REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3086/2012

In the matter between:

CATERPLUS NAMIBIA (PTY) LTD T/A BLUE MARINE INTERFISH	**PLAINTIFF**

and

HALLIE INVESTMENT 142 CC T/A WIMPY MAERUA	**1ST DEFENDANT**
CHRISTIAAN JACOBUS VAN DER MERWE	**2ND DEFENDANT**

Neutral citation: *Caterplus Namibia Pty Ltd t/a Blue Marine Interfish v Hallie Investment 142 CC t/a Wimpy Maerua* (I 3086/2012) [2018] NAHCMD 320 (12 October 2018)

Coram: OOSTHUIZEN, J
Heard: **2 March 2018 and 30 April 2018**
Delivered: **12 October 2018**

Flynote: Late amendments to pleadings. Namibian approach.

Summary: Defendants brought an application to amend its plea and counterclaim almost 2 years after filing their second set. Defendants failed to give an explanation when called to do so. Namibian approach to late amendments require an explanation.

Held, application to amend plea and counterclaim dismissed with costs.

ORDER

Therefore, the court orders that —

[1] Defendants application for leave to amend their existing plea and counterclaim in accordance with their Notice of Intention to Amend dated 26 October 2017, is dismissed.

[2] Defendants shall pay the costs of the plaintiff occasioned by their application for leave to amend, which costs will include the costs of one instructing and two instructed counsel and not to be limited by Rule 32(11).

JUDGMENT

OOSTHUIZEN J:

[1] On 15 December 2017 the defendants applied for leave to amend their plea and counter claim (which they delivered on 7 January 2016 and which was dated 14 December 2015).

[2] Subsequent to defendants' plea and counterclaim delivered on 7 January 2016, the plaintiff delivered its replication to defendants' plea and pleaded to their counterclaim on 20 April 2016.

[3] On 15 June 2016 the defendants delivered a rejoinder to the plaintiff's replication to their plea (and not a replication to plaintiff's plea to their counterclaim as ordered).

[4] On 27 June 2016 the court ordered the plaintiff to deliver its surrejoinder to defendants' rejoinder by not later than 15 July 2016 and postpone the matter to 18 July 2016 for case management.

[5] On 28 June 2016 the plaintiff delivered its surrejoinder.

[6] On 18 July 2016 the court postpone the matter again for case management to 15 August 2016.

[7] The parties filed a joint case management report on 10 August 2016.

[8] In the joint case management report of 10 August 2016 the parties, both represented by experienced legal practitioners, agreed that the pleadings properly define all issues between them and that they do not foresee the need for further amendments, but should the need arise it will be dealt with in terms of the Rules of Court.

[9] They further agreed the dates to file witness statements, expert notices and summaries, discovery, further discovery and expert reports. All of the aforementioned to be completed before the end of October 2016.

[10] On 15 August 2016 the court adopted the joint case management report and postponed the matter to 5 December 2016 for a pre-trial conference. The pre-trial report had to be filed by 1 December 2016. The court also set the matter down for trial from 12 to 16 June 2017.

[11] On 10 November 2016 Erasmus Associates withdrew as legal practitioner for the defendants. None of the procedural steps agreed in the joint case management report on 10 August 2016 and adopted on 15 August 2016 was done by the defendants.

[12] On 22 November 2016 the current legal practitioners of defendants came on record and on 23 November 2016 the court ordered substituted dates for discovery, further and better discovery, replies, witness statements etc. It is noted that the plaintiff discovered on 31 October 2016 and was ready to file its witness statements by the end of October 2016 simultaneously with defendants (who apparently was not ready to file their witness statements as agreed).

[13] On 22 November 2016 a pre-trial conference was scheduled for 27 March 2017, the trial dates being 12 to 16 June 2017.

[14] Defendants requested further and better discovery on 23 January 2017 (after they discovered late, on 9 December 2016) and evinced an unfavourable response on 1 March 2017, which resulted in an application to compel, which was not persisted with.

[15] The trial dates for 12 -16 June 2017 were vacated. No pre-trial was done. Defendants having brought the aforementioned application to compel.

[16] Defendants delivered a notice of intention to amend their pleadings on 26 June 2017. It was not persisted with.

[17] On 26 October 2017 the defendants filed a notice to amend its plea and counterclaim filed on 7 January 2016.

[18] In the introductory paragraph of the Notice to Amend they withdrew their notices to amend filed on 26 June 2017 and 9 October 2017.

