendant contends that the notice to amend still does not cure the defects of the particulars of claim that was complained about in the exceptions filed earlier. The first defendant contends that the first plaintiff instituted the action in her private capacity, yet in some aspects appears to be acting for the estate of the deceased, while the executor of the deceased's estate is not party to the proceedings. It is further stated that the plaintiffs proceed to make allegations on behalf of the estate, without the executor being involved.

[13] Mr Namandje argued that the failure to join the executor to the proceedings affects the *locus standi* of the plaintiffs. He invited the court to consider the absence of the executor in the proceedings not as a non-joinder but of so much significance that it results in the plaintiffs being without the necessary *locus standi* to institute these proceedings.

[14] The first defendant also contends that it is not clear under paragraph 28 of the particulars of claim as to who is alleged to have employed first plaintiff. This is attributed to the alleged vagueness of whether the employer was the first or second defendant. It is further the first defendant's case that the allegations made that the second defendant terminated the employment agreement was inconsistent with the fact that the plaintiffs also allege that the employment relationship was with the concerned plaintiffs and the first defendant.

[15] The first defendant, in his answering affidavit deposed to, averred that the amendment sought by the plaintiffs prolongs the proceedings and delays the finalisation of the matter to the prejudice of the defendants. He contended further that the particulars of claim remain flawed on the basis of the objections raised and the grounds of the exception raised in the already filed exception. The amendments sought, therefore, do not cure the defects in the particulars of claim.

[16] Mr Namandje argued that the particulars of claim were still vague and embarrassing and could not be pleaded to, and that the first defendant's objections to the intended amendment must succeed with costs.

#### The second defendant's case and arguments

[17] The second defendant, in its written objections, insisted that the legal practitioner who signed the notice of motion seeking the amendments to the particulars of claim on behalf of the plaintiffs is not a legal practitioner practising in this court and, therefore could not have signed the said notice. The plaintiffs argued that the said notice of motion was signed by Mr Florian Beukes, who is a legal practitioner practising as such in this court. During oral arguments, Mr Amoomo did not pursue the aforesaid second defendant's contention. I say no further on the subject.

[18] The second defendant further contended that the plaintiffs failed to file confirmatory affidavits of the second to fourth plaintiffs to the founding affidavit filed in support of the application to amend. The said confirmatory affidavits were subsequently

filed albeit belatedly and Mr Amoomo thereafter did not persist with this ground of objection, correctly so in my view.

[19] The second defendant further joined forces with the first defendant in the contention that the executor of the deceased estate has not been joined as a party to the proceedings while the executor has an interest in the matter. Mr Amoomo argued that allowing the amendment will unnecessarily prolong the matter as the plaintiff may have to join the executor at a later stage. Mr Amoomo argued that the objection raised by the second defendant, must succeed with costs.

#### The plaintiffs in reply

[20] In reply, Mr van Vuuren submitted that upon perusal of the papers filed in this matter, it became apparent that the issue regarding the executor is raised on the basis of non-joinder and not *locus standi*.

[21] Mr van Vuuren reminded the court of the discretion that it should exercise in this matter. He further submitted that, *in casu*, it is the plaintiffs that seek an indulgence from the court. The plaintiffs, in their application to amend, called for their application to succeed with costs. During arguments, however, Mr van Vuuren submitted that if the application is to succeed, the plaintiffs must pay the wasted costs of the defendants in view of the indulgence sought.

#### The law and analysis

[22] A full bench of this court in *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*<sup>1</sup>, considered the approach to amendments in terms of the Rules of Court, and Damaseb JP who wrote for the court remarked as follows regarding a late amendment sought:

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<sup>1</sup> *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).



[44] Although as I point out later, I am in general agreement with the approach that late amendments and revision of pre-trial orders must be discouraged, I wish to caution that it should not be elevated to a rule of law and that each case must be considered on its facts. If a bona fide mistake had been made by a lawyer in correctly representing the client's version in the pleadings or the pre-trial order, it would be manifestly unjust to hold the party to a version which does not reflect the true dispute between the parties. But that is by no means the end of the matter as the very fact of the alleged mistake and the subsequent attempt to change front may well go to the merits of the matter overall in that a finding that it was not bona fide could well undermine a party's case and strengthen the probabilities in favour of the opponent...

[49] The unchanged position under the rules of court at the time the matter was argued and now is that an amendment may be granted at any stage of the proceeding and that the court has discretion in the matter, to be exercised judicially. The common law position that a party may amend at any stage of the proceedings as long as prejudice does not operate to the prejudice of the opponent remains, save that, like every other procedural right, it is also subject to the objectives of the new judicial case management regime applicable in the High Court. That includes the imperative of speedy and inexpensive disposal of causes coming before the High Court...

