REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 601/2013 &
Case no: I 4084/2010

In the matter between:

I A BELL EQUIPMENT COMPANY (NAMIBIA) (PTY) LTD **PLAINTIFF**

And

ROADSTONE QUARRIES CC **DEFENDANT**

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

Coram: DAMASEB, JP, HOFF, J and UEITELE, J
Heard: **13 March 2014**
Delivered: **15 October 2014**

Flynote: Interlocutory – Amendment of pleading brought late in the proceedings – Counsel advanced reasons that a possible amendment became apparent only when senior counsel became involved at the late stage of the case and that prejudice suffered

by the respondent can be cured with a cost order –Where an amendment to withdraw admissions is sought , a reasonable explanation for change of front is required, such reason must be bona fide and there must be special circumstances to allow parties to resile from a court order – With the advent of judicial case management – A judge-controlled civil litigation – the common law position that a party may amend at any stage of proceedings as long as prejudice does not operate to the prejudice of the opponent remains, save that, like every other procedural right, it is also subject to the objectives of the new judicial case management regime applicable in the High Court – This places obligations on legal practitioners to through early and thorough preparation identify real issues in dispute for the speedy and expeditious finalization of the matter – New approach to be adopted is that in the exercise of its discretion, court must observe parties' rights to state their case at any stage and to amend pleadings, even withdraw admissions in a pre-trial order – Such variation of pleadings subject to the presumption that pleadings drawn on instructions of the client - If amendment based on a mistake, such mistake must be bona fide – Court cannot hold parties to a version which no longer represents its stance – Ultimate aim is to allow parties to ventilate the real issues between them and the interest of the administration of justice.

ORDER

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1. The proposed amendment of the plea to the claim in reconvention and revision of the pre-trial order of 25 June 2013 and the associated application for condonation for the late filling, are deferred to be decided at the trial together with the merits if still persisted with;

2. The costs of the opposed application to amend stands over for determination together with the merits;

3. The applicant is ordered to pay the respondent's costs occasioned by the

opposition to the abandoned joinder application and the application to add further causes of action;

4. The trial of the matter shall proceed on the pleadings as they stood on 16 September 2014; and

5. The matter is enrolled for status hearing on **21 October 2014 at 14h15** for allocation of new trial dates and for further directions.

JUDGMENT

DAMASEB, JP (HOFF, J AND UIETELE, J CONCURING):

[1] At the outset I must extend an apology to the parties for the delay in handing down judgment in this interlocutory application to amend pleadings. Amendments have lately become problematic in this court and the impact judicial case management has (or has not) on them has become a source of controversy and differing judicial opinion. It was the reason for my empanelling a full court.[1] After we heard argument on 13 March 2014, I had to give the matter some careful consideration in the light of our case law since the advent of judicial case management and also to consider comparative jurisprudence for guidance - hence the delay.

[2] The present application brought by the plaintiff in the main action and who is also the defendant in reconvention, commenced as an opposed application to (a) join a third party, add additional causes of action and (b) to amend pleadings in order to withdraw admissions made in a plea to the defendant's counterclaim. During the course of argument, the applicant conceded that the application for joinder and to add new causes of action was ill-conceived and would no longer be pursued. Mr Strydom, for the applicant, further conceded that the respondent was entitled to the costs occasioned by its opposition to the ill-fated application. Such an order will therefore be made.

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[1] In terms of s 10(1)(a) of the High Court Act, 1990 (Act 16 of 1990).

[3] What remained for the court to consider is the application to amend the plea in reconvention. The application to amend was brought late in the course of proceedings as will soon become apparent. It is common cause that the proposed amendment scuppered the trial which was scheduled for the period 16 -19 September 2013.

State of pleadings at time of proposed amendment

[4] It will be conducive to clarity to first set out the state of pleadings as at the date the matter was ripe to proceed to trial. In the original declaration[2] dated 10 May 2011, the plaintiff claimed payment of the agreed purchase price of N$ 128,000 for front-end loader tyres sold and delivered by it to the defendant during October 2010. The plaintiff alleged that the defendant had taken delivery of 'a number of tyres' but failed or neglected to pay for them. Although the plaintiff immediately (ie on 28 July 2011) amended the declaration, the substance remained the same: ie that the defendant had taken delivery of four tyres but failed, upon being invoiced, to pay the cost of the tyres in the amount of N$ 128 000. The defendant requested further particulars to the amended declaration in the following terms:

> 'The defendant requests the following further particulars to the amended declaration:
>
> 1. In paragraph 5 it is alleged that the terms stated were "*inter alia"* agreed upon between the parties. What is meant by this? A full explanation is required.
> 2. What were the full terms of the agreement between the parties?
> 3. Which terms were written and which terms were oral?
> 4. The full specifications of the alleged tyres are required with reference to the make, the size and the type.
> 5. Were the tyres supplied loose or fitted to rims?
> 6. How were the tyres delivered, loose or fitted to an implement?' (my underlining for emphasis)

[2]The action was commenced under the old rules of court which allowed the simple summons procedure under rule 17.

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[5] Significantly[3], the plaintiff chose to be evasive and not to clearly answer the questions posed in the request for further particulars. It answered the questions in the following terms:

> '1. AD PARAGRAPH 1 THEREOF:
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> The pleaded terms constitute the material terms of the agreement between the parties.
>
> 2. AD PARAGRAPH 2 THEREOF:
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> The particulars sought are not strictly necessary to enable the defendant to plead thereto and are accordingly refused.
>
> 3. AD PARAGRAPH 3 THEREOF:
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> Invoice (No 67175) constitutes the written part of the agreement between the parties.
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> 4. AD PARAGRAPH 4 THEREOF:
>
> The particulars sought are not strictly necessary to enable the defendant to plead thereto, alternatively is a matter for evidence and are accordingly refused.
>
> 5. AD PARAGRAPH 5 AND 6 THEREOF:
>
> The particulars sought are not strictly necessary to enable the defendant to plead thereto and are accordingly refused.'

[6] As can be seen, the plaintiff answered only one of the questions posed and, in particular, refused to answer the question that asked it to provide the 'full terms of the agreement between the parties'. That raises the obvious question if at this early stage already the plaintiff's legal practitioners (both instructing and instructed) took the necessary instructions from the client as regards the requested 'full terms of the agreement between the parties'. I raise this issue at this early stage because it is

[3]Significantly because, had they been provided, it would considerably have narrowed the real dispute between the parties at this early stage and would have helped counsel properly consult with the client in order to take full instructions about the terms which have now become the subject of dispute.

relevant to what I say later in support of the result I arrive at on the present dispute.

[7] The initial plea dated 11 November 2011 was itself not a model of clarity. Except for admitting the identities of the plaintiff and the defendant and the representatives of the parties, each and every one of the allegations were denied: Thus, it was denied that an agreement was entered into, that tyres for a front-end loader were sold and delivered, that the defendant took delivery of them or that it failed to pay for them. An amended plea was however filed on 14 June 2012 from which the defendant's defence to the plaintiff's claim can be summarised as follows:

(a) The purchase price was denied, although it was admitted that on or about April 2010 plaintiff at the specific instance and request of the defendant delivered four new front-end loader tyres.

(b) The method by which plaintiff was to invoice the defendant, and that payment was to be made within one month of invoice, was also denied.

(c) Delivery was admitted but it was pleaded that the plaintiff was indebted to the defendant in the amount of N$ 774,000 in respect of damages allegedly occasioned by plaintiff and that any amount due to plaintiff was set off by the defendant's liquidated debt due and payable as at 1 May 2010.

