



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1545/2009

In the matter between:

NEDBANK NAMIBIA LIMITED

PLAINTIFF

And

TILE AND SANITARY WARE CC

1ST DEFENDANT

BAREND VAN DEN BERG

2ND DEFENDANT

ANTONIO DI SAVINO

3RD DEFENDANT

Neutral citation: *Nedbank Namibia Limited v Tile and Sanitary Ware CC* (I 1545/2009)
[2014] NAHCMD 279 (25 September 2014)

Coram: MILLER, AJ

Heard: 21 August 2014

Delivered: 25 September 2014

Flynote: Practice and procedure – Amendment to pleadings – Judicial case management – Matter enrolled for trial – subsequent application to amend pleadings – Explanation for delay to be explained on affidavit.

ORDER

The following order is made:

I will as a result dismiss the application with costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER, AJ:

Introduction

[1] In this matter the third defendant seeks to amend his plea in the manner set out hereunder. The application is opposed by the plaintiff. I shall refer to the parties as the

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plaintiff and the third defendant respectively.

[2] Mr Barnard appears for the plaintiff and Mr Heathcote, SC, assisted by Ms Schneider appears for the third defendant.

Background

[3] Plaintiff instituted action by way of summons against the first, second and third defendants on 30/4/2009. I sought to recover from the first defendant monies lent and advanced to it in terms of various written agreements which are attached to the particulars of claim, as amended. The plaintiff's claim against the second and the third defendants is based on the allegation that the latter had bound themselves as sureties and co-principal debtors for the obligations of the first defendant.

[4] Summary judgment was granted against the second and first plaintiffs on 19 June 2009 and 8 June 2009 respectively. The case proceeded from then on only against the third defendant. Subsequent to a request for further particulars and the response thereto, the third defendant filed a plea on 6 May 2013. In that plea two interconnected special pleas were pleaded. It was pleaded that the persons who signed the power of attorney to institute in proceedings had no authority to do so. Thus the proceedings instituted are a nullity.

[5] It is further pleaded that as a result of the foregoing the claim has also become prescribed. The plea goes on to plead over on the merits. It is not necessary to set those out for purposes of this judgement.

[6] On 21 May 2013 and as required by that in terms of the amendment to the then existing Rule 37 of the now repealed Rules of Court, the plaintiff's legal practitioner advised the Registrar of this Court that the pleadings had closed and requested that the case be allocated to a Managing Judge. The case was allocated to Damaseb JP who advised the parties that an initial case management conference was scheduled for 15 October 2013 at 8h30.

[7] A joint case management report agreed to by the parties was filed on 10 October 2013. The salient portions thereof are the following:

- a) No further pleadings or amendments are currently considered by the parties;
- b) Requests for trial particulars will be made by 2 December 2013;
- c) No interlocutory motions were anticipated;
- d) Discovery and the exchange of bundles of discovery documents will be completed by 8 November 2013;
- e) A status hearing was proposed for January or February 2014;
- f) Trial dates during the first term of 2014 were proposed;.

[8] On 15 October 2014 Damaseb JP made the following case management order:

"Having considered the parties' proposed case management report dated 10th October 2013 (in terms of Rule 37(4)) and having regard to the proceedings in that regard and attended by **Mr Vlieghe** for the plaintiff and **Ms Schneider** on behalf of the 3rd defendant, the Court issues a case management order as follows:

Request for Trial Particulars

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A party desiring trial particulars from the opponent, as contemplated in rule 21(4), is directed to comply with the terms of that rule not later than **2 December 2013**.

Discovery

The parties are directed to make discovery and exchange bundles of discovered documents not later than **8 December 2013**.

Experts

Any party desiring to call expert witnesses, is directed to comply with the terms of rule 36(9) not later than **9 December 2013**.

Separate hearing in respect of defendant's special pleas

In the interest of speedy finalization of the entire matter and to discourage piecemeal adjudication, and in order to save costs, it is hereby determined that the defendant's special pleas shall be heard together with the merits of the matter.

Witness Statements

The parties are directed to file a list of all factual witnesses each intends to call at trial, and in respect of each such witness, file a witness statement sufficient to constitute the witness evidence – in chief, not later than **17 January 2014**.

Pre-Trial Conference

There shall be a pre-trial conference on **21 January 2014** and the parties are directed to comply with all their obligations in respect of the pre-trial conference.

Possible sanctions for failure to comply

Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 37(16)(e).

It is directed that a failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions at the instance of the other party or of the Court acting on its own motion, unless it seeks condonation therefor within a reasonable time, by notice to the opposing party.”

