REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-ACT-CON-2021/03496

In the matter between:

JOHAN DANIEL NIENABER T/A AREBBUSCH TRAVEL LODGE **PLAINTIFF**

and

SANTAM NAMIBIA LTD **DEFENDANT**

Neutral citation: *Johan Daniel Nienaber t/a Arebbusch Travel Lodge v Santam Namibia Ltd* (HC-MD-CIV-ACT-CON-2021/03496) [2023] NAHCMD 250 (10 May 2023)

Coram: RAKOW J

Heard: **20 April 2023**

Delivered: **10 May 2023**

Flynote: Civil Procedure – Rule 52 of the High Court Rules – Amendment of pleadings – Amendment is necessitated by the fact that the original 2010 policy wording and the schedule was only discovered recently – It is indeed changes necessary to explain the ambit of plaintiff's case and to allow the defendant to better

plea to the exact allegations made by the plaintiff – The crux of the matter needs to be established through the history of the contracts between the parties.

Summary: The plaintiff's premises and business were insured by the defendant as set out in the contract of insurance. The plaintiff was obliged to pay the defendant the monthly premium in advance. Part of the insured interest was a business interruption cover. According to the particulars of claim, the maximum amount insured in respect of business interruption was limited to revenue lost by the business up to the amount of N$63 800 000, together with an additional amount of N$120 000 in respect of the additional increase in the cost of working and the maximum amount of N$50 000 in respect of the claims preparation costs. The business interruption indemnification was for a maximum of 12 (twelve) months from the onset of the interruption in the business. This period is disputed by the defendant and is the crux of this matter.

The plaintiff filed an application to amend its particulars of claim. In the founding affidavit to this application, the plaintiff explains that the amendment is necessitated by the fact that the original 2010 policy wording and schedule was only discovered recently. Mr Williams, the General-manager of Arebbusch Lodge went through old documents and emails looking for the original policy wording for the 2010 policy. He also asked Ms Swartz, the Arebbusch bookkeeper, to check whether she could not find it. This was on 29 June 2022. She went through the archives and found a Santam document containing the policy wording and schedule issued to the plaintiff by the defendant in October 2010.

The plaintiff insists that this wording in the policy is very relevant in terms of the agreement between the parties. The amendment seeks to introduce the 2010 policy wording and schedule together with each subsequent renewal thereof for reasons which are clear from the notice of amendment, read with the existing particulars of claim. This proposed amendment is opposed by the defendant.

Held that: the court is of the opinion, after taking into account the explanation provided by the plaintiff for these changes, that it is indeed changes necessary to explain the ambit of their case and to allow the defendant to better plea to the exact allegations made by the plaintiff.

Held further that: an exuberant history of the case might not be necessary in all cases but in the current matter, the crux of the matter, according to the plaintiff needs to be established through the history of the contracts between the parties and as such those agreements and parts thereof need to be pleaded and the defendant needs to have an opportunity to plea to it.

The application to amend is herewith allowed.

ORDER

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1. The application to amend is herewith allowed, with costs of such application awarded to the plaintiff.

2. The wasted costs incurred by the defendant in the event that pleadings and other papers need to be amended to be carried by the plaintiff.

3. The defendant is to plea to the amended particulars of claim on or before 9 June 2023.

4. The plaintiff is to replicate to the amended particulars of claim on or before 23 June 2023.

5. The parties are to file a joint status report on or before 29 June 2023 setting out the further conduct of the matter.

6. The matter is postponed to 4 July 2023 for a status hearing.

JUDGMENT

RAKOW J

Introduction

[1] The plaintiff is Johan Daniel Nienaber t/a Arebbusch travel lodge (the Business), a major male businessman. The plaintiff operates a tourist accommodation establishment with a restaurant, entertainment facilities, and

conference facilities in Windhoek under the name and style of Arebbusch Travel Lodge. The defendant is Santam Namibia Ltd, an insurance company duly registered as an insurer in terms of the Short-term Insurance Act 4 of 1998. The application before the court is one for the amendment of pleadings.

[2] On or about 15 November 2019 and at Windhoek, the defendant issued the plaintiff with a written tourism insurance policy which records the terms and conditions of the Contract of Insurance concluded between the plaintiff and the defendant, which is according to the plaintiff cumulative of a number of insurance policies since its inception on 1 October 2010.

Background

[3] The plaintiff's premises and business were insured by the defendant as set out in the contract of insurance. The plaintiff was obliged to pay the defendant the monthly premium in advance. Part of the insured interest was a business interruption cover. According to the particulars of claim, the maximum amount insured in respect of business interruption was limited to revenue lost by the business up to the amount of N$63 800 000, together with an additional amount of N$120 000 in respect of the additional increase in the cost of working and the maximum amount of N$50 000 in respect of the claims preparation costs. The business interruption indemnification was for a maximum of 12 (twelve) months from the onset of the interruption in the business. This period is disputed by the defendant and is the crux of this matter.

[4] With effect from 28 March 2020, the business was interrupted as a result of the Covid-19 outbreak in Windhoek and Namibia, which resulted in a substantial loss of revenue for the plaintiff. That interruption continued for the following 12 (twelve) months period, until after 27 March 2021. As a result, the plaintiff lost revenue for the period from 28 March 2020 until 27 March 2021 in the amount of N$18,646,650 (excluding Value Added Tax) and therefore instituted a claim with the insurer for this amount.

