

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Directive 61

Case Title: Jonas Shimutwikeni and Evs Mining Contractors (Pty) Ltd QKR Namibia Navachab Gold Mine (Pty) Ltd	Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-CON-2022/02422 Division of Court: Main Division Heard: 13 June 2023
Heard before: Honourable Lady Justice Rakow	Delivered: 7 July 2023	
Neutral citation: <i>Shimutwikeni v Evs Mining Contractors (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2022/02422) [2023] NAHCMD 386 (7 July 2023)		
Order: <ol style="list-style-type: none">1. The amendments as proposed by the plaintiff is hereby allowed with the provision that the plaintiff is to carry the wasted costs that the first defendant might have incurred in relation to the amendment.2. Costs of this application is awarded to the plaintiff.3. The plaintiff to file its amended particulars of claim on or before 18 July 2023.4. The first defendant to file its plea to the amended particulars of claim on or before 26 July 2023.5. The plaintiff to replicate to the plea of the defendant on or before 4 August 2023.6. The parties to file a joint case management report on or before 10 August 2023.7. The matter is postponed for a case management conference hearing on 15 August 2023 at		

15:30.

RAKOW J:

Introduction

[1] The plaintiff instituted an action against the first and second defendant on the 10th of June 2022. On the 1st of November 2022, the plaintiff obtained summary judgment against the first defendant for the delivery of the machine. However, when the plaintiff went to collect the machine, he noticed the damage on the machine after it was leased to the first defendant. On the 17th of February 2023, the plaintiff withdrew its claim against the second defendant. At this stage, the plaintiff's action is only against the first defendant.

[2] On the 3rd of February 2023, the plaintiff filed his notice of intention to amend his particulars of claim.

Reasons for the amendment

[3] On 27 October 2022 the plaintiff obtained summary judgment against the first defendant for the collection of his CAT320DL excavating machine. This judgment was in the meantime abandoned. When the plaintiff saw his machine he saw that it was severely damaged and needed to be repaired. He does not know how the machine was damaged and did not see it before that, that is why he now wants to institute a claim against the first defendant.

[4] The amendment concerns material aspects of his claim against the first defendant because he suffered damages in the amount of N\$439 908.61, being the fair and reasonable costs he will have to incur for repairing the machine to the condition it was in before the lease agreement. It also seeks to introduce an amended claim amount for the lease.

First defendant's objections to amendment

[5] The first defendant objects to the amendment as it will introduce averments which is in stark contrast to the original averments in the particulars of claim. It further does not state how and in what respect the affected paragraphs of the original particulars of claim are proposed to be amended, it is merely stated that the respective new paragraphs and it also does not indicate how the numbering of the paragraphs is proposed to be affected.

[6] The plaintiff now wish to allege that in concluding the alleged agreement, the plaintiff was allegedly represented by Mr Fillemon Josef while the first defendant was allegedly represented by Mr Barnabas Uugwanga which amounts to the third change in stance on the side of the plaintiff and undermines the possibility of a fair adjudication of the dispute between the parties.

[7] From the reading of the particulars of claim in its amended format it seems that the judgment is still sought against the first and the second defendant, however this action was already withdrawn against the second defendant on 17 February 2023.

[8] The plaintiff seeks to allege that the machine was severely damaged and that some parts were removed and he suffered damages, however the plaintiff does not allege any causal nexus between the damages he suffered by linking it to the first defendant and consequently the claim contained in the amended particulars of claim would be excipiable on the basis that is does not disclose a cause of action.

Legal considerations

[9] 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.

(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.'

[10] 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*¹ as follows:

'[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'

[11] 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*² 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.'

[12] Regarding the general principles applicable to amendments, the following is clear from our

¹ *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

² *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

case law:

‘(a) Amendments should create triable issues.³

(b) Amendments that introduce excipiable matter, i.e. defences that, in law, are unsustainable, should be refused.⁴

[13] In the matter of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty)*⁵ a triable 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.’

[14] 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.

[15] In *Paulus v Ndaumbwa*⁶ 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.⁷

[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’.⁸ The court

³ *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.

⁴ *Cross v Ferreira* 1950 (3) SA 443 (C) at 449; *Fischer Seelenbinder Associates v Steelforce* 2010 (2) NR 684 (HC) at 694 par [22].

⁵ Supra.

⁶ *Paulus v Ndaumbwa* (HC-MD-CIV-ACT-OTH-2020/02023) [2021] NAHCMD 194 (29 April 2021).

⁷ *Trans-Drakensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 at 641.

⁸ *Cross v Ferreira* 1950 (3) SA 443 at 447.

would normally disallow a proposed amendment if same is not made in good faith or would prejudice the opposing party or would be excipiable.⁹

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

[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.¹⁰

[16] 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*¹¹:

'36. The Judge President, writing for the Full Court in *IA Bell*¹², 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.'

[17] 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.'

⁹ *Trans-Drakensberg Bank Ltd supra*.

¹⁰ *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.

¹¹ *Windhoek Municipal Council v Pioneerspark Dam Investment CC* (SA 70 of 2019) [2021] NASC 21 (23 June 2021).

¹² *Supra*.

Conclusion

[18] In light of the arguments heard in this matter and the legal considerations the court is inclined to allow the amendments as requested by the plaintiff as it present triable issues.

[19] In light of the above, I make the following order:

1. The amendments as proposed by the plaintiff is hereby allowed with the provision that the plaintiff is to carry the wasted costs that the first defendant might have incurred in relation to the amendment.
2. Costs of this application is awarded to the plaintiff.
3. The plaintiff to file its amended particulars of claim on or before 18 July 2023.
4. The first defendant to file its plea to the amended particulars of claim on or before 26 July 2023.
5. The plaintiff to replicate to the plea of the defendant on or before 4 August 2023.
6. The parties to file a joint case management report on or before 10 August 2023.
7. The matter is postponed for a case management conference hearing on 15 August 2023 at 15:30.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	First – Defendant:
WC Chinsembu Of Henry Shimutwikeneni & Co Inc, Windhoek	F Fernandes Of Shikongo Law Chambers, Windhoek