[9] That conference was subsequently postponed to 11 February 2014 and again to 4 March 2014 and 20 May 2014. On 4 March 2014 it was ordered that the pre-trial report had to be filed not later than 12 May 2014. The matter was enrolled for hearing on 10 – 13 November 2014.

[10] The case was re-allocated to me and first come before me on 20 May 2014. I was advised that the third defendant wished to amend his plea. I ordered that a notice of amendment had to be filed not later than 6 June 2014 and scheduled a status hearing for 19 June 2014.

[11] On 19 June 2014 I enrolled the application to amend which had become opposed for hearing on 21 August 2014. I heard arguments on that date and reserved judgment until 26 September. As matters now stand the matter remains enrolled for hearing on 10 – 13 November 2013. Barring the outcome of this application the matter is ripe for hearing.

The amendment being sought

[12] The amendment being sought is in the following terms:

“Kindly take notice that the third defendant herein, intends to amend his special pleas and plea on the merits herein as follows –

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Ad the third defendant's special plea:

1. By re-naming the third defendant's special plea to read:
FIRST SPECIAL PLEA"
2. By adding, after the existing paragraph 9 and before the "plea", a second special plea, to read as follows:
"SECOND SPECIAL PLEA"
3. By inserting, after the aforesaid heading, the following paragraphs and re-numbering the existing paragraphs thereafter chronologically:

"10. The third defendant got married to Mary-Ann Calabrese in Italy on 2 July 1997 and they are still so married. A copy of the marriage certificate, in the Italian language, is attached hereto as annexure SP1 and a copy of a duly translated version thereof in the English language, is attached as annexure SP2.

11. Ex facie annexures SP1 and SP2 it appears that the third defendant and his wife "decided on the law of separation of property" when their marriage was solemnized.

12. Even if this "decision" amounts to an ante-nuptial contract in terms of Italian law, executed outside Namibia, then the third defendant pleads that for the purposes of Namibian law and vis-à-vis, the third defendant and his wife are married in community of property by virtue of the provisions of section 86 read with sub-section 87(2) of the Deeds Registries Act No 7 of 1937 ("the Act").

13. Section 86 of the Act reads:

'An antenuptial contract executed before and not registered at the

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commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section eighty-seven, and unless so registered shall be of no force and effect as against any person who is not a party thereto’.

14. Section 87(2) provides in peremptory terms:
‘An antenuptial contract executed outside Namibia shall be attested by a notary or otherwise be entered into in accordance with the law of the place of its execution, and shall be registered in a deed registry within six months after the date of its execution or within such extended period as the court may on application allow.’

15. The definition of “deeds registry” appears in section 102(1)(b) of the Act:
‘deeds registry’ means
 - (a)
 - (b) when used in relation to any deed or other document, any deeds registry in Namibia wherein that deed or other document is registered or registrable.’

16. The third defendant and his wife have not registered any antenuptial contract and/or decision whatever nature in a deeds registry in Namibia within the 6 month period referred to in section 87(2) of the Act quoted above, nor has any court been approached by them on application or at all, as envisaged in the afore-mentioned section of the Act.

17. The third defendant thus pleads that, as far as it concerns the plaintiff’s rights, as third party, (if any) against him and his wife, he is married in community of property.

18. The provisions of the Married Persons Equality Act, No 1 of 1996 (“the Equality Act”) thus apply to the third defendant and his wife, and more particularly sub-section 7(1)(h) read with sub-section 7(2)(b) of thereof.

19. For sake of completeness, the afore-mentioned statutory provisions are quoted – subsection 7(1)(h) contains the following prohibitory provision:

‘Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse –

‘(h) bind himself or herself as surety;’

20. Sub-section 7(2)(b) of the Equality Act takes the afore-mentioned prohibition further as regards to spouses binding themselves as surety, and reads:

‘Sub-section 7(2)(b)

The consent required under subsection (1) for the performance of an act contemplated in that subsection may be given either orally or in writing, but the consent required for the performance of –

b) an act contemplated in paragraph (h) of that subsection,

shall, in respect of each separate performance of such act, be given in writing only.’

21. The third defendant pleads that –

21.1 when he purportedly signed the Deed of Suretyship on behalf of the first defendant (annexure A to the plaintiff’s amended particulars of claim), and thereby purportedly bound himself as surety, he did not know about the provisions of the Equality Act, and did not have the consent of his wife, either in writing or at all; his wife also did not know about the aforesaid provisions of the Equality Act and did not know that the third defendant signed the

surety; she also did not co-sign the deed of suretyship.

