"ANNEXURE 11"

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: KEMPINSKI NATURE ESTATE CC v SQUARE FOOT DEVELOPMENTS CC	**Case No:** HC-MD-CIV-ACT-DEL-2019/01372
	Division of Court: MAIN DIVISION
Heard before HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	**Date of hearing:** 9 March 2021
	Delivered: 31 March 2021

Neutral citation: *Kempinski Nature Estate CC v Square Foot Developments CC* (HC-MD-CIV-ACT-DEL-2019/01372) [2021] NAHCMD 142 (31 March 2021)

Having heard Mr Zandre Duvenhage on behalf of the First and Second Applicants/Defendants also standing in for Mr Konrad Marais.

Ruling:

1. The First and Second Defendants are granted leave to amend their plea dated 25 October 2020 with costs. Such costs to include the costs of one instructing and two instructed counsel.
2. The costs are limited in terms of rule 32(11).

Further conduct of the matter:

3. The matter is postponed to 15 April 2021 at 15:00 for status hearing to determine dates for the further exchange of pleadings.
4. The Parties must file a joint status report on or before 9 April 2021.

Reasons for orders:

Introduction

[1] The case before me is an opposed interlocutory application, wherein the applicants seek leave to amend their plea to the respondent's particulars of claim.

[2] The applicants are the first and second defendants in the main action, namely Square Foot Developments CC and Ziveli Property Developments (Pty) Ltd ("the defendants"). Only the first and second

defendants are relevant for purposes of these proceedings.

[3] The respondent is the plaintiff in the main action, namely Kempinski Nature Estate CC.

[4] For ease of reference, I will refer to the parties as they are in the main action.

Background

[5] The gist of the plaintiff's case giving rise to the main action may be summarised as follows:
The plaintiff is the owner of property situated in the Aris Town Planning Scheme ("the Scheme"). The second defendant's property, namely Portion 8 (a portion of Portion 4) of the Farm Aris, No 29, Windhoek ("the subject property") also falls within the Scheme and is adjacent to the plaintiff's property. The first defendant has undertaken development on the subject property, which development is the bone of contention between the parties.

[6] The defendants were successful in obtaining the necessary approval from the Townships Board and the Minister of Tourism in launching the development on the subject property. The plaintiff avers that the defendants were deceitful in obtaining the said development approval in that they applied for the development of a retirement village, when in actual fact they sought to develop a normal lifestyle estate for families. The plaintiff further avers that the development is unlawful as it is, inter alia, contrary to the provisions of the Scheme (the current zoning of the Scheme makes provision for a retirement village but not for a lifestyle village).

[7] The plaintiff seeks an order from this court, inter alia, interdicting and restraining the defendants from proceeding with the development on the subject property and directing the defendants to demolish all existing structures built on the subject property.

[8] The defendants noted their defence of the plaintiff's claims and filed their plea dated 25 October 2019.

Application for leave to amend and opposition thereto

[9] The defendants seek leave to make several amendments to their plea. However, the only amendments with which the plaintiff takes issue are the amendments relating to references to a retirement village which the defendants now wish to amend to lifestyle village.

[10] In his founding affidavit, Mr Dirk Oosthuizen, on behalf of the defendants, sets out the history of the matter on how the erroneous admissions came to be pleaded and the necessity to amend same. Essentially, Mr Oosthuizen lays the blame at the feet of his erstwhile legal practitioner whom he submits had not given

the defendants' case the proper attention it required. In addition thereto, the plea drafted by the defendants' erstwhile legal practitioner and instructed counsel had not been sent to Mr Oosthuizen to consider and confirm its content. After appointing new instructing and instructed counsel and undertaking proper consultations on the defendants' case, Mr Oosthuizen states it became clear that the plea did not reflect the true state of affairs. The admissions made in the plea were bona fide mistakes which now need to be corrected to properly place the defendants' position before this court.