[5] The defendant proposed to settle the plaintiff's claim in the amount of N$6,841,517.71, consisting of the plaintiff's business interruption but only for a three-month period. The plaintiff rejected the offer and persists with his claim for indemnification in the amount of N$18,646,650 plus Value Added Tax thereon of N$2,796,997.50, making a total amount of N$21,443,647.50, as well as N$50,000 in respect of costs for the preparation of the claim. The defendant then paid over an interim amount of N$6 000 000 which is deducted from the claim amount, leaving the claim amount at N$15,493,647.50.

Background to the application to amend

[6] In the founding affidavit to this application, the plaintiff explains that the amendment is necessitated by the fact that the original 2010 policy wording and schedule was only discovered recently. Mr Williams, the General-manager of Arebbusch Lodge went through old documents and emails looking for the original policy wording for the 2010 policy. He also asked Ms Swartz, the Arebbusch bookkeeper to check whether she could not find it. This was on 29 June 2022. She went through the archives and found a Santam document containing the policy wording and schedule issued to the plaintiff by the defendant in October 2010.

[7] The plaintiff insists that this wording in the policy is very relevant in terms of the agreement between the parties. The amendment seeks to introduce the 2010 policy wording and schedule together with each subsequent renewal thereof for reasons which are clear from the notice of amendment, read with the existing particulars of claim.

[8] This proposed amendment is opposed by the defendant.

The amendment

[9] The proposed amendment is quite voluminous as it intends to place before the court the actual position of the plaintiff with reliance on the history of the agreement between the parties. The amendment that is proposed, is as follows:

'1.By capitalising the word "plaintiff" wherever it appears uncapitalised in the body of the amended particulars of claim so that all such references should read as "Plaintiff" and not "plaintiff".

2. By deleting the word "with" between the words "establishment" and "a" in paragraph 1 and replacing it with the words "on Erf 6303, Windhoek, which includes".

3. By deleting paragraphs 3, 4, 5 and 6 of the Plaintiff's Amended Particulars of Claim and replacing it with the following paragraphs:

"The Contracts of Insurance negotiated by Alexander Forbes and thereafter by Marsh

3.1 On 30 November 2010 Alexander Forbes Group Namibia (Pty) Ltd ("Alexander Forbes"), the Plaintiff's then insurance broker, wrote to Arebbusch Travel Lodge (the Plaintiff's business), and recorded the material terms of the contract of insurance which the Plaintiff, represented by Alexander Forbes, had concluded in Windhoek with the Defendant. When the contract of insurance was concluded, the Defendant was also represented by Alexander Forbes, alternatively by a person who is unknown to the Plaintiff. Alexander Forbes also attached the original Policy Schedule and Wording which had been issued by or on behalf of the Defendant at that time. A copy of that letter and the attachment thereto are annexed hereto marked "POC 1".

3.2 The express, alternatively tacit, material terms of the contract of insurance which the Plaintiff concluded with the Defendant in respect of the insurance cover provided by the Defendant to the Plaintiff for interruption to his Business are recorded by Alexander Forbes in their letter in the following terms: -

3.2.1 The Defendant undertook to indemnify the Plaintiff for loss sustained by him caused by the Interruption of his Business as a result of Contagious and Infectious Diseases;

3.2.2 The indemnity period for the cover in respect of such business interruption was for a period of up to 12 months.

3.2.3 The Defendant undertook to indemnify the Plaintiff for the Gross Revenue lost by his Business as a result of the interruption thereof; and

3.2.4 The Defendant also undertook to indemnify the Plaintiff in respect of the loss occasioned to his Business by the additional increased cost of working as a result of such business interruption, as well as for the additional claims preparation costs which would be incurred when making a claim.

3.3 The only material terms which the Defendant recorded in its Policy Schedule and Wording were the following:

3.3.1 The first page of the policy document recorded that:

3.3.1.1 The Plaintiff was the insured;

3.3.1.2 The Defendant was the insurer;

3.3.1.3 The Policy number was 9/84420050101/6/M;

3.3.1.4 The Policy was dated 18 November 2010;

3.3.1.5 The Policy was signed by Franco Feris on behalf of the Defendant;

3.3.1.6 The policy commenced with effect from 1 October 2010 and was to continue from month to month;

3.3.1.7 Its anniversary/renewal date was 1 October – i.e. the next anniversary/renewal date was 1 October 2011.

3.4 The Schedule, insofar as it related to the business interruption portion of the Contract of Insurance, recorded that: -

3.4.1 The Schedule was “Revision No: 1”, being the firstSchedule issued by the Defendant in respect of the insurance.

3.4.2 The effective date of the policy was 1 October 2010, being the date on which the insurance cover provided by the Defendant commenced.

3.4.3 The Indemnity Period in respect of business interruption was for “a maximum of twelve months”; and

3.4.4 The Defendant agreed to indemnify the Plaintiff in respect of loss of Revenue (“Item 3”), the additional increase in cost of working (“Item 4”) as well as the additional claims preparation costs. The reference to “Item 3” and “Item 4” were references to Items 3 and 4 of the Business Interruption Section of the Policy Wording.

3.5 The “Policy Wording”, insofar as it related to business interruption portion of the Contract of Insurance: -

3.5.1 recorded that the “Indemnity Period” was:“The period beginning with the commencement of the Damage and ending not later than the number of months thereafter stated in the Schedule during which the results of the business shall be affected in consequence of the Damage.”The period stated in the Schedule was 12 months.