23. The third defendant thus pleads that the fact that he signed annexure A did not create any manner or form a legal nexus between the common estate in Namibia and the plaintiff.

24. The third defendant thus pleads that he, or the common estate in Namibia, is not liable towards the plaintiff for any monies claimed from him under the deed of suretyship, neither is he liable towards the plaintiff in respect of any agreements flowing therefrom or at all.”

Ad third defendant's plea on the merits

By adding after sub-paragraph 16.6 and before paragraph 17 thereof, a new sub-paragraph 16.7, which is reads as follows:

16.7 Furthermore, the third defendant pleads that it is unconscionable and against the public interest that the plaintiff, while having been informed by the third defendant that he is no longer a member of the first defendant and thus no longer has any insight of power in respect of the financial affairs of the first defendant, and no longer derives any benefit –

financial or otherwise – from the first defendant, to proceed, with that knowledge, to hold the third defendant liable for any monies, while the plaintiff knew that the third defendant sold his membership interest to the second defendant and to issue summons against the third defendant. Moreover, in circumstances where

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the first defendant's liability towards the plaintiff is substantially increased, with no knowledge and/or insight and/or control of the third defendant.”

The delay in seeking the amendment

[13] The first point made by the plaintiff in the notice of objection to the proposed amendment is that the amendment is being sought at a late stage, due to the inordinate delay in filing same and works to the prejudice of the plaintiff. In addition the reasons for the delay are not explained in a supporting affidavit.

[14] Mr Heathcote argues on the authority of *Trans-Drakensberg Bank (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967(3) SA 632 D that as a general rule Courts incline to grant amendments unless the application is *mala fide* or any prejudice is not capable of being recompensed by an appropriate cost order. That is so because it enables a full ventilation of the disputes between the parties. As to the explanation for the delay he argues that such explanation may be given in the Heads of Argument.

[15] The approach to amendments is pronounced in the *Trans-Drakensberg Bank* case (*supra*), precedes the adoption of the system of judicial case management in Namibia.

[16] In *Kandjii v Tjingaete* 2014 JDR 1090 (Nm) Damaseb JP stated the following:

“I have shown the number of times this case was the subject of case management. I have also shown the number of trial dates vacated in the matter. The timing for the application to amend therefore called for a satisfactory explanation, coming as it does so late in the evaluation of the case ... A party seeking an amendment therefore runs the risk of being denied an amendment if no explanation is given on affidavit and the court is unable to properly exercise its discretion.”

See also *Scania Finance South Africa (Pty) Ltd vs Aggressive Transport CC and Another* 2014 92) NR 489.

Although the facts in that case are in some respects distinguishable the general tenor of the judgment is relevant.

[17] Applications for the amendment of pleadings at an advanced stage of proceedings frustrates the overriding principle of judicial case management. It brings in its wake postponements and unnecessary delay. It is of the essence of judicial case management that the issues which exist between the parties are identified at an early stage and is recognised and defined prior to the case being enrolled for hearing.

[18] Cases are enrolled for hearing by a managing judge on the basis that the matter

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will be heard on the assigned date, and not become begged down by interlocutory proceedings raised after the matter was enrolled for hearing.

[19] In my view a managing judge should be slow to allow any late interlocutory proceedings which may delay the final determination of the case.

[20] I am alive to the fact that there may be cases where due to unforeseen circumstances an application to amend pleadings may become necessary at a late stage in the evolution of the case. In such cases there will have to be a full and acceptable explanation of the circumstances which gave rise to the late application. These should be set out in an affidavit.

[21] As indicated there is no affidavit in the matter before me. Even if I were to have regard to the explanation in counsel's Heads of Argument, the explanation does not pass muster. The springboard for the amendment now being sought is the proprietary regime of the third defendant's marriage which was concluded in Italy. I will assume in favour of the third defendant that it is akin to what we know as a marriage by antenuptial contract. I must infer, in the absence of any explanation by the third defendant, that this fact is within his personal knowledge. Why this fact only dawned upon the third defendant when the plaintiff made supplementary discovery of documents, is not

explained. I remain unpersuaded that the delay has been explained. The same applies to the further defence now raised that the agreements are unconsciable and against public policy.

[22] I will as a result dismiss the application with costs which will include the costs of one instructing and one instructed counsel.

P J Miller
Acting Judge

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APPEARANCES

PLAINTIFF: Adv T Barnard

Instructed by : KOEP & PARTNERS

3RD DEFENDANT: Adv R Heathcote, SC
Asst. by: Adv Schneider

Instructed by: FRANCOIS ERASMUS & PARTNERS.