[11] The most controversial amendment relates to annexure "C" to the plaintiff's particulars of claim. Annexure "C" is the written approval by the Khomas Regional Council ("KRC") to the defendants' application, which approval refers to that of a retirement village. As the plea currently stands, defendants have admitted to the averments made by the plaintiff in relation to annexure "C". However, in the intended amendments, the defendants aver that upon a proper construction of annexure "C" the KRC treated and supported the application as an application for a lifestyle village.

[12] Mr Oosthuizen submits that the intended amendments in respect of annexure "C" would merely raise new interpretational and legal issues, which he has been advised cannot patently attract any objection.

[13] Plaintiff's objections are rooted in the view that the amendments would amount to a withdrawal of admissions already made in the defendants' plea. In motivation of its objections, plaintiff states that it is prejudiced in that it acted according to the admissions and would have taken a different course of action had the defendants taken the stance they now wish to adopt from the very beginning.

[14] Mr Norbert Leopold Liebich deposed to the answering affidavit on behalf of the plaintiff.

[15] Mr Liebich takes issue with the defendants' explanation that the mistakes were as a result of their erstwhile legal practitioner's failure to give their case his full attention. He notes that in addition to hiring two senior counsel, the defendants expended some N$1.5 million in legal expenses, which can only speak to the amount of time and effort put into their case by their legal practitioner and the instructed counsel.

[16] He further submits that it is untenable for the defendants to argue that the amendments sought are bona fide, with such amendments being sought some 13 years after the Khomas Regional Council first issued its approval as contained in annexure "C". He submits that the defendants had on numerous occasions been forced to consult with their erstwhile counsel regarding the KRC's approval in preparation for these current proceedings and in all previous related proceedings. It can therefore not be accepted that at no time prior to the current application was the issue of a novel interpretation of annexure "C" raised.

[17] Mr Liebich goes on to submit that should the defendants be granted the amendment sought as it relates to annexure "C" the plaintiff will suffer severe prejudice. He explains that had the defendants taken issue with the wording of annexure "C" at the time it was issued or shortly thereafter, the plaintiff would have taken a different route in having its grievances addressed, namely that it would have taken the KRC on review, lodged an internal appeal or taken whatever other steps necessary to ensure the KRC's compliance with the Scheme. Should annexure "C" now be afforded a different interpretation, the defendants cannot now, 13 years later, lodge a review application or seek other appropriate relief.

First and second defendants' contentions

[18] In their heads of argument, the defendants submit that the contemplated amendments are bona fides and that their necessity only came about upon careful analysis of all records and consultations by their new Counsel.

[19] Mr Marais, counsel for the defendants, furthered the defendants' stance by arguing that it is common for counsel to seek amendments of pleadings as a case progresses or where there are changes in case law, and for counsel to reconsider and revisit cases. Amendments as a result of this cannot be regarded as being mala fides.

[20] Plaintiff's argument in objection to the amendments is that it will suffer irremediable prejudice if the amendments are allowed. This is because had it been aware of the defendants' interpretation it would have challenged the KRC's decision by review or appeal, which it can no longer do due to the defendants' belatedness in bringing the issue of interpretation to the fore.

[21] In response to the argument on prejudice, Mr Marais submitted that the plea in which the erroneous admissions were made was filed in many years after the KRC's decision. If the plaintiff claims that it is now too late for it to challenge the KRC's approval of the defendants' application, the plaintiff was already late in taking such steps prior to the defendants' application for amendment. The plaintiff is therefore not prejudiced by the defendants' change in their approach to the pleadings. Whether or not the amendment is granted, the plaintiff will find itself in the same position in that it cannot revisit reviewing or appealing the KRC's decision.

[22] Mr Marais further argued that all that is required is for the plaintiff to establish that a triable issue exists, which he contended, was the case in the present matter.

Plaintiff's contentions

[23] In its heads of argument, the plaintiff asserts its stance that the defendants' sought amendments

should be refused.