3.5.2 recorded the manner in which the Plaintiff’s loss of revenue was to be calculated in Item 3 thereof as follows:

“Item 3 Revenue - The insurance under this item is limited to:

(a) loss of revenue and

(b) increase in cost of working and the amount payable as indemnity hereunder shall be

(a) in respect of loss of revenue the amount by which the revenue during the indemnity period shall, in consequence of the Damage, fall short of the standard revenue

(b) in respect of increase in cost of working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of revenue which, but for that expenditure, would have taken place during the indemnity period in consequence of the Damage, but not exceeding the amount of loss of revenue thereby avoided less any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of revenue as may cease or be reduced in consequence of the Damage, provided that the amount payable shall be proportionately reduced if the sum insured in respect of revenue is less than the annual revenue where the maximum indemnity period is 12 months or less, or the appropriate multiple of the annual revenue where the maximum indemnity period exceeds 12 months.”

3.5.3 recorded the manner in which the Plaintiff’s additional increase in the cost of working was to be calculated in Item 4 thereof as follows:

“Item 4 Additional increase in cost of working

The insurance under this item is limited to reasonable additional expenditure (not recoverable under other items) incurred with the consent of the company during the

indemnity period in consequence of the Damage for the purpose of maintaining the normal operation of the business."

4. On 1 October 2011 Alexander Forbes advised the Plaintiff that the policy had been renewed for the next year, being for the period from 1 October 2011 to 31 October 2011 and monthly thereafter. Alexander Forbes, when writing this letter acted on behalf of the Plaintiff when representing the Plaintiff's requirements to the Defendant and on behalf of the Defendant when it recorded the terms of the contract of insurance which had been concluded by the Defendant with the Plaintiff and when it compiled what it describes as the "Policy Schedule and Wording" which it attached. A copy of that letter and the attachment is annexed hereto marked "POC 2".

4.1 The express, alternatively tacit, material terms of the contract of insurance which the Plaintiff concluded with the Defendant in respect of the insurance cover provided by the Defendant to the Plaintiff for interruption to his business in terms of the renewal policy for the next year from 1 October 2011 to 30 September 2012 are recorded by Alexander Forbes in their letter in the following terms:

4.1.1 The Defendant undertook to indemnify the Plaintiff for loss sustained by him caused by the interruption of his Business as a result of Contagious and Infectious Diseases;

4.1.2 The indemnity period for the cover in respect of such business interruption was for a period of up to 12 months;

4.1.3 The Defendant undertook to indemnify the Plaintiff for the Gross Revenue lost by his Business as a result of the interruption thereof; and

4.1.4 The Defendant also undertook to indemnify the Plaintiff in respect of the loss occasioned to his Business by the additional increased cost of working as a result of such business interruption, as well as for the additional claims preparation costs which would be incurred when making a claim.

5. The only material terms which the Defendant recorded in its "Policy Schedule and Wording" which was attached to the letter, was constituted by the Defendant's Multimark III Schedule.

6. As set out in that Schedule: -

6.1 The Insurance was arranged and issued by Alexander Forbes on behalf of the Defendant, the Defendant's contact person being Bennie Visser;

6.2 The Policy number was 84420050101;

6.3 The Policy was signed on 1 October 2011 by P Louw, a representative of Alexander Forbes, on behalf of the Defendant;

6.4 The Policy was renewed with effect from 1 October 2011 and continued monthly thereafter, the anniversary/renewal date being 1 October 2012;

6.5 Business interruption cover was included as part of the insurance provided by the Defendant as set out on pages 9 to 11 thereof;

6.6 That business interruption cover included loss of business caused by Contagious & Infectious Diseases (see page 9 of that Schedule);

6.7 The Defendant agreed to indemnify the Plaintiff in respect of the Gross Revenue which was lost by his Business as a result of Contagious & Infectious Diseases, as well as the additional increase in cost of working and the additional claims preparation costs, subject to:

6.7.1 The limit of Indemnity for each category which was listed on that page; and

6.7.2 An Indemnity period of up to 12 months (see page 11 of that Schedule).

7.

7.1 With effect from January 2012 Marsh Namibia (Pty) Ltd ("Marsh") took over the business of Alexander Forbes.

7.2 After that date Marsh represented both the Plaintiff and the Defendant in concluding the annual renewals of the contract of insurance between the Plaintiff and the Defendant, acting in the same capacity as Alexander Forbes had previously acted.

8.

8.1 The annual renewals of the insurance were concluded in each succeeding year from 1 October 2012 until 30 September 2018.

8.2 During that period no additional terms were introduced which are relevant to the business interruption cover provided by the Defendant to the Plaintiff.

9. On 30 September 2018 Marsh ceased to act on behalf of both the Plaintiff and the Defendant, the last policy document being issued by Marsh under policy number 9\84420050101\6\M was Revision No. 81.The Contracts of Insurance negotiated by Herman Krause Insurance Brokers

10. On 17 September 2018 the Plaintiff appointed Herman Krause Insurance Brokers ("HKIB") to act as his insurance broker in accordance with the written appointment which was

signed on that date by the Plaintiff's duly authorised representative John Williams. A copy of that appointment is annexed hereto marked "POC 3".

11. At that time HKIB had been appointed as an intermediary by the Defendant in terms of the Intermediary Agreement which was signed at Windhoek on 18 July 2016 by Franco Feris on behalf of the Defendant and on 26 September 2016 by Herman Krause on behalf of HKIB. A copy of this Intermediary Agreement is annexed hereto marked "POC 4" (the "Intermediary Agreement").