[55] Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judicially. An amendment may be brought at any stage of a proceeding. The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings. Although concessions made in a pre-trial order are binding on a party, being an admission, they can be withdrawn on the same basis as an admission made in a pleading. Facts admitted in case management orders are not that easily resiled from than those in pleadings: that is so because a legal practitioner is presumed, because of the new system which requires them to consult early and properly, to have done so and committed a client to a particular version only after proper consultation and instructions. That presumption entitles the opponent to rely on undertakings made by the opponent and to plan its case accordingly. A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought... If the proposed amendment is justified on the ground that it arose from a mistake, the

mistake relied on must be bona fide and will only be allowed if good grounds exist for allowing the amendment.'

[23] For as long as the prejudice, if any, caused to the other party can be cured by an appropriate award of costs, an application that seeks to amend pleadings in order to adjudicate the real issues between the parties should be granted for such disputes to be determined by the court.<sup>2</sup> This, in my view, is what justice dictates.

#### Application of the law to the present intended amendment

[24] At the outset, I opt to address the issues of the plaintiffs' failure to cite the executor. I do so as this is an issue that is central to the objections of both defendants. The defendants are correct that the executor is not cited in this matter yet, the plaintiffs raise issues that relate to the estate of the late van Wyk.

[25] Mr Namandje argued that the failure to cite the estate results in the plaintiffs not having the necessary *locus standi* to institute the proceedings against the defendants and the necessary *locus standi* to pursue the present application. Mr van Vuuuren argued to the contrary. Who of the protagonists is on the right side of the law?

[26] The defendants' answering affidavits were deposed to by the first defendant, understandably so given the inter-related relationship between the defendants alluded to above. I confidently state that one searches the answering affidavits filed by the defendants in an attempt to trace and digest the manner in which the plaintiffs' locus standi is challenged for not citing the executor of the deceased late estate, but all is in vain. None of the defendants raised the issue of *locus standi* in their answering affidavits. I find that the failure by the defendants to raise *locus standi* in the answering papers deprives them of relying on it during arguments. This is so due to the fact that the plaintiffs are not forewarned of the objection or defence raised by the defendants in order to appreciate the said objection or defence and to meaningfully prepare and

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<sup>2</sup> *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

respond thereto. In my considered view, this is tantamount to trial by ambush which is foreign to our jurisdiction.

[27] When it is argued that the lack of *locus standi* is raised as a point of law, as stated by Mr Namandje if I heard him properly, the response is not different. I find that the issues of *locus standi* raised is so central to the matter that even if it is raised as a point of law it is required to be raised in the papers in order to afford the opposing parties an opportunity to properly respond thereto. In my view, defences that go to the core of the matter cannot be sprung around under the cover of being a legal issue and, therefore, catch the adversary off guard. I, in the premise, decline to entertain Mr Namandje's argument of *locus standi* for not being properly raised.

[28] In respect of non-joinder of the executor of the estate of the late, this issue was raised in the answering papers of the defendants. In arguments, it was specifically insisted on by Mr Amomo. I find that in the event that the leave to amend sought is granted, the defendants will not be prejudiced in their attempt to have the non-joinder raised and argued. The issues of non-joinder can still be raised as a special plea. For this reason, I find that insistence on non-joinder in an application to amend the particulars of claim, which is at the starting blocks of the matter, where the defendants are yet to file their plea and where the application sought does not close the defendants out of court and deny them of an opportunity to raise non-joinder at a later stage, does not prejudice them and is meritless in these proceedings, to say the least.

[29] I further find that the defendants' insistence on non-joinder of the executor of the estate of the deceased in this application contributes to the delay to adjudicate the matter and it contravenes the overriding objective of the rules which is to facilitate the resolution of the real issues in dispute between the parties in a just, speedy and a cost-effective manner.<sup>3</sup> For all the above reasons the non-joinder raised at this stage ought to fail.

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<sup>3</sup> Rule 1(3).

[30] It was argued that the amendments sought do not cure the grounds of the exception raised. While it is correct that a well-grounded exception on the facts of the matter may be invoked to ward off an application for leave to amend, a careful consideration of such exception must be exercised. Where the exception is arguable, the determination of an application to amend should not be allowed to degenerate into strictly a hearing of the exception.<sup>4</sup> In *casu*, I am of the view that the grounds of the exception raised by the parties are arguable and need not cloud the court at this juncture. I, therefore, decline to get embroiled in, literally, the determination of the exception filed earlier by the defendants. Nothing prevents the defendants from pursuing their exception at the appropriate time if they truly believe it to have merit.