[24] The plaintiff referred to section 5 of the Townships and Division of Land Ordinance 11 of 1963[1] which provides for the publication of applications made to the Board and the participation of interested parties in inspecting such applications.

[25] The plaintiff submits that had the defendants made it aware of their interpretation of annexure "C" to mean an approval for something other than a retirement village, the plaintiff could have and would have objected to a development other than a retirement village. In withdrawing its admission and changing the meaning of annexure "C" as per the sought amendment, the plaintiff would be forever deprived from participating in the process laid down in section 5 of the Townships and Division of Land Ordinance.

[26] With reference to the defendants' bona fides in seeking the amendments, Mr Heathcote, counsel for the plaintiff, submitted that a party was not necessarily vexatious or malicious when not being bona fides. However, to interpret a document to state something other than what it plainly is, is not a bona fides interpretation. One could not interpret annexure "C" in light of the context in which the words are used and the context of the Scheme to mean anything other than a retirement village, especially as the Scheme does not permit application for a lifestyle village.

[27] Mr Heathcote concluded his arguments by requesting that the application be dismissed with costs, with such costs to be capped in terms of rule 32(11).

General principles relating to amendments

[28] The amendment of pleadings is regulated by rule 52 of the Rules of Court and with specific reference to rule 52(9), which provides as follows:

'52(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.'

[29] The principles of amendments have been considered by our courts on numerous occasions. These principles 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*[2] wherein Maritz JA, Strydom AJA and O'Regan

[1] '5(5)(a)(iii) Should the Minister decide that the establishment of the proposed township is desirable and necessary, it shall refer the application to the Board and thereupon the Board shall publish, once in the Gazette and once in such newspaper or newspapers as the Board may deem fit, a notice that such an application has been received and is open for inspection at the office of the Director of Local Government and at such other places (if any) as may be stated in such notice.'

[2] *Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

AJA stated the following:

'[38] . . . The established principle that relates to amendments of pleadings is that they should be ''allowed in order 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 . . . .'

[30] In *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[3] Damaseb, JP, Hoff, J and Ueitele J 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 represent 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.'[4]

[31] A reasonably satisfactory explanation for a proposed amendment is strongest when it is brought late in proceedings and/or where it involves a change of front or withdrawal of a material admission. In the latter instance, tendering wasted costs or the possibility of a postponement to cure prejudice is not enough.[5]

[32] The court also pointed out that difficulty arises if the change of front is opposed by the other side. In that situation the change of front becomes the real issue between the parties and the court stated that although the court has no power to hold a party to a version it seeks to disown, it is entitled to hold it as being an afterthought and the fact that it has withdrawn late in the day a concession consciously and deliberately made or to change a front persisted with for considerable time in the life of the case. The explanation offered for the proposed change, or lack of it, may well go to credibility and the overall probabilities of the case.[6]

Discussion

[33] Amendment of pleadings in our law has always been a contested terrain. It has always been a constant strife between two competing rights of that of the applicant, where such amendment is not mala

[3] *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).
[4] Supra para 55.
[5] Ibid.
[6] Ibid.

fides, and a right by the respondent, where such amendment has a potential to prejudice that party. Centre stage to this is the court's discretion to allow or refuse the amendment which epitomises the court's primary object of allowing amendment is "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done"[7]. The court has a discretion to grant or refuse the amendment which must be exercised judicially. The court is inclined to grant the amendment where it is made in good faith. For the court to exercise its discretion in favour of granting the amendment, the seeker must demonstrate a measure of good faith.

[34] Good faith is one of the main issues raised by the plaintiff. Mr Heathcote argued that the plaintiff's position is that the defendants are mala fides by giving a meaning to the wording of annexure "C", which does not exist and is patently against the actual meaning of the document. In addition thereto there is no provision for lifestyle village.