[8] The defendant's claim is fleshed out in the counterclaim accompanying the plea and in essence alleges that the tyres delivered to it by the plaintiff, contrary to an express representation to that effect by the plaintiff and his employees or representatives, did not meet the specifications agreed between the parties. The result, the counterclaim alleges, was that the tyres did not perform as expected once fitted to the defendant's front-end loader, resulting in the front-end loader not being deployed for the defendant's business operations and the defendant suffering resultant losses in the

amount claimed.

Plea to counterclaim

[9] In its counterclaim dated 14 September 2012 the plaintiff in reconvention alleged as follows:

> *'1. During or about November 2008 telephonically and in person Mr. Harold van Druten on behalf of the Defendant entered into negotiations with Mr. Johan van Wyk acting on behalf of Plaintiff to set in motion the purchase of a Bell L20606 Front-end Loader.*
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> *2. During these negotiations as well as physical inspection on a site at kilometre 10 Tsumeb-Tsintsabis Road Mr. Harold van Druten specifically informed Mr. Johan van Wyk, by pointing to Mr. Johan van Wyk on the site, that Defendant needs a Front-end Loader which is similar in size to the Caterpillar 966 Front-end Loader which Defendant was using on site at the time. Mr Harold van Druten further made in (sic) unequivocally clear to Mr. Johan van Wyk that the Front-end Loader Defendant required must have the same quality tyres as L5 Firestone Tyres which can operate under quarry conditions on hard sharp edged rock as was clear on the site they were at.*
>
> *3. Mr Harold van Druten further informed Mr. van Wyk that the Caterpillar Front-end Loader they were using on site had, at that stage, worked more than 6000 hours with the same tyres in the same rocky conditions.*
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> *4. At these meetings, and more specifically the meeting on site, Mr. Johan van Wyk stated, on behalf of Plaintiff, that the Bell L2606 Front-end Loader Plaintiff sells will be more than able to adhere and conform to all the requirements of the Defendant, as specified by Mr Harold van Druten and more.*
>
> *5. Mr. Harold van Druten had two separate dinner meetings with Mr. Wolfgang Schweiger at the Minen Hotel in Tsumeb where he on both occasions also informed Mr. Wolfgang Schweiger of Defendant's requirements should it set in motion the purchase of the Bell L2606 Front-end Loader from Plaintiff and on both occasions Mr Wolfgang Schweiger also confirmed, as Mr Johan van Wyk did, that their Front-end Loader will be*

able to adhere and conform to all the requirements of the Defendant and more.

6. During or about 26 November 2008 Mr Harold van Druten accompanied Mr. Johan van Wyk to the bell Equipment offices in Jet Park, Johannesburg, South Africa, and they met with a certain Mr. Terry Gillham where Mr. Harold van Druten again reiterated the requirements of Defendant in using the Bell L2606 Front-end Loader at all times acquiesced to all statements made by Mr. Terry Gillham to Mr. Harold van Druten regarding the conformity and adherence of the Bell L2606 Front-end Loader to the specific requirements of the Defendant.

7. The representation made by the Plaintiff to Defendant relating to the tyres were material as Mr. van Druten expressly stated to Mr Van Wyk, Mr. Wolfgang Schweiger and Mr. Terry Gillham that the Defendant could not afford the Front-end Loader not being operational at all times as the Defendant would suffer a loss of income.

8. Due to the aforementioned representations made by Plaintiff's representatives the Defendant set in motion and the conclusion of the purchase of the Bell L2606 Front-end Loader from Plaintiff by Defendant's bank, being Bank Windhoek.' (My underlining for emphasis)

[10] The above are the defendant's allegations which preface its counterclaim against the plaintiff to the effect that within the first 100 hours of work the front-end loader purchased from the plaintiff developed complications and became 'inoperable', causing the defendant 'financial harm'.

[11] In its plea to the defendant's counterclaim dated 14 September 2012, the plaintiff denies making any false representations to the defendant or that defendant suffered any financial loss as a result of defendant's purchase of the four tyres. It however made the following admissions in paragraphs 2 and 3 of the plea to the counterclaim:

'AD PARAGRAPH 2 THEREOF:

2.1 Apart from denying that defendant was using a Caterpillar 966 front-end

loader on site at the time, plaintiff admits the content of the remainder of this paragraph.[4]

2.2. Plaintiff pleads that defendant was making use of a Caterpillar 938 front-end loader at the time.

AD PARAGRAPHS 3-9 THEREOF

The content thereof is admitted.[5] (My underlining for emphasis)

The proposed amendment

[12] The plaintiff applied to amend its declaration and the plea to the counterclaim on 20 September 2013, about a year after the original declaration and plea were filed. With regard to the plea to the counterclaim, the plaintiff seeks to withdraw admissions relating to the discussions that occurred between the plaintiff and the defendant's representatives at the site relating to the requirements of the front-end loader which, according to the plaintiff, did not include the suitability of the tyres in question. The plaintiff further seeks to deny that the representations made by the plaintiff to the defendant as regards the requirements and suitability of the front-end loader was material or that it would be responsible for any loss resulting from the front-end loader not being operational.

[13] The defendant immediately objected to the amendment on the basis that the proposed amendment would render the declaration excipiable as it did not disclose a cause of action on the allegations pleaded.[6] As regards the proposed amendment to the plea to its counterclaim, the defendant objected on the grounds that the intended

[4]Thus admitting the representations repetitively set out and expressly relied on by the plaintiff in reconvention.

[5]Ditto.

[6] This is the aspect conceded by the plaintiff in argument to be bad in law, and which Mr Strydom withdrew and tendered wasted costs.

amendment constitutes a withdrawal of admissions confirmed by agreement between the parties and reflected in the parties' 'Proposed Pre-trial Order' which was made an order of court on 25 June 2013. The pre-trial order in relevant part reads as follows:

'**All relevant facts not in dispute**

i. The citation of the parties;
ii. That plaintiff was represented by Mr Johan Van Wyk and defendant by Mr Von Druten;
iii. That the plaintiff delivered 4 new front-end loader tyres to defendant during April 2010;
iv. That defendant received plaintiff's invoice annexure "A"
v. That defendant refuses to pay to plaintiff the amount of N$ 125 800 as claimed by the plaintiff;
vi. That during or about November 2008 telephonically and in person Mr Harold van Druten on behalf of the defendant entered into negotiations with Mr Johan Van Wyk on behalf of the plaintiff to set in motion the purchase of a bell L2606 front-end loader;
vii. That during these discussions as well as a physical inspection on the site at kilometre 10 Tsumeb – Tsintsabis road Mr Harold van Druten specifically informed Mr Johan van Wyk, by pointing to Mr Johan van Wyk on the site, that defendant need a front-end loader which is similar in size to the specific front-end loader which defendant was using on the site at the time (the plaintiff maintains that it was a caterpillar 938)
viii. That Mr Harold van Druten made it unequivocally clear to Mr van Wyk that the front end loader defendant required must have the same quality tyres as L5 firestone tyres which can operate under quarry conditions on hard sharp edge rock as was clear on the site they were at;
ix. That Mr Harold van Druten further informed Mr van Wyk that the caterpillar front end loader they were using on site had, at that stage, worked more than 6000 hours with the same tyres in the same rocky conditions.

x. That at these meetings, and more specifically this meeting on site, Mr Johan van Wyk stated , on behalf of the plaintiff, that the Bell L2606 front-end load plaintiff sells will be more than able to adhere and conform to all the requirements of the defendant, as specified by Mr Harold van Druten and more.