[31] A lot of song and dance was made by the defendants regarding the reference to the “first defendant and/or the second defendant” in the plaintiffs’ notice to amend. They claimed that it prejudices them to the extent that they are unable to properly plead thereto. I do not agree. The close relation between the defendants alluded to above, in my view, appears to justify the plaintiffs’ option to refer to the defendants as they do in the notice to amend.

[32] In consideration of the above, I opine that no *mala fide* is apparent *ex facie* the plaintiffs’ application to amend, nor was *mala fide* raised by the defendants. To the contrary, it appears to me that the plaintiffs seek leave to amend the particulars of claim in order for the court to ventilate the real issues between the parties. This conclusion finds support from a decision of the High Court of South Africa of *Bankorp Ltd v Anderson-Morshead*,<sup>5</sup> where Flemming DJP remarked as follows:

‘The overall pattern is ever firmer that... an amendment is granted if a party deems it necessary to bring his real case before Court. The exceptions are really limited once the party is *bona fide* and is not attempting to gain time. An amendment is refused when it is certain that the new view is untenable and will not assist the party or because of prejudice to another party or to

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<sup>4</sup> *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) 265-259.

<sup>5</sup> *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) 253.

the administration of justice which cannot be adequately averted by, for example, standing a case down, postponing it, reimbursing wasted costs.’

[33] As stated above, I find that the application to amend is brought by the plaintiffs in good faith, while the objections, on the other hand appear to be of a technical nature.

### Conclusion

[34] In view of the conclusions mentioned above, I find that some of the objections raised do not strictly speaking prejudice the defendants. I hold the view that considering that the amendments sought are at an infancy stage of the proceedings where the defendants are yet to file their pleas, avenues are not closed for the defendants to raise some of their defences appropriately. I, therefore, find as I hereby do, that the plaintiffs have made out their case to be granted leave to amend their particulars of claim.

### Costs

[35] As alluded to hereinabove, Mr van Vuuren submitted that the plaintiffs seek an indulgence from the court, therefore, if the court is to find for the plaintiffs in respect of th application for amendment, then the plaintiffs must pay for the prejudice caused to the defendants. I find that this concession resonates with the principle that where an indulgence is likely to prejudice a party, it should be ascertained whether such prejudice cannot be cured by an appropriate costs order.

[36] In *casu*, I find that the defendants contributed to the delay in the progress of the matter. The defendants raised issues like *locus standi* which I found to be foreign to the papers filed of record. They insisted on non-joinder of the executor prematurely when same could still be raised through a special plea. The defendants, in my view, raised all conceivable objections which may frustrate the plaintiffs in their quest to have the defendants to plea to the particulars of claim. Ordinarily I would have been hesitant to award costs in favour of the defendants.

[37] In *casu*, I find that considering that this is the second amendment of the particulars of claim sought by the plaintiffs, prejudice is caused to the defendants even to a minimal degree. The defendants are legally represented and they had to engage their legal practitioners to consider the amendment sought and raise the objections. This is so even though some of the objections were prematurely raised. On the basis of the above, and in the exercise of my discretion, I am of the view that the defendants deserve to be compensated for their wasted costs. Wasted costs shall be awarded to the defendants.

[38] This, being an interlocutory application, I opine that rule 32(11) finds application to an award of costs. I find no justification to depart from the provisions of rule 32(11) and, therefore, the costs order shall be subject to the said rule.

#### Order

[39] In view of the above, it is ordered that:

1. The plaintiffs' application for leave to amend their particulars of claim, as set out in their notice of intention to amend in terms of rule 52 dated 16 June 2023, is granted.
2. The plaintiffs must file their amended particulars of claim on or before 18 March 2024.
3. The plaintiffs, must jointly and severally, the one paying the other to be absolved, pay the defendants' taxed costs for opposing the application, capped in terms of rule 32(11).
4. The matter is postponed to 28 March 2024 at 08h30 for an additional case planning conference.

5. Parties must file their joint case plan on or before 25 March 2024.

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O S SIBEYA  
JUDGE

APPEARANCES

PLAINTIFFS:

A van Vuuren

Assisted by L Shikongo

Instructed by Metcalfe Beukes Attorneys

Windhoek

FIRST DEFENDANT:

S Namandje

Of Sisa Namandje Inc

Windhoek

SECOND DEFENANT:

K Amoomo

Of Kadhila Amoomo Legal Practitioners

Windhoek