12. In terms of the Intermediary Agreement:

12.1 HKIB was authorized and empowered to canvass insurance business on behalf of the Defendant by eliciting applications from members of the general public (as provided for in annexure "B" to the Intermediary Agreement).

12.2 HKIB was "to elicit applications from members of the general public for the Defendant's short term insurance products", and then "to forward such applications to the Defendant, which may either accept or reject such applications" (see clause 5.2 thereof).

12.3 It was for the Defendant, "as soon as possible after a completed application has been accepted" to "deliver the policy document to the policy holder or intermediary" (see clause 9.1.1 thereof).

12.4 It was for the Defendant to "advise policyholders of approved policies ... [and] of any amendments thereto" (see clause 9.1.2 thereof).

13. On 25 September 2018 HKIB sent the Plaintiff's application for the renewal of his insurance from 1 October 2018 to the Defendant under cover of an email dated 25 September 2018, a copy of which is annexed hereto as "POC 5". That application was constituted by the Renewal Closings which were annexed to that email.

14. As set out in that application the Plaintiff required business interruption cover in the event that his Business was interrupted by "Contagious & Infectious Diseases" for the indemnity period of "twelve months".

15. On 16 October 2018, the Defendant, duly represented by Mr. Franco Feris, accepted the Plaintiff's application and thereafter sent its policy document to HKIB, a copy of which is annexed hereto marked "POC 6".

16. As is apparent from annexure "POC 6": -

16.1 A new policy number was allocated by the Defendant to the policy, being Policy No. 9\55121960005\O\M;

16.2 The Policy document was constituted by a cover page setting out the details of the cover provided, followed by an 80 page schedule;

16.3 The heading of each page of that Schedule stated it was Revision Nr. 2 (after mistakes in Revision No. 1 had been corrected by the Defendant) and that it was a “new policy”;

16.4 The first page of the Policy document reflected that:

16.4.1 It was dated 16 October 2018;

16.4.2 It was signed by Franco Feris on behalf of the Defendant;

16.4.3 The policy commenced with effect from 1 October 2018,and was to continue from month to month;

16.4.4 Its anniversary/renewal date was 1 October – i.e., the next anniversary date was 1 October 2019.

16.5 In the Business Interruption section thereof it is recorded that:

(1) this section is not subject to any endorsement(s) and/or memorandum(s), and

(2) the indemnity period was for “a maximum of twelve months”.

17.

17.1 On 18 September 2019, prior to the anniversary date of 1 October 2019, HKIB sent to the Defendant the Plaintiff’s application for the renewal of his insurance for the year from 1 October 2019 by way of the spreadsheet for the renewal of the policy, a copy of the covering email and attached application is annexed hereto marked “POC 7”.

17.2 As set out in annexure “POC 7”, the Plaintiff required business interruption cover in the event that his Business was interrupted by “Contagious & Infectious Diseases” for the indemnity period of “12 months”.

18. On or before 17 October 2019, the Defendant, duly represented by Mr. Franco Feris, accepted the Plaintiff’s application, annexure “POC 7” hereto,and sent its policy document to HKIB, a copy of which is annexed hereto marked “POC 8”.

19. Subsequent thereto, the Plaintiff, duly represented at the time by HKIB,required unrelated amendments to the Contract of Insurance in respect of the motor section and other items insured, which amendments the Defendant accepted on or before 15 November 2019, whereafter it sent its amended Policy document, a copy of which is annexure “A” hereto, to HKIB.

20. Save for that amendment, the terms of the policy document, annexure “A” hereto, are identical to those set out in the Policy document, annexure “POC 8” hereto.

The interruption of the Plaintiff’s business

21.

21.1 With effect from 28 March 2020 the Plaintiff’s Business was interrupted as a result of the Covid-19 outbreak in Windhoek and Namibia, which resulted in a substantial loss of revenue for the Plaintiff. That interruption continued for the following 12 (twelve) months period, until after 27 March 2021.

21.2 Covid-19 is a Contagious and Infectious Disease. The contract of insurance which had application when the Plaintiff’s business was interrupted

22.

22.1 The contract of insurance which had application when the Plaintiff’s Business was interrupted as aforesaid, was concluded, on or shortly before, 17 October 2019 in Windhoek, when the Defendant accepted the Plaintiff’s written application, annexure “POC 7” hereto, and thereafter delivered its policy document, annexure “POC 8” hereto to HKIB.

22.2 The contract of insurance was amended on 15 November 2019 when the Defendant issued its amended policy document, Annexure “A” hereto, but the material terms of the contract of insurance remained the same.

22.3 When the contract of insurance was concluded, and subsequently amended, the Plaintiff was represented by Herman Krause and the Defendant by FR Feris, the Defendant’s representative who signed the policy documents, annexure “POC8” and “A” hereto.

23. The following are the material express, alternatively implied, alternatively tacit terms of the Contract of Insurance which are recorded in writing in Annexures “POC7”, “POC8” and “A” hereto:-

23.1 The Plaintiff’s premises and Business were insured by the Defendant.

23.2 The Plaintiff was obliged to pay to the Defendant the monthly premium of N$43,915.33, which premium was to be paid monthly in advance.

23.3 The policy’s anniversary/renewal date was 1 October 2020.

23.4 The period of insurance was from 1 October 2019 to 31 October 2019, together with every subsequent period of one calendar month in which the Defendant agreed to renew the policy until the next anniversary date, being 1 October 2020;

23.5 The business interruption cover which the Defendant agreed to provide in respect of the Plaintiff's Business was recorded in the Schedule, p 32 of Annexure "A".