xi. That Mr Harold van Druten had two separate dinner meetings with Mr Wolfgang Schweiger at the Minnen in Tsumeb where he on both occasions also informed Mr Wolfgang Schweiger of defendant's requirements should it set in motion the purchase of the Bell L2606 front-end loader from plaintiff and on both occasions Mr Wolfgang Schweiger also confirmed, as Mr Johan van Wyk did, that their front-end loader will be able to adhere and conform to all the requirements of the defendant and more;

xii. That during or about 26 November 2008 Mr Harold van Druten accompanied Mr Johan van Wyk to the Bell Equipment offices in Jett Park Johannesburg South Africa and they met with a certain Mr Terry Gillham where Mr Harold van Druten again reiterated the requirements of defendant in using the Bell L2606 front-end loader. At this meeting and thereafter Mr Gillham also confirmed to Mr Harold van Druten that the Bell L 2606 front-end loader will conform to all the requirements of defendant. Johan van Wyk at all times acquiesced to all statements made by Mr Terry Gillham to Mr Harold van Druten during to the conformity and adherence of the Bell L2606 front-end loader to the specific requirements of the defendant;

xiii. That the representation made by the plaintiff to the defendant relating to the tyres were material as Mr van Druten expressly stated to Mr van Wyk, Mr Wolfgang Schweiger and Mr Terry Gillham that the defendant could not afford the front-end loader not being operational at all times as the defendant could suffer a loss of income;

xiv. That due to the aforementioned representations made by plaintiff's representatives the defendant set in motion and the conclusion of the purchase of the Bell L2606 front end loader from plaintiff by defendant's bank, being Bank Windhoek;

xv. That the Bell L2606 front-end loader was delivered to the defendant on or about the 9th of July 2009.

xvi. That a burst front-end loader tyre caused the front-end loader of plaintiff to be

inoperable which caused defendant financial harm.

xvii. That the defendant concluded a suspensive sale agreement with bank Windhoek for the purchase of the front-end loader; and

xviii. That Mr van Wyk and Mr Wolfgang Schweiger are both employees of the plaintiff and at all relevant times acted within the course and scope of their employment.'

[14] The defendant's stance is that the plaintiff cannot withdraw such admissions without rescinding the court's pre-trial order. This position is correct in view of the then applicable rule 37(14) which stipulated that issues, evidence and objections not set out in the pre-trial order are not available to the parties at the hearing. I am satisfied though that subrule 37(17) is wide enough as to bestow a discretion on the managing, on good course shown, to vary a pre-trial order 'so that only the real issues between the parties …are determined at the trial'. The new rule dispensation is even clearer on the court's discretion in regard to a pre-trial order. Rule 26(10) states that:

' Issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with the leave of the managing judge or court granted on good cause shown'.

[15] Not surprisingly therefore, the plaintiff on 9 October 2013 launched a formal application to amend the plea to the counterclaim as well as the pre-trial order, which application was subsequently heard by a full bench of this court on 13 March 2014. The application was served two days late and condonation is also sought.

[16] On behalf of the plaintiff / defendant in reconvention, it is conceded that the amendment sought involves the withdrawal of admissions, the reasons advanced for the withdrawal being that the admissions were erroneously made and do not conform to the client's instructions to instructed counsel, Mr Small, who prepared the plea filed of record on 14 September 2012. It is alleged that it was only on 5 August 2013, during consultation between Mr Small, and his newly-briefed senior, Mr Strydom, and the applicant's witnesses, that it came to light that the initial plea was defective. Mr Small who deposed to the affidavit in support of the application apologised for the mistake and

stated under oath that granting the amendment would reflect the true instructions of the applicant and would ultimately result in pleadings that would facilitate the proper ventilation of the issues between the parties. He stated that the defendants would suffer no prejudice that cannot be cured by a costs order. The plaintiff's employees or officers with personal knowledge of the facts did not either confirm on oath Mr Small's assertions or depose independent affidavits explaining the alleged misunderstanding between them and Mr Small and how it came about.

Brief history of the matter and instructed counsel's involvement

[17] The summons was issued on 8 March 2011, the particulars whereof were settled by Theunissen, Louw and Partners on 10 May 2011. The action was duly served on 2 April 2012, pleadings closed on 02 November 2012 and the first pre-trial conference took place on 25 June 2013. The matter was called on 7 February 2012 for initial case management conference and the plaintiff was represented thereat by Mr Small who similarly appeared for the plaintiff on 13 March 2012 and 22 May 2012 at the pre-trial and status hearing respectively. A notice that pleadings had closed[7] was filed of record on behalf of the plaintiff on 2 November 2012 and Mr Small appeared at two further status hearings on the 5th and 12th February 2013, when, on the latter date, the present matters were consolidated. Mr Small still appeared for the plaintiff on 26 February 2013 when the trial dates were set for 20-23 May 2014. On 9 April 2013 Mr Small was still on record for the plaintiff when the trial dates were vacated and new trial dates set for 16-19 September 2014.

[18] Mr Strydom then came on record on 16 September 2013 and applied for a postponement, advancing as the main reasons for the postponement the grounds that the plaintiff wishes to amend the declaration and the plea to the counterclaim. The plaintiff sought this amendment on 20 September 2013, about a year after the original

[7]This is the next crucial stage at which the plaintiff's practitioners had the opportunity to assure themselves that their pleadings accorded with the client's instructions, yet the crucial step was taken to now move the case forward to trial.

declaration and plea were filed. An objection was raised to the proposed amendment on 26 September 2013 and the application to amend was launched on 9 October 2013. It is that proposed amendment that falls for determination in the present proceedings.

[19] To recapitulate: It is alleged in justification of the proposed amendment that it was only after Mr Strydom was briefed that the mistake necessitating the proposed amendment was discovered.

Parties' submissions

Applicant/ plaintiff

[20] On behalf of the applicant /plaintiff, Mr. Strydom submitted that the practice of our courts is to grant amendment of pleadings for the proper ventilation of a dispute between the parties, however neglectful or careless the first omission may have been or however late the amendment sought is. Counsel argued that an amendment should be allowed as long as there is no incurable prejudice to the other party either by way of a costs order or a postponement. He accepted that the withdrawal of an admission is not more readily allowed as it involves a change of front and that prejudice to the other party is self-evident. Counsel also accepted that a full explanation is required for the withdrawal of an admission and maintained that courts would readily condone and grant an amendment sought on the ground of a misunderstanding by the legal adviser.

[21] In an attempt to marry the law to the facts, Mr. Strydom submitted that because Mr Small did not consider it necessary at the time of drafting the plea to deny the allegations of the defendants, particularly those allegations pertaining to the suitability of the front-end loader tyres and that the mistake was only discovered during preparation for discovery and trial, the reason for the proposed amendments was bona fide and that any prejudice suffered by the respondent would be cured by a costs order. Counsel further submitted that the proposed amendment is an attempt to rectify a mistake that was discovered late and that it would be in the interest of justice to allow it.

Mr Strydom submitted it would be a grave injustice, if, on account of an error of judgment on Mr Small's part, the applicant is penalised.

Respondent/ plaintiff in reconvention

[22] On behalf of the respondent/plaintiff in reconvention, Mr. Barnard argued that the amendments sought seek to withdraw an admission that representations on the quality of the tyres fitted to the front-end loader were indeed made. Counsel further submitted that the principles relied on by counsel for the applicant are no longer applicable to amendment applications with the advent of judicial case management. He argued forcefully that, with the introduction of judicial case management, a pre-trial order that has been made an order of court has the same force as any other agreement and that parties should not be allowed to resile from such agreements without good cause being shown. He added that to allow parties to undo their concurrence to confine issues would fundamentally undermine the objectives of case management, cause delay and unnecessary expense, compromise the efficient use of scarce judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice.