[35] I am however of the considered view that the matter is not quite as simple as that. Mr Heathcote impressed on the court that the issue of annexure "C" and the wording thereof is not an issue for interpretation, as on the affidavit of Mr Swartz, the town planning expert, it is a mistake made by KRC and if that is the case then the matter is one of a mistake and not an issue for interpretation. However the document which appears to be attached to annexure "C" under the heading 'Motivation for the Development of a Life Style Village on Portion No.8 of the Farm Aris No 29' refers to the development of a lifestyle village and not a retirement village. Should one read the documents in conjunction with each other, then questions arise as to the approval of the defendants' application and what was approved. In addition thereto there appears to be a number of legislative instruments to be considered within which the context of annexure "C" needs to be considered and interpreted. This is an issue that can surely only be resolved during trial after having heard evidence in context and with reference to the surrounding circumstance of the granting of the approval.

[36] The plaintiff's complaint in raising the issue in respect of the approval as contained in annexure "C" raises a legal argument as regards the terms of the approval by the KRC as well as the interpretation thereof. I remain of the view that the best forum to argue it is rather before the trial court itself.

[37] The explanation by the defendants for the proposed amendment is that its new counsel considered the advice by the Town Planner and had to bring their plea in line with the advice received. There is nothing sinister about this. It happens as a daily occurrence that parties wish to amend their pleadings as their case

[7] *Cross v Ferreira* 1950 (3) SA 443 (CPD) at 447.

progresses and new information comes to light.

[38] Having considered the very able arguments by counsel I cannot find any mala fides on the part of the defendants in bringing the application to amend its plea nor can I find that counsel's interpretation of annexure "C" is mala fides.

[39] On the issue of prejudice the plaintiff's counsel contended that there will be obvious injustice to the plaintiff and submitted that if it had been informed by defendants that annexure "C" referred to anything else but a retirement village it would approached the matter differently and would have objected to a development other than a retirement village. However, the decision by the KRC approved the motivation of the defendants some 13 years ago with a letter referring to a retirement village. It is common cause that the KRC issued annexure "C" and it is common cause that the annexure "C" was issued following the motivation. Reference is made interchangeably to lifestyle village and retirement village in the documents attached to annexure "C" in the pleadings. I am of the considered view that even if the defendants pleaded with reference to a lifestyle village from the onset, it would not have placed the plaintiff in the position to act by noting an appeal or a review to the decision of KRC. The position of the plaintiff will remain unaffected even if the defendants are granted leave to effect the intended amendments. As a result I can find no merits in the complaint by the plaintiff that it would suffer substantial prejudice because of the intended amendment.

[40] I do not regard the withdrawal of the admission as an afterthought as the position of the defendants was clear from the time of the filing of the motivation for the approval sought from the KRC and this position was strengthened by the further advice obtained from the Town Planner and counsel employed. Although a considerable period of time has passed since the inception of this case, because of various factors, we are yet to reach case management conference stage in this matter and the granting of the amendment will not cause any undue delay.

[41] I am satisfied that a reasonable explanation was advanced for the proposed amendments and having considered the papers before me I am satisfied that there is indeed a triable issue between the parties and that the proposed amendment should be allowed.

Costs

[42] The remaining issue to decide on is the issue of costs. It is common cause that in terms of rule 54(8) the party giving notice of the amendment will be liable for costs unless the court decides otherwise. I am in agreement with Mr Marais that the plaintiff was entitled to raise objections and that the defendants must be liable to carry the cost up to when the application was served but then it must have become abundantly clear

that there is a triable issue between the parties as discussed earlier. To then persist with the objection to the defendants' application would be unreasonable. From that point onwards the plaintiff should be liable for costs.

[43] This application is interlocutory in nature and I am of the view that the costs should be limited in terms of rule 32(11).

[44] My order is therefor set out above.

Judge's signature:	**Note to the parties:**
PRINSLOO J	Not applicable.
Counsel:	
Plaintiff/Respondent	**Defendant/Applicant**
Adv R Heathcote On the instructions of Engling, Stritter and Partners	Adv J Marais On the instructions of Fisher, Quarmby and Pfeiffer