23.6 As set out in that Schedule: -

23.6.1 The maximum amount insured in respect of business interruption was limited to revenue lost by the Business up to the amount of N$63 800 000.00, together with an additional amount of N$120 000.00 in respect of the additional increase in the cost of working and the maximum amount of N$50 000 in respect of claims preparation costs.

23.6.2 The business interruption indemnification provided by the Defendant was for a maximum of 12 (twelve) months from the onset of the interruption of the Business.

23.6.3 The cover in respect of business interruption was not subject to any endorsements and/or memoranda.

24.

24.1 In addition to those terms, and as the contract of insurance was a renewal of the insurance which had been in place since 1 October 2010, those written terms which had had application prior to 1 October 2019 continued to have application to the contract of insurance, save to the extent that prior to 1 October 2019 they had been amended or replaced.

24.2 Those terms which continued to have application, and which are recorded in writing in annexures "POC1" to "POC6" hereto and which are pleaded in paragraphs 3 to 15 above, are the following:-

24.2.1 The Defendant undertook to indemnify the Plaintiff for loss sustained by him caused by the interruption of his Business as a result of Contagious and Infectious Diseases (See paragraphs 3.2.1, 4.1.1, 6.6 and 13 above);

24.2.2 The indemnity period for such business interruption was for a maximum of 12 months (See paragraphs 3.2.2, 3.5.1, 4.1.2, 13 and 15.5 above);

24.2.3 The Defendant undertook to indemnify the Plaintiff for:

(i) the Gross Revenue lost by his Business as a result of the interruption thereof (See paragraphs 4.1.3 and 6.6 above); and

(ii) the loss occasioned to his Business by the additional increased cost of working as a result of such business interruption, as well as for the additional claims preparation costs which would be incurred when making a claim (See paragraphs 3.2.4, 4.1.4 and 6.7 above);

24.3 The manner in which the Plaintiff's loss of revenue was to be calculated was as follows:

"Item 3 Revenue

The insurance under this item is limited to:

(a) loss of revenue and

(b) increase in cost of working and the amount payable as indemnity hereunder shall be

(a) in respect of loss of revenue the amount by which the revenue during the indemnity period shall, in consequence of the Damage, fall short of the standard revenue.

(b) in respect of increase in cost of working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of revenue which, but for that expenditure, would have taken place during the indemnity period in consequence of the Damage, but not exceeding the amount of loss of revenue thereby avoidedless any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of revenue as may cease or be reduced in consequence of the Damage, provided that the amount payable shall be proportionately reduced if the sum insured in respect of revenue is less than the annual revenue where the maximum indemnity period is 12 months or less, or the appropriate multiple of the annual revenue where the maximum indemnity period exceeds 12 months."(See paragraph 3.5.2 above)

24.4 the manner in which the Plaintiff's additional increase in the cost of working was to be calculated was as follows:

"Item 4 Additional increase in cost of working

The insurance under this item is limited to reasonable additional expenditure (not recoverable under other items) incurred with the consent of the company during the indemnity period in consequence of the Damage for the purpose of maintaining the normal operation of the business."(See paragraph 3.5 3 above)

25. The Plaintiff has duly paid the premiums due in terms of the contract of insurance to the Defendant monthly in advance, which premiums have been accepted by the Defendant, with the result that the policy has been duly renewed from month to month by the Defendant."

4. By renumbering the existing paragraphs 7 to 24 and their applicable subparagraphs as follows:

4.1 Existing paragraph 7 be renumbered to paragraph “26”.

4.2 Existing paragraph 8 be renumbered to paragraph “27”.

4.3 Existing paragraph 9 be renumbered to paragraph “28”.

4.4 Existing paragraph 10 be renumbered to paragraph “29”.

4.5 Existing paragraph 11, 11.1 and 11.2 be renumbered to paragraph “30”, “30.1” and “30.2”.

4.6 Existing paragraph 12 be renumbered to paragraph “31”.

4.7 Existing paragraph 13 be renumbered to paragraph “32”.

4.8 Existing paragraph 14 be renumbered to paragraph “33”.

4.9 Existing paragraph 15 be renumbered to paragraph “34”.

4.10 Existing paragraph 16 be renumbered to paragraph “35”.

4.11 Existing paragraph 17, 17.1, 17.2 and 17.3 be renumbered to paragraph “36”, “36.1”, “36.2” and “36.3”.

4.12 Existing paragraph 18 be renumbered to paragraph “37”.

4.13 Existing paragraph 19 be renumbered to paragraph “38”.

4.14 Existing paragraph 20 be renumbered to paragraph “39”.

4.15 Existing paragraph 21 be renumbered to paragraph “40”.

4.16 Existing paragraph 22 be renumbered to paragraph “41”.

4.17 Existing paragraph 23, 23.1, 23.2, 23.3, 23.3.1, 23.3.2, 23.3.3, 23.3.4 and 23.3.5 be renumbered to paragraph “42”, “42.1”, “42.2”, “42.3”, “42.3.1”, “42.3.2”, “42.3.3”, “42.3.4” and “42.3.5”.

4.18 Existing paragraph 24 be renumbered to paragraph “43”.

5. By inserting the heading “The Plaintiff’s lost Revenue” directly above the new (renumbered) paragraph 26.

6. By inserting the words “of the interruption to his business situate at Erf 6303, Windhoek, Namibia, caused by a Contagious and Infectious Disease” between the words “result” and “the Plaintiff” in the new (renumbered) paragraph 26.