[23] Mr Barnard relied on authorities[8] emanating from this court to the effect that an amendment sought after the pre-trial stage stands at a different footing to an amendment sought before the pre-trial stage and that a party must make out a good case for a proposed amendment or there must be a 'compelling' and 'persuasive explanation' for the change. He submitted that the court's pre-trial order stood on the same footing as a commercial agreement and that it should stand unless reconsidered, varied or rescinded on good cause shown.[9]

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[8] Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC (I 3499/2011) [2014] NAHCMD 57 (19 February 2014).

[9]Compare Stuurman v Mutual & Federal Insurance Company of Namibia Limited 2009 (1) NR 331 (SC) and Bella Vista Investments v Pombili and Another 2011 (2) NR 694 (HC).

[24] According to Mr Barnard, the reasons advanced on behalf of the applicant/plaintiff for the change of front and the late amendments are not *bona fide.* Additionally, he stated that the facts in this matter indicate no special circumstances and that there is no good cause shown to allow the applicant to resile from the pre-trial order and that the application for the proposed amendments should be dismissed, with costs.

[25] There is an understandable uncertainty about the impact of the new rules of court on amendments to pleadings, especially those brought after close of pleadings, after pre-trial order, just before or during the course of a trial. The case law I will soon refer to accentuates that uncertainty. It was therefore necessary for me to do some comparative research to place the matter in proper perspective. I will next set out the common law relative to amendments, sketch a comparative law background and set out what I consider to be the proper approach to amendments with the advent of a judge-controlled civil litigation system.

The common law position on amendments

[26] The common law regime governing amendment of pleadings was very lax in Namibia before the introduction of judicial case management (jcm) - a civil litigation process in which: (a) a judge controls the pace of litigation; (b) the parties are required to cooperate with the court to, through early and thorough preparation, identify the real issues in dispute (both as to law and fact); (c) the interest of the administration of justice requires that costs are limited as far as possible and that hearings take place on the dates assigned by the court for a matter; (d) parties are required to make early and automatic discovery without the need for being called upon to do so.[10]

[10]The new rules contain an overriding objective in rule 3 and in rule 18 gives power to the court to manage cases filed at the court and rule 19 imposes obligations on the parties in relation to litigation being conducted in the High Court. All these provisions clearly go against the notion of a litigation system whose core function is 'justice between the parties to litigation' and place the broader public interest of the administration of justice as a central plank of our civil litigation process.

[27] The pre-jcm culture placed great accent on the so-called litigant- freedom in the conduct of litigation. Thus, the core inquiry in an amendment dispute was whether the proposed amendment ventilated the real dispute between the parties and whether any prejudice was occasioned thereby to the opponent. The Namibian Supreme court pointed out in *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*[11] at para 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.[12]

[28] In South Africa, Watermeyer, J reflected the widely held view in *Moolman v Estate Moolman*[13] that:

'The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'.

[29] As was famously put in *Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co Ltd*[14]:

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[11] *(SA 33-2010)[2013]NASC 11(19 August 2013).*

[12] See further *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A.

[13] 1998 (1) SA 53 (W) p 56.

[14] 1923 TPD 309.

'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise.'

And:

'However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.'

[30] In Australia, the attitude of the court to amendments was no different to the pre-April 2011[15] approach of our courts to amendments. Put simply, that attitude was that parties are allowed to amend pleadings at any stage of the proceedings in order to ventilate the real issues between them as long as: (a) there was no prejudice to the opponent and (b) such prejudice could be cured by an appropriate cost order. A classic statement of the principle is *Queensland v JL Holdings Pty Ltd* [16] in which the court held that justice between the parties was the 'paramount' consideration in determining an application to amend pleadings and that an application to amend should be granted so long as it raised an 'arguable issue' and any prejudice to the respondent could be compensated by costs. The court also stated that no principle of case management can be allowed to supplant the 'court's ultimate aim of the attainment of justice'. That approach was said in later judgments to hamstring the court's ability to effectively manage cases.[17]

[31] The occasional murmur[18] about the interests of the administration of justice in such an inquiry was not properly, coherently or consistently articulated and did not

[15]When judicial case management was for the first time introduced in Namibia.

[16] (1997) 189 CLR 146.

[17]Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd [2007] FCA 1623 (26 October 2007) [3] – [5].

[18] As, for instance, Flemming DJP J did in Bankorp Ltd v Anderson- Morshead 1997 (1) SA 251 (W) at 253.

reflect what the courts do in practice. The obligations of the lawyer in the conduct of litigation and the harmful impact that an amendment may have to the expeditious finalisation of a case and the general interest of the administration of justice, received scant recognition. Frankly, what public confidence is inspired by a system which makes it possible for a party represented by a lawyer to place a particular version of facts and law before court only to come back and say, look that is not really what my case is, the true position is now this or that? That is understandable to limited extent but not where it represents a complete volte-face. The practices adopted by the courts should avoid creating the impression that litigation is some sort of game and that parties can, without good reason, change their positions as they go along and as circumstances suit them.

Change in landscape with the advent of Judicial Case Management.

The AON Approach in Australia

[32] In *Aon Risk Services Australia Ltd v Australian National University*[19] *(AON),* the court was called upon to consider a late amendment of a pleading against the backdrop of a rule on amendment which provides[20] that all 'necessary' amendments *must* be made for the purposes of: (a) deciding the 'real issues' in the proceeding; and (b) avoiding multiple proceedings; and one[21] which provides that, at any stage of a proceeding, the court *may* give leave to or direct a party to amend a court document in the way it considers appropriate. Rule 21(1) states that the purpose of the Rules is 'to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense' and Rule 21(2) states that, accordingly, the Rules are to be applied to achieve: (a) the 'just resolution of the real issues in the proceedings'; and (b) the 'timely

[19](2009) 239 CLR 175.

[20]Rule 501 of the Court Procedures Rules 2006 (Act)

[21]Rule 502(1).

disposal' of the proceedings, and all other court proceedings, at a cost affordable by the parties.'

[33] Our own rule on amendments at the relevant time stated as follows:

'28(8) The court may during the proceedings at any stage before judgment grant leave to amend any pleading or document on such terms as to costs or otherwise as to it seem meet.'

[34] The plaintiff in *AON* sought to amend its particulars of claim at the beginning of trial stating that the amendment was sought based on information received during mediation and which could not be disclosed to the court. Overruling *JL Holdings*, Australia's highest court of appeal held in *AON* that:

'An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs [and that there] is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management will assume importance'.[22]

The court took the view that 'limits may be placed upon re-pleading, when delay and costs are taken into account'. The court also made clear that 'case management considerations may sometimes - and not only in "extreme circumstances" '– require that a party be shut out from raising an arguable claim.

[35] The *AON* court identified the following as relevant to the court's exercise of the judicial discretion to allow an amendment:[23] (a) the extent of delay in seeking leave and its associated costs; (b) the point the litigation has reached: applications brought during

[22]AON (2009) 239 CLR 175,217, per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[23]AON at 218.

the time set for trial or that require vacating trial dates are less likely to be granted; (c) the prejudice to the respondent if leave is granted – including the financial and emotional 'strain' of ongoing litigation, which even a costs indemnity may not heal; (d) the prejudice to other litigants and the efficient use of court resources: that is, the court held that the 'just' resolution of disputes is not limited to justice between the parties, but requires account to be taken of other litigants; (e) the applicant's explanation for the delay; (f) the 'nature and importance' of the amendment to the applicant; and (g) the 'need to maintain public confidence in the judicial system'.