[19] Defendants Notice to Amend (26 October 2017) is substantial and comprises 16 pages and numerous paragraphs, sub-paragraphs and sub-sub-paragraphs. It

seek to introduce on the one hand supplementary and additional defences based on a bouquet of agreements not between the litigants directly and on the other hand a fresh defence based on the marital regime between second defendant and his wife, which second defendant say concerns the validity of the surety agreement with plaintiff. The intended amendments to the counterclaim seek to introduce a counterclaim for the same amount as previously counterclaimed but on an interpretational regime of agreements between plaintiff and third parties and defendants and third parties all related to the Wimpy Franchise, which is also contained in the amendment it seeks to their plea. The intended amendment to the counterclaim of the defendants might warrant further and better discovery by plaintiff, which to date is refused. Vide paragraphs [14] and [15] above.

[20] On 22 November 2017 the plaintiff objected in terms of Rule 52 (4) of the rules, setting out in detail its objections to the intended amendments. Plaintiff's objections comprise 12 pages, and include the following paragraphs 30 and 31 quoted hereunder:

"30. The amendments seek to introduce substantially new and different defences and a counterclaim on a substantially different premise at a belated stage, which - in the absence of a proper explanation - is unreasonable and should not be permitted. This further conflicts with the core principles underlying the case management system in Namibia, which calls for a speedy resolution of matters and generally offends the principle that there should be finality to litigation.

31. Alternatively to the previous paragraph:

31.1 The lateness of the amendment sought;

31.2 The history of the amendments and attempted amendments sought in this matter;

31.3 The new and changed nature of the defences and claims sought to be introduced by the proposed amendment;

31.4 The substantial delays caused by the aforegoing;

31.5 The extent of the discovery previously (and impermissibly) sought, which inter alia sought the disclosure of documents which were irrelevant or disproportionate to the needs of the case;

31.6 The yet further discovery that might well be sought by the defendants as alluded to by the defendants (in the excipiable and yet further defence sought to be introduced in paragraph 6.4 of the amended plea),

render the amendments not bona fide. Indeed it appears from the amendments sought that same are being introduced for an ulterior purpose and in order to serve as a basis to achieve impermissible discovery of immense proportions (compare paragraph 6.4 of the proposed counterclaim), which attempt should not be countenanced".

[21] Despite the above, second defendant elected not to address the concerns of the plaintiff in his affidavit filed in support of defendants' application for leave to amend in terms of Rule 52(4) on 15 December 2017.

[22] The amendments sought came about almost 2 years (22 months) after defendants filed their previous plea and counterclaim as a result of a Supreme Court judgement wherein they were partially successful and was granted leave to amend their counterclaim[1].

[23] It is noted that the case started in 2012 and defendants initially filed a plea and counterclaim on 24 September 2013.

[24] It is further noted that defendants admitted that the whole cause of action arose in the jurisdiction of the Namibian High Court and admitted an agreement entered into between plaintiff and first defendant on 5 September 2006 in Windhoek ("POC 1")[2]. This admissions are not sought to be withdrawn. Instead the

[1] *Hallie Investment v Caterplus* 2016 (1) NR 291SC at 306 paragraph [64].
[2] Index of pleadings in the main action, pp3,4,5,21 and 22.

defendants sought to qualify the admissions and to subject POC 1's interpretation to other agreements concluded between plaintiff and parties not before court and between defendants and absentee parties, which defendants say are related agreements.

[25] In *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[3], three judges of the High Court highlighted the Namibian approach to late amendments under the new Rules of Court which came into operation on 16 April 2014[3].

[26] Damaseb JP (as he then was) with the other two judges concurring, pronounced that the common thread that runs through the judgments of this court is that a late amendment and change of front calls for an explanation. The court also observed that the explanation offered for the amendment and its timing by the party seeking the amendment could well be decisive[4].

[27] Defendants, despite being warned by plaintiff's objections, failed to provide an explanation under oath in their founding affidavit in circumstances where an explanation was called for concerning their late attempt to amend their plea and counterclaim. The circumstances calling for an explanation under oath was the lateness of their notice to amend, the nature of the amendments they seek, the change of front they seek based on the Married Persons Equality Act, Act 1 of 1996 and their own adopted leisurely pace in which they thus far participated in the litigation.

[28] "Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judicially. 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

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[3] (I 601 -2013 P 1 4084 - 2010)[2014]NAHCMD 306 (17 October 2014) paragraphs [40] to [62]. Paragraph [51] make it clear that judicial case management impacts on the right of parties to amend pleadings.

[4] Op cit, paragraph [48].

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"[5].

[29] The court further reiterated that a litigant must be allowed to ventilate what they believe to be the real issues between them and the other side, and continue to say the following:

"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[6]."

[5] Excerpt from paragraph [55], *op cit*.
[6] Excerpt from paragraph [55], *op cit*.

[30] Defendants endeavoured to give some belated explanations under oath in their replying affidavit. It is trite that an applicant should make its case in the founding affidavit.

[31] In this matter the court accorded the defendants the opportunity to make use of motion proceedings under Rule 52(4) and it was expected from defendants to make out a proper case in its founding affidavit and give proper explanations for its late amendments. Defendants disregarded the forewarning in paragraph 30 