7. By inserting the heading “The Interim Payment” directly above the new (renumbered) paragraph 29.

8. By inserting the heading “The Plaintiff’s Claim” directly above the new (renumbered) paragraph 36.

9. By deleting the words “paragraphs 3, 4 and 6 above” in the new (renumbered) paragraph 42 and replacing it with the words “paragraphs 3 to 20 and 22 to 25above”.

10. By deleting the words “paragraphs 5 and 7 to 18 above” in the new (renumbered) paragraph 43 and replacing it with the words “paragraphs 21 and 26 to 38 above.’

Grounds for objection

[10] The defendant objected to the said amendment for the following reasons:

‘1. The newly contemplated paragraph 3

1.1 relates to an entirely different insurance period

1.2 seeks to incorporate a different policy with different policy provisions entirely irrelevant to the peril and insurance period relied upon for the relief claimed;

1.3 introduces impermissible *facta probans;*

1.4 uses phrases like wrote and recorded which are evidential and/or introductory in nature, and confusing, since the Defendant is unable to determine whether or not what was written or recorded constituted the actual terms agreed upon;

1.5 creates uncertainty about the meaning of the phrase the only material terms, since no indication of whether or not it is maintained that those terms were correct, inclomplete or whether, in fact, such policy (whatever it might be) as might be relied upon by the Plaintiff, falls to be rectified or not.

2. The newly contemplated paragraphs 5 and 6:

2.1 relates to an entirely different insurance period;

2.2 seek to incorporate a different policy with different policy provisions entirely irrelevant to the peril and the insurance period relied upon for the relief claimed;

2.3 introduce impermissible *facta probans*;

2.4 again uses evidential phrases like advised and recorded, without indicating whether or not the terms recorded or advised were, in fact, agreed;

2.5 creates uncertainty about the meaning of the phrase the only material terms, since there is no indication of whether or not it is maintained that those terms were correct, incomplete or whether, in fact, such policy (whatever it might be) as might be relied upon by the Plaintiff, falls to be rectified or not.

3. The newly contemplated paragraphs 7 and 8:

3.1 relates to entirely different insurance periods;

3.2 seeks to incorporate different policies (without identification) entirely irrelevant to the insurance period relied upon for the relief claimed;

3.3 introduce impermissible *facta probans;*

4. The newly contemplated paragraphs 10 to 12:

4.1 contain no more than historical facta probans;

4.2 do not refled and facta probanda necessarily relied upon by the Plaintiff and leaves the Defendant uncertain as to the reason for the introduction of such evidence

5. The newly contemplated paragraphs 13 to 16:

5.1 relate to entirely different insurance periods;

5.2 seek to incorporate different policies with different policy provisions entirely irrelevant to the peril and the insurance period relied upon for the relief claimed;

5.3 introduce impermissible facta probans;

5.4 introduce an email, evidential indication of the Plaintiff's claimed requirements and used the phrase accepted, without indication of their relevance as facta probanda, whether they constitute the terms of the Agreement and whether or not the Plaintiff relies upon the policy ("POC6") as containing, in the policy documents, the relevant terms of cover for the relevant period and, if so, whether the absence of any clause extending or introducing a claim for business interruption arising from a contagious and infectious disease is accepted or challenged by the Plaintiff.

6. The newly introduced paragraphs 17 to 20":

6.1 again introduce the phase accepted, without indicating whether or not the terms sought were accepted or whether or not the Defendant had simply received or acknowledged receipt of the application for renewal sent through to it;

6.2 Introduce an email, evidential indication of the plaintiff's claimed requirements and, again, use the phrase accepted, without indication of their relevance as facta probanda, whether they constitute the terms of the Agreement and whether or not the Plaintiff relies upon the policy ("POC8") as containing, in the policy documents, the relevant terms of cover for the relevant period and, if so, whether the absence of any clause extending or introducing a claim for business interruption arising from a contagious and infectious disease is accepted or challenged by the Plaintiff.

7. The newly contemplated paragraphs 22 to 24:

7.1 seek to rely upon annexures "POC7", "POC8" and "Annexure A" as the documents constituting the written Agreement between the parties, whilst, in fact, these annexures constitute only schedules to be read with the relevant policy (in case of POC8 and Annexure A) or a summary (in the case of POC7).

7.2 fail to identify the actual policy wording relied upon when, having regard to the schedules, they self-evidently related to the Santam Tourism Policy;

7.3 identifies no written agreement, clause or document giving cover to the Plaintiff for business interruption losses arising from contagious or infectious disease;

7.4 seek to introduce amendments to these annexures by relying upon the terms of different policies, concluded in respect of different insurance periods and on different terms, without any indication of the facta probanda relied upon by the Plaintiff to cut and paste into the new insurance period, different policy provisions relating to different policy periods or indicating any basis for its statement that those (historical) terms continue to have application;

7.5 fail entirely to reveal the reason for, or basis upon which, it is claimed that old policy provisions were incorporated (by their mere history) into a policy issues more than a decade later and how the different provisions are to be reconciled or the provisions of the latest policy could be relied upon in harmony with old policy provisions (in the absence of any claim for rectification), when they are clearly inconsistent with one another.

8. The newly contemplated paragraphs all incorporate and repeat the Plaintiff's apparent reliance upon a decade long history with each annual policy or renewal thereof, in

circumstances where all of that is entirely irrelevant to the period of insurance relied upon or the peril alleged to have occurred during that period and by again seeking impermissible to incorporate *facta probans* of no more than historical relevance.