[36] Therefore, 'an appropriate costs order heals all' approach has now been resoundingly rejected in Australia. Leave to amend pleadings was refused in *AON* by the highest court in the land because the trial court and the intermediate appeal court disregarded case management considerations in the exercise of the court's jurisdiction to grant or disallow amendments, and rather based the decision on the traditional grounds of the need to do substantial justice between parties and the curing of prejudice by a postponement and an appropriate costs order. The court held that the following factors ought to have been had regard to in refusing the application to amend:

a) The proposed amendment sought to introduce very late in the proceedings substantial new claims which would require the opponent to re-craft their defence from the beginning;

b) The application was brought at a time set down for trial and a postponement would scupper the remaining days of trial;

c) An award of costs would not overcome the prejudice to the opponent from substantial delay and the necessity to defend new claims;

d) The applicant who had throughout had full knowledge of the facts on which it now sought to rely offered no explanation for the delay in timeously seeking the amendment;

e) Allowing the amendment and postponing the matter would delay the hearings of other litigants and undermine public confidence in the administration of justice.

[37] It is now accepted in Australia, whose legal system also embraces case management and in the rules calls for 'quick, inexpensive and efficient justice', that the old permissive and liberal attitude to amendment of pleadings is inimical to the ethos of case management which have shifted the emphasis from 'doing substantial justice between parties', to the interests of the administration of justice overall - of which doing justice between the parties is but one consideration.

[38] Since *AON*, Australian courts have disallowed amendments brought during the hearing and those that would necessitate vacating the hearing[24]; and amendments which would substantially increase the length, cost and complexity of proceedings due to the introduction of substantial new issues.[25]

[39] Australian decisions emphasise though that judges must avoid using the discretion to disallow amendments punitively[26] and that allowance must be made for the

[24]Compare Nolan v MBF Investments Pty Ltd (No 3) [2009] VSC 457 (14 October 2009); Ehsman v Nutectime International Pty Ltd [2009] NSWSC 909 (28 August 2009); Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 2) [2010] FCA 275 (March 2010); MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 1) [2010] NSWSC 241 (23 March 2010);

[25] Compare Nolan v MBF Investments Pty Ltd (No3) [2009] VSC 457 (14 October 2009) [36] Pacific Exchange Corpn Pty Ltd v Federal Commissioner of Taxation (2009) 180 FCR 300,311; and Ginger Roger Pty Ltd v Parella Enterprises Pty Ltd (No 2) [2010] FCA 128 (24 February 2010) [27].

[26]Environment East Gippsland Inc v Vicforests (Ruling No 2) [2010] VSC 53 (25 February 2010); Tinworth v WV Management Pty Ltd [2009] VSC 553 (3 December 2009) [35].

complexity of matters and for changes which inevitably occur in litigation.[27] Therefore, amendment was allowed where it was sought at an early stage of the proceeding and when trial dates had not yet been allocated[28]; did not raise new issues but only sought to prosecute or clarify existing claims[29]; where the amendment would save time and costs later in the proceedings[30]; where there is no or little prejudice to the opponent which cannot be cured by an order of costs or a postponement[31]; where it is possible to discount the prejudice to the opponent on account of its inaction or non-compliance[32] ; where, upon discovering the mistake, the party seeking the postponement burns the midnight oil and immediately brings it to the attention of the court[33]; and greater indulgence is given to self-represented litigants[34] although such indulgence is not unlimited.[35]

The unchanged position

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[27]Chaina v Presbyterian Church (NSW) Property Trust (No 3) [2009] NSWSC 1243(23 November 2009) [51] per Hoeben J; Multi-Service Group Pty Ltd v Osborne [2010] QCA 72 (26 March 2010) [32].

[28]Scantech Ltd v Asbury [2009] FCA 1480(11 December 2009) [41]-[42]; QBE Insurance (Aust) Ltd v Westpoint Reality [2009] NSWSC 1298 (16 November 2009) [14] ; Gerard Cassegrain & Co Pty Ltd v Cassegrain [2010] NSWSC 91 (19 February 2010) [24]-[25]; Major v Woodside Energy Ltd (No 4) [2009] WASC 248 (8 September 2009)[54]; Hartnett v Hynes [2009] QSC 225 (11 August 2009) [22].

[29]Gerard Cassegrain supra; Scantech supra; Zonebar Pty Ltd v Global Management Corpn Ltd [2010] QSC 67 (15 March 2010) [58]; Pascoe v Boensch [2009] FCA 1240 (3 November 2009) [79].

[30] Gerard Cassegrain , supra.

[31]Fletcher v St George Bank [2010] WASC 75 (20 April 2010) [28]

[32]Beverage Bottlers (SA) Ltd (in liq) v Adobe Enterprises (Pty) Ltd [2009] SASC 272 (3 September 2009) [168], [132] per Kourakis J.

[33]Namevski Developments Pty Ltd v Rockdale City Council [2010] NSWLSEC 7 (5 January 2010) [17]; Genworth Financial Mortgage Insurance Pty Ltd v Peter Clisdell Pty Ltd

[34]Grivas v Harrison [2010] NSWSC 208 (18 March 2010) [10];

[35]Markisic v Commonwealth [2010] NSWSC 24 (25 February 2010) [205]; Pond v Thurga (No2) [2009] FamCA 1241 (2 December 2009) [16].

[40] The right to amend pleadings at any stage of the proceedings has not been removed by the rules of court either before or in the new rules. The rule operative when this dispute arose reads as follows:

'**28(8):** The court may during the hearing at any stage before judgment grant leave to amend any pleading or document on such terms as to costs or otherwise as to it seems meet.'

The present rule reads 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.'

[41] I now proceed to consider some decided cases since the introduction of case management.

[42] In *Coertzen v Neves Legal Practitioners*[36], Parker, AJ refused an application to amend particulars of claim after the plaintiff closed its case and before an application for absolution could be heard. The learned judge reasoned that the rule that the court may during the hearing (of an application for leave to amend) at any stage before judgment grant leave to amend a pleading is a rule in its generality. Accordingly, it does not mean that 'leave to amend' can be obtained merely for the asking. The judge observed that a litigant seeking an amendment is in fact *craving an indulgence* and must offer some explanation for why the amendment is required and, more especially, if the application for amendment is not timeously made, some reasonably satisfactory account for the delay must be provided, more so as the litigant had enough time during case management to amend any pleadings. On its facts the result reached by the learned judge is sound.

[36] (I 3398/2010) [2013] NAHCMD 283 (14 October 2013), p 4, para 5.

[43] Again, in *Jin Casings & Tyre Supplies CC v Hambabi*[37] Parker AJ confirmed the ratio of *Coertzen v Neves Legal Practitioners* and dismissed an application to vary the terms of a pre-trial order. Additionally, he reasoned that the parties' proposed pre-trial order, upon which a pre-trial conference order was issued, constituted a 'compromise through and through' and had the effect of *res judicata* which is binding on the parties. Thus, the learned judge held that by signing the proposed pre-trial order the legal practitioners signified their assent to the contents thereof based on the principle of *caveat subscriptor* and if the contents subsequently turn out not to be according to instructions, as is in that case, the party had no one but itself to blame.[38]

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

[45] In *Loubser v De Beers Marine Namibia (Pty) Ltd,* Geier, J rejected *res judicata* as a valid basis for objecting to an amendment and variation of a pre-trial order. The approach adopted by the learned judge was that to make a pre-trial order binding would render meaningless the courts inherent power to grant amendments; that a pre-trial order should be able to be varied, most importantly, in order to expedite the

[37] (I 1522/2008) [2013] NAHCMD 215 (25 July 2013).

[38]Page 6, para 11.

determination of the real issues between the parties; that a managing judge may, on good cause, at any stage at any status hearing, case management hearing or at trial allow or order amendments to the pleadings so that the real issues between the parties and not mere technicalities are determined at the trial. The court observed that expeditious determination of any interlocutory issue forms part of the objectives of case management, which were not intended to prevent the parties from ventilating the real issues to be determined at the trial. Accordingly, if a party makes out a case in accordance with the applicable principles pertaining to amendments, that, on its own, will, or should, go a long way to persuade a court that *good cause*, as is required by rule 37(17), has been shown, even if this necessitates the variation of a pre-trial order, which may, in the interim, have been made by the court on the strength of the parties' pre-trial proposal.[39] This approach commends itself if applied in keeping the principles we propose later in this judgement.

[46] Geier J's approach was revisited in *Scania Jinance Southern Africa (Pty) Ltd v Aggressive Transport CC*[40] where Smuts, J pointed out the impact of judicial case management on applications to amend. The learned judge stated that the objectives of judicial case management are, inter alia, to identify issues in dispute at an early stage which brings about obligations for parties and their legal practitioners to assist the managing judge in curtailing proceedings by confining the issues of fact and law which are in dispute between the parties resulting in the pre-trial order to be prepared by the parties. The same rules also cautions that issues, evidence and objections not set out in a managing judge's pre-trial order are not available to the parties at the trial or hearing. Smuts, J further pointed out that where parties have elected to limit the ambit of a case by agreement, the election is usually binding and that a party cannot resile from an agreement of that nature without the acquiescence of the other party or the approval of the court on good cause shown. He further pointed out that:

[39] (I 341/2008) [2013] NAHCMD 382 (26 September 2013), p 14-15.

[40] *(I 3499/2011) [2014] NAHCMD 57 (19 February 2014).*

'This approach has now been trenchantly reinforced by rule 37(14) when a matter is the subject of case management and for good reason. The parties have after all agreed upon the issues of fact and law to be resolved during the trial and which facts are not to be disputed. That agreement, as occurred in this matter, is then made an order of court. Plainly, litigants are bound by the elections they make when agreeing upon which issues of fact and law are to be resolved during the trial and which relevant facts are not in dispute when preparing their draft pre-trial order. It is after all an agreement to confine issues which is binding upon them and from which they cannot resile unless upon good cause shown. It is for this reason that the rule-giver included rule 37(14). To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an interlocutory application and compromise the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice.'[41]

[47] Smuts J's approach and that adopted by Geier J are not irreconcilable. Smuts, J refused an application to amend a plea to introduce a new defence at an advantaged stage of the trial action between the parties after the plaintiff had adduced evidence and closed its case and after the main witness for the defendants had testified. The result reached by the learned judge is no different to the one I would have come to faced with the same facts and resonates with the proper approach we propose in this judgment.

[48] The common thread that runs through the judgments of this court is that a late amendment and change of font calls for an explanation. For example, in *Moongold Properties CC v The Estate Agents Board*[42] and *Ondangwa Hardware CC v Ndahafo & Filhos*[43] Smuts, J, pointed out that where an amendment involves withdrawal of an admission, the parties seeking to do so must, when an objection is raised, provide a full

[41]Para 26.

[42] (I 982/2011) [2013] NAHCMD 30 (4 February 2013).

[43] (I 4162/2011) [2013] NAHCMD 100 (15 April 2013).

explanation so as to convince the court of the *bona fides* of seeking the amendment.[44] In my view, the explanation offered for the amendment and its timing by the party seeking the amendment is no less important and could well be decisive.

The unchanged position

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

The proper approach

[50] Namibia embraced judicial case management in April 2011[45] with the introduction of a new rule 37 which, for the first time in our nation's history, placed the control of the pace of litigation in the hands of judges, with , inter alia, the following objectives[46]: (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

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[44]Cilliers, A.C., Loots, C & Nel, H.C. 2009. *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* fifth edition. Cape Town: Juta & Co, 683; Compare *Andreas v La Cock and Another* where the court pointed out that:

'. . . . an explanation for the amendment and the timing thereof needs to be given on affidavit. 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 properly to exercise its discretion. In certain circumstances, even a satisfactory explanation from the Bar may suffice.'

[45]Government Notice 57 published in the Government Gazette No. 4709 of 13 May 2011.

[46]Rule 1A.

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'.

[51] It is idle to suggest, against the above background, that judicial case management has no impact on the parties' rights to amend pleadings. The basis upon which the courts in the past decided the principles relating to amendments did not take into account the ethos of judicial case management. The new ethos of judicial case management was described in the following terms by Ncgobo AJA in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd:*[47]

'[89] The main purpose of JCM is to bring about a change in litigation culture. The principal objectives of JCM are to: ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement; increase the cost effectiveness of the civil justice system and to eliminate delays in litigation; promote active case management by the courts and in doing so, not only facilitate the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources; and inculcate a culture among litigants and their legal representatives that there exists a duty to assist the court in furthering the objectives of JCM.

[90] With the advent of the JCM rules where all parties to the proceedings have the obligation to prosecute the proceeding and assist the court in furthering the underlying objectives, it would be highly relevant to consider any inaction on the part of the parties. And there is no place for defendants to adopt the attitude of 'letting sleeping dogs lie' and for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be asserted.'

[47] 2012 (2) NR 671 (SC) at 698.

[52] Against the backdrop of the introduction of judge-controlled civil litigation in Namibia, the approach relative to an amendment aimed at withdrawing an admission was correctly stated by Smuts, J in *Scania Jinance South Africa (Pty) Ltd v Aggressive Transport CC* [48] in the passage quoted at para 46 of this judgment.

[53] In preparation for trial, witnesses are precognised by reference to their own witness statement, those of the opposing side and the discovered documents. They are also mentally prepared for the impending 'ordeal': Every trial lawyer knows the fear of God that the prospect of cross examination drives in lay witnesses. This is what is called the 'strain' of litigation which a costs order alone does not sufficiently address. When a postponement occurs, this strain is repeated. Next time round, as not seldom happens in practice, another counsel takes charge of a matter and the process starts afresh with its attendant complications. It is that uncertainty about our civil practice which undermines public confidence in the legal system and which trial judges must guard against.

[54] I wish to record at the outset that I find the ratio and underlying reasoning of *AON* and the subsequent cases[49] that followed it persuasive as it reflects the new ethos of our civil litigation process. Guided generally by the Australian jurisprudence which I embrace, and specifically by the ratio of *AON* and the new dispensation ushered in by our judge-controlled civil litigation process, I now proceed to set out what I consider should be the proper approach to amendment applications.

[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

[48](I 3499/2011)[2014]NAHCMD 57 (19 February 2014)

[49]For example: Cleary Bros (Bombo) Pty Ltd v Waste Recycling & Processing Corpn [2009] NSWSC 1248 (19 November 2009) [6]; Public Trustee, South Australia v Commonwealth [2009] NSWSC 1008 (25 September 2009) [36].