9. The Plaintiff considered it necessary to introduce 488 pages of annexures, most of which relates to other sections or provisions of no apparent relevance to the claim, in circumstances where the Defendant is left to unnecessarily wade through all of those without knowing whether or not there is any particular relevance relied upon.

10. In light of the aforegoing, the Defendant is prejudiced by the vague and inconsistent approach revealed by the aforegoing, unable to plead meaningfully and it will therefore be procedurally embarrassed if the amendments are pursued with.'

Arguments by the parties

[11] For the plaintiff, it was argued that the amendment is necessitated by the fact that the plaintiff discovered the original 2010 policy document only on 29 June 2022 and this document sets out the original policy wording as well as the applicable schedule which was issued by the defendant to the plaintiff. The insurance was renewed each year thereafter but none of the renewals replaced the 2010 policy wording. For that reason, the original terms remained the basis of the agreement between the parties. It is argued that the defendant complains because the amendment covers a period of about ten years, and it refers to voluminous documents as annexures. However, that was only because of the defendant's failure to issue a policy with all of the terms which had application when the plaintiff's claim arose.

[12] What is clear is that the defendant's objection, generally, is aimed at select portions of the intended amended pleadings, while it is trite that an exception (which is the basis of the grounds of objection) must go to the root of a pleading. It is also trite, with respect, that when considering the grounds of objection, the facts as pleaded in the intended amendment must be taken as correct. When these trite principles are applied, the flawed nature of the defendant's objection to the amendment is revealed.

[13] The defendant argues that it takes issue with the kind of amendments which is sought to be introduced. Allowing amendments obviously applies to proper amendments and could never support the 'everything goes' approach. The basis of a pleader's duty is to allege the facts upon which he relies, followed by the conclusion of law which he claims, follow from the pleaded facts… with facts and conclusions of law kept separate.[1] The court was further referred to Levy J in *Secretary of Finance v Esselmann*[2] who said the following regarding the obligations on a pleader:

> 'A pleading should not contain matter irrelevant to each claim. The facts whereon a Plaintiff relies should be concisely stated in his particulars of claim and these facts only, and no other, should be pleaded.'

[14] It was further submitted that in some cases for the sake of clarity, history should be pleaded. When that happens, unlike in this instance, it should be done with much caution, otherwise, it would render the pleading vague and embarrassing. Where the plaintiff seeks to introduce numerous earlier agreements relevant only to the specific time period that applied at the time, it could hardly be stated that the plaintiff intended to prove a clear and concise statement. On behalf of the defendant it was further argued that if the amendment is allowed, it will convert the pleadings into witness statements and leave the defendant guessing about the plaintiff's case in circumstances where the defendant is severely prejudiced by not being able to meaningfully plead to the history sought to be introduced.

Legal considerations

[15] Rule 52 of the High Court rules deals with the amendment of pleadings. It reads as follows:

> '(1) A party desiring to amend a pleading or document, other than an affidavit, filed in connection with a proceeding must give notice to all other parties to the proceeding and the managing judge of his or her intention so to amend.

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[1] *Prinsloo v Wool Workers Federation Ltd* 1955 (2) SA 298 NPD.
[2] *Secretary of Finance v Esselmann* 1988 (1) SA 594 SWA.

(2) A notice referred to in subrule (1) must state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.

(3) If no objection in writing is made the party receiving the notice is considered as having agreed to the amendment.

(4) If objection is made within the period referred to in subrule (2), which objection must clearly and concisely state the grounds on which it is founded, the party desiring to pursue the amendment must within 10 days after receipt of the objection apply to the managing judge for leave to amend.

(5) The managing judge must set the matter down for hearing and thereafter the managing judge may make such order thereon as he or she considers suitable or proper and that order must be made within 15 days from the date of the hearing.

(6) Whenever the court has ordered an amendment or no objection has been made within the time specified in subrule (2), the party amending must deliver the amendment within the time specified in the court's order or within five days after the expiry of the time specified in subrule (2).

(7) When an amendment to a pleading has been delivered in terms of this rule, the other party is, within 15 days of receipt of the amended pleading, entitled to plead to the amendment or to amend consequentially any pleading already filed by him or her.

(8) A party giving notice of amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned to any other party.

(9) The court may during the hearing at any stage before judgment, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.

(10) If the amendment of a pleading affects any deadline set in a case plan order, the managing judge or the court must give appropriate directions as to new dates for the taking of such steps as remain unfinished in terms of the case plan order.'

[16] The principles regulating the granting of a proposed amendment of a pleading are very clear and were summarized in a Supreme Court judgment *of DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* [3] as follows:

[3] *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

'[38]. . . The established principle that relates to amendments of pleadings is that they should be "allowed to obtain a proper ventilation of the dispute between the parties … so that justice may be done", subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement . . . .'

[17] A further elaboration on these principles can be found in the matter of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[4] wherein it was held that:

'[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 . . .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 . . . A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought . . . A court cannot compel a party to stick to a version either of fact or law that it says no longer represents its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.'

[18] Regarding the general principles applicable to amendments, the following is clear from our case law:

- Amendments should create triable issues.[5]

- Amendments that introduce excipiable matter, i.e. defences that, in law, are unsustainable, should be refused.[6]

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

[5] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641. See also Hartzenberg v Standard Bank Namibia Ltd (supra) at para 54 and, generally and relating to amendment applications in this regard, Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd 2002 (2) SA 447 (SCA) at 462 – 464.