discretion to allow or refuse an amendment, the discretion must be exercised judicially. An amendment may be brought at any stage of a proceeding. The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings. Although concessions made in a pre-trial order are binding on a party, being an admission, they can be withdrawn on the same basis as an admission made in a pleading. Facts admitted in case management orders are not that easily resiled from than those in pleadings: that is so because a legal practitioner is presumed, because of the new system which requires them to consult early and properly, to have done so and committed a client to a particular version only after proper consultation and instructions. That presumption entitles the opponent to rely on undertakings made by the opponent and to plan its case accordingly. A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought. Amendments take different forms and vary from the simple and obvious typographical or arithmetic, to the more substantial such as change of front or withdrawal of an admission. Given the latter reality, one cannot apply the same test to proposed amendments. The case for an explanation why the amendment is sought and the form it will take will also be determined by the nature of the amendment. The less significant the amendment, the less the formality for the explanation. For example, why should a typographical error be explained on oath? The more substantial an amendment, the more compelling the case for an explanation under oath. A reasonably satisfactory explanation for a proposed amendment is strongest where 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. The interests of the administration of justice require that trials proceed on dates assigned for the hearing of a matter. If the proposed amendment is justified on the ground that it arose from a mistake, the mistake relied on must be bona fide and will only be allowed if good

grounds exist for allowing the amendment. Although a litigant does not itself have to explain on oath the basis of an alleged mistake necessitating an amendment, its failure to do so may in an appropriate case be held against it if the explanation by the legal practitioner does not disclose good grounds for the alleged mistake or the necessity for the amendment. An amendment that is not opposed or one that is minor will invariably be granted. What is the court to do when a party says: 'well, true I said that in the past; I am sorry but it was said in error: My case is in fact the opposite of what I earlier stated; alternatively; I wish to completely change the basis of my case? 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. The 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; for although the court has no power to hold a party to a version that it seeks to disown, it is entitled to hold against it, as being an afterthought, 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. The court has the following avenues open to it in such a case: (a) if a party has failed to provide an explanation on oath or otherwise in circumstances where one was called for, the proposed amendment must be disallowed. (b) If a party provides an explanation that is not reasonably satisfactory or is lacking in bona fides, the court may disallow the amendment especially if it is opposed and has the potential to compromise a firm trial date. (c) Where the court is inclined to allow an amendment although opposed, it must defer it for consideration together with the merits if the fact of the amendment becomes the real issue between the parties. Whether or not the alleged mistake necessitating the amendment is genuine; or put another way: whether or not the alleged mistake necessitating the amendment is bona fide and not an afterthought may in certain

circumstances become the real issue between the parties. A court may well come to the conclusion that it is an afterthought on account of its lateness and the deliberate manner and surrounding circumstances in which it was originally made and persisted with. It is then bound up with the probabilities of the case. A very substantial change of front or withdrawal of a concession previously made in such circumstances becomes the real dispute between the parties. The appropriate course then is to defer the proposed amendment and, through cross examination by the opposing side, determine the bona fides of the withdrawal when, ultimately, it decides the probabilities. In that process the truthfulness or otherwise of the version of the party making a withdrawal becomes no less an important consideration. Change of front and wholesale amendment of pleadings and pre-trial orders, especially late in proceedings may, in an appropriate case - especially when it is not properly explained - undermine the credibility of a party's version. If that looms as a possibility or a reasonable inference from the affidavits relating to the opposed amendment, the court must consider deferring the proposed amendment and require the party to deal with it together with the merits. This approach has the advantage that the party opposing the amendment can though cross-exanimation challenge the bona fides of the alleged mistake and demonstrate that there in fact was no mistake in the way the matter was pleaded and that the claim or plea as it stood accords with the respondent's version of events and that it should, for that reason, succeed on the disputed issues as the probabilities are in its favour. (d) The imperative of speedy and inexpensive justice may in an appropriate case justify the denial of an amendment if it was necessitated by demonstrably poor preparation or lack of practitioner diligence which will have the effect of frustrating the early disposal of the case and therefore the administration of justice. (f) The discretion to disallow late amendments must not be exercised punitively, and each case must be considered on its facts, balancing the need to do justice between the parties by ensuring that the court allows them to ventilate the real issues between them, and the interests of the administration of justice. It has become common practice in our courts

for parties to bring substantial amendments on the eve of trial, fully aware it is going to be opposed, and in that way effectively secure a postponement. I cannot think of a practice that is more pernicious and subversive of the proper and orderly administration of justice than that. Such applications must therefore be entertained only in the rarest of cases. As the authors of *Herbstein & van Winsen* correctly argue[50], the notice procedure[51] is in any event not applicable to such applications and parties must not be allowed to use it to scupper set down trials. Rather, if a party contemplates late amendment or an amendment that is likely to compromise trial dates, it must, after informing the opponent in writing about the details of the proposed amendment, seek directions from the managing judge in terms of rule 32(4)-(10), for the court to allow the bringing of the amendment. The managing judge may, in line with the approach we set out in this judgment and after entertaining representations from the parties, refuse to entertain the proposed amendment; or he or she may give directions for the filing of papers for him or her to determine the proposed amendment, and before the trial actually takes place.

Guidelines and obligations of legal practitioners under Judicial Case Management

[56] The applicant's explanation in justification of its proposed withdrawal of the admissions confirmed in both the plea to the counterclaim and the pre-trial order, makes it necessary to lay down some guidelines and to highlight the obligations resting on legal practitioners, which will aid the smooth and effective management of cases under our new judicial case management system.

[57] I am alive to the reality of our practice that the legal practitioner of record often drafts the first pleadings and much later in the process briefs instructed counsel to take

[50] At p. 676.

[51] In the old rules contained in rules 28(1)–(6) , and in the new rules contained in 52(1) –(9).

control of a client's case and to take the matter to trial. In that situation, instructed counsel has the duty to acquaint himself/ herself immediately with all aspects of the client's case and to ensure in particular that he or she consults with the client or its key role players to ensure that they are satisfied with the state of the pleadings. It is a dereliction of duty for instructed counsel not to do so and to rely solely on what is provided to them by instructing counsel. It is certainly unacceptable for instructed counsel to settle any further pleadings in the matter or to settle case management reports and pre-trial orders without prior consultation with the client.

[58] A legal practitioner is an agent of the client. The source of his or her authority and mandate is the client. It is for that reason assumed that when a legal practitioner files a pleading or makes undertakings to the court, he or she has the necessary authority and mandate to do so. If that were not so, our litigation process will be afflicted by uncertainty. The legal practitioner therefore has a special duty to make sure that his or her conduct of the client's case accords with instructions. It is a breach of an ethical duty not to do so and the surest way of making sure that does not happen is to take a detailed statement from the client at the first consultation; meet the client again to take instructions in relation to pleadings of substance received from the opponent; confirm with the client admissions and denials made in either pleadings or case management reports, especially the pre-trial report which binds the parties to admissions and denials made for the purpose of trial. It is not unusual that in cross-examination litigants, when confronted with allegations made on their behalf in pleadings, express surprise. Courts, as they are entitled to do, make adverse inferences against a litigant when that happens. It therefore places a duty on a legal practitioner to ensure that his or her client not only understands the pleadings, but owns up to what is said on their behalf.

[59] The system of judicial case management in which practitioners are by law required from an early stage in the life of a case to limit issues and identify the real

issues for determination by the court has the undoubted merit, and therefore imposes the duty on the practitioner, to consult early, thoroughly and to obtain all relevant evidence from the client. That must, of necessity, limit the number of mistakes by counsel on account of not properly understanding a client's version. It is that logic that informs the ratio in *Scania Jinance Southern Africa (Pty) Ltd v Aggressive Transport CC*[52] and *Jin Casings & Tyre Supplies CC v Hambabi.*[53]

[60] If legal practitioners punctiliously follow the guidelines set out above, the instances where major changes to pleadings are sought at an advanced stage of a case will be few, except for situations involving genuine misunderstandings and minor amendments which, human nature being what it is, it would be unwise to legislate against.

[61] The purpose of my highlighting these obligations is based on what, as managing judges, we experience in practice and which, for the most part, accounts for the myriad of amendments to pleadings just before a matter proceeds to trial. Managing judges must be astute in future in ascertaining whether a failure to comply with the obligations set out herein has occasioned the amendment sought. If indeed such failure had that result, it makes the case for late amendment the more unwarranted and therefore unlikely to be allowed.

[62] During argument of this matter, the court reminded counsel that based on our experience as judges, there is a very high incidence of postponement of trial actions in this jurisdiction and that the majority of such postponements are the result of amendment of pleadings just before trial. As will soon become apparent from the facts of this case, there is nothing inevitable or inherently natural about amendments: it is

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[52] *(I 3499/2011) [2014] NAHCMD 57 (19 February 2014).*

[53] (I 1522/2008) [2013] NAHCMD 215 (25 July 2013).

invariably the function of poor preparation and lack of practitioner diligence. I say so based on our daily experience as trial judges.

Identified proper approach applied to the facts

[63] Given the late stage at which the amendment is sought in the present matter, the applicant had the duty to offer a satisfactory explanation for the amendment which, being the withdrawal of an admission, cannot be had for the asking. It is apparent from the way Mr Small's affidavit is crafted that the plaintiff's representatives were not apprised of the pleadings as they stood on the two occasions that the matter was set down for trial and, one assumes, instructed counsel then acting for it could, or ought to, have consulted properly with all witnesses in preparation for trial. How else can one construe the explanation that the pleadings prepared by him do not reflect the client's instructions? The applicant has made a curious choice of only relying on an explanation of its legal practitioner instead of that of an office bearer who bears personal knowledge of the facts which, it is said by the lawyer, constitute its defence to the plaintiff's claim. The deponent is the very same legal practitioner who supposedly made a mistake in putting forward a version in the pleadings which is now disavowed by the applicant. The applicant therefore places itself in the enviable position that on a future date it can advance the argument that the position as at present advanced does not reflect the correct position. That is prejudicial to the respondent. Although it is permissible for a legal practitioner, instead of the client, deposing an affidavit explaining how an error was made during consultations and thus necessitating the amendment,[54] the explanation offered by the practitioner must be satisfactory. For the reasons that I will now set out, the explanations offered by Mr Small are not satisfactory and the failure by the applicant to itself come on oath raises a strong inference of lack of bona fides of the alleged mistake relied on for the proposed amendment. What we have before us therefore is a

[54] Compare Van Zyl and Maritz NNO v South African Special Risks Insurance Association 1995 (SA) SA 331 at 339A-B.

mere say-so by Mr Small that a mistake was made in the way he pleaded the plaintiff's case but not confirmed by the client – let alone an explanation how it happened.

[64] As is apparent, the representations allegedly made by the plaintiff to the defendant are repeated in seven paragraphs (2- 8). That the plaintiff's counsel could have settled the plea thereto without taking specific instructions beggars belief and, in any event, raises the question whether the alleged mistake is bona fide or an afterthought. I say so because, in essence, the plaintiff had in the plea to the counterclaim conceded a substantial part of the defendant's case in reconvention, leaving only to be proved the breach and the quantum. Most significantly, the very same admissions were recorded as undisputed fact in the pre-trial order. The improbability that counsel could have settled a plea (and reiterate it in the pre-trial order) in those terms without clear instructions seems apt, it appears to me, to be tested under cross-examination. That is only possible at a trial on the merits. That is so because the court can grant an amendment at any stage of proceedings before judgment. As the learned authors of Erasmus' *Superior Court Practice*[55] correctly sum up the common law by reference to decide cases:

> 'Applications for amendments have been entertained and allowed after both sides have closed their cases, during the hearing of an application for absolution and in certain cases even after the conclusion of argument'.

[65] The proper approach to amendments set out above does not affect the practice that an amendment may, all things being equal, be allowed during the hearing of

[55]B1-186B, Service 7 1997.

evidence,[56] after the conclusion of evidence[57] or even after argument has been heard.[58] The rules governing when an amendment may be allowed are so permissive that it is also possible on appeal.[59] That is of course no license for seeking late amendments. The principles are subject to a party properly justifying the late amendment based on the proper approach set out above.

[66] Reverting to the case at hand, it still remains open to the court after the parties' versions had been fully and comprehensively ventilated at trial and properly tested under cross-examination, to grant or refuse the proposed amendment. No trial prejudice is occasioned thereby because the plaintiff is now put on notice that it will be required to deal with its proposed amendment together with the merits so as to lay the evidential basis for the amendment it seeks and therefore run its case on the basis that the admissions were erroneously made – except, of course, that the defendant is entitled to challenge that version.

[67] The nature of the amendments sought and the absence of a satisfactory explanation for the alleged error in my view has made the bona fides of the proposed amendment the real issue between the parties. The proposed amendment has become inextricably interwoven with the merits of the matter. Therefore, the present dispute is best resolved by keeping the proposed amendment in abeyance, allowing the parties to proceed on the pleadings as they stand and affording the applicant the opportunity, if so advised, to, through evidence on the merits, lay the evidential basis for the amendment,

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[56]Ferreira Deep Ltd v Olver 1903 TS 145; Strydom v Ohlsen 1913 TPD 288; Meyers v Abramson 1951 (3) SA 438(C).

[57]City of Cape Town v National Meat Supplies Ltd 1938 CPD 59; Pennefather v Gokul 1960 (4) SA 42 (N) at 51A-C; Solomon v Spur Cool Corpn [2003] All 359 (C) at 369.

[58]Clayton v Feitelberg 1903 TH 99; Whittaker v Roos; Morant v Roos 1911 TPD 1092.

[59]Shahmahomed v Hendriks 1920 AD 151 at 159-60; SAR & H v National Bank of SA Ltd 1925 AD 704 at 716; Van der Spuy v Malpage [2005] 2 ALL SA 635 (N) at 640 and British Diesel s Ltd v Jeram & Sons 1958 (3) SA 605 (N).

subject to the respondent's right to cross examine. In order to avoid prejudice to the respondent, it is matter which legitimately the plaintiff ought to be challenged on under cross examination as it is the very basis of each side's case. The safest route to follow in such circumstances is not to deny the proposed amendment but to conflate it with the merits so that the party seeking the amendment can be properly tested on cross-examination as to the bona fides of the alleged mistake.

[68] In coming to this conclusion, it is not lost on me that our litigation system is premised on the foundation that a legal practitioner informs the client about the pleadings he or she prepares and files on behalf of the client, especially any concessions made in the name of the client. The notion that both instructing and instructed counsel never shared the same with the client either before or after the concessions were made in its name is one that is difficult to accept and required confirmation by the client under oath. I am further fortified in that conclusion by the applicant's failure to, on oath by its office bearers, confirm the fact that Mr Small had incorrectly made admissions on its behalf in the pleadings.

[69] The result I propose therefore is that the proposed amendment be kept in abeyance and that the applicant is allowed, if so advised, after the evidence had been led at the trial to move it on the same papers, duly amplified if need be. The costs, in so far as it was not already tendered by the applicant, in respect of the proposed amendment also stands to be reserved and to be considered when the proposed amendment is considered alongside the merits of the matter.

Order

[70] In the premise, it is ordered that:

1. The proposed amendment of the plea to the claim in reconvention and revision of the pre-trial order of 25 June 2013 and the associated application for condonation for the late filling, are deferred to be decided at the trial together with the merits if still persisted with;

2. The costs of the opposed application to amend stands over for determination together with the merits;

3. The applicant is ordered to pay the respondent's costs occasioned by the opposition to the abandoned joinder application and the application to add further causes of action;

4. The trial of the matter shall proceed on the pleadings as they stood on 16 September 2014; and

5. The matter is enrolled for status hearing on **21 October 2014 at 14h15** for allocation of new trial dates and for further directions.

P T Damaseb
Judge-President

I agree,

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E PB Hoff,
Judge

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I agree,

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S Ueitele

Judge

APPEARANCES

Applicant:	JAN Strydom (Assisted by AJB Small)
Instructed by:	Theunissen, Louw & partners
Respondent:	PC Barnard
Instructed by:	Du Plessis, Roux, De Wet & partners