[6] *Cross v Ferreira* 1950 (3) SA 443 (C) at 449; Fischer Seelenbinder Associates v Steelforce 2010 (2) NR 684 (HC) at 694 par [22].

[19] In the matter of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty)*[7] a trialable issue was explained to be:

'(a) 'n geskilpunt wat, indien dit aan die hand van die getuienis wat die applikant in sy aansoek in die vooruitsig stel, bewys word, lewensvatbaar of relevant sou wees; of

(b) 'n geskilpunt wat op die waarskynlikhede deur die getuienis wat aldus in die vooruitsig gestel word, bewys sou word.'

[20] Requiring the party who wishes to amend a pleading, to show that there is:

(a) a dispute which, if it is proved based on the evidence foreshadowed by the applicant in his application, will be viable or relevant, or

(b) a dispute which will probably be established by the evidence thus foreshadowed.

[21] In *Paulus v Ndaumbwa*[8] Justice Usiku said the following regarding the amendment of pleadings:

"In order to persuade the court to exercise its discretion in its favour, an applicant for leave to amend must show that the proposed amendment is worthy of consideration and introduces a triable issue. The court shall then weigh the reasons and explanations given by the applicant for the amendment, against the objections raised by the opponent. Where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.[9]

[21] The primary objection of allowing amendments is to facilitate 'a proper ventilation of disputes between parties, to determine the real issues between them, so that justice may be done'[10]. The court would normally disallow a proposed amendment if same is not made in good faith or would prejudice the opposing party or would be excipiable.[11]

[22] In the present case, the defendant contends that the proposed amendments will result in the summons still being excipiable.

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[7] Supra.
[8] *Paulus v Ndaumbwa* (HC-MD-CIV-ACT-OTH-2020/02023) [2021] NAHCMD 194 (29 April 2021).
[9] *Trans-Drankensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.
[10] *Cross v Ferreira* 1950 (3) SA 443 at 447.
[11] *Trans-Drakensberg Bank ltd* supra.

[23] The general rule applicable to pleadings, requires pleadings to be drafted in a lucid and intelligible manner. The cause of action (or defence) must appear clearly from the factual allegations made in the pleadings. An excipient bears an onus of persuading the court that upon every interpretation which a pleading can reasonably bear, no cause of action is disclosed.[12]"

[22] Regarding the raising of the possible exception at this time, the court considered the ethos of the JCM system as set out in *Windhoek Municipal Council v Pionierspark Dam Investments CC*:

"The Judge President, writing for the Full Court in IA Bell[13], reached this conclusion after considering recent decisions of the High Court on the issue since the introduction of JCM in Namibia in 2011 and after an exhaustive survey of the approach followed in Australia after that jurisdiction introduced JCM. The Full Court stressed that a new approach to amendments under JCM was underpinned by the following overriding objectives of JCM:

'(a) to ensure the speedy disposal of any action or application,

(b) to promote the prompt and economic disposal of any action or application,

(c) to use efficiently the available judicial, legal and administrative resources,

(d) to identify issues in dispute at an early stage,

(e) to curtail proceedings, and

(f) to reduce the delay and expense of interlocutory processes. Rule 1B imposed an obligation on the parties 'to assist the managing judge in curtailing the proceedings."

[23] In the above matter it was also held that 'although the position that "doing substantial justice between the parties" is no longer the primary consideration, it remains of considerable importance but is now to be considered within the context of the objectives of Judicial Case Management, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice.'

<u>Conclusion</u>

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[12] *Van Straten and Another v Namibia Financial Institutions Supervisory authority* 2016 NR 747 (SC). An exception raised on the ground of vagueness and embarrassment is normally a curable defect, cured by amending same summons to which an exception is raised.

[13] Supra.

[24] When looking at the proposed amendment one must conclude that it is quite a lengthy one that is proposed with a number of new matters being introduced. However, the court is of the opinion, after taking into account the explanation provided by the plaintiff for these changes, that it is indeed changes necessary to explain the ambit of their case and to allow the defendant to better plea to the exact allegations made by the plaintiff.

[25] An exuberant history of the case might not be necessary in all cases but in the current matter, the crux of the matter, according to the plaintiff needs to be established through the history of the contracts between the parties, and as such those agreements and parts of agreements need to be pleaded and the defendant needs to have an opportunity to plea to the theses as well. In the current instance, the amendment as proposed by the plaintiff is therefore allowed.

[26] As it is an indulgence that the plaintiff seek and a number of case management stages have been completed, it is just fair to order the plaintiff to be responsible for the wasted costs that the defendant will incur with amending its papers after the amendment.

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

1. The application to amend is herewith allowed with costs of such application awarded to the plaintiff.

2. The wasted costs incurred by the defendant in the event that pleadings and other papers need to be amended to be carried by the plaintiff.

3. The defendant is to plea to the amended particulars of claim on or before 9 June 2023;

4. The plaintiff is to replicate to the amended particulars of claim on or before 23 June 2023.

5. The parties are to file a joint status report on or before 29 June 2023 setting out the further conduct of the matter.

6. The matter is postponed to 4 July 2023 for a status hearing.

E RAKOW

Judge

APPEARANCES

Plaintiff: RWF MacWilliams (SC) (with him CE Van Der Westhuizen)
Instructed by Etzold-Duvenhage, Windhoek

Defendant: J Marias(SC) (with him L Lochner)
Instructed by Engling, Stritter & Partners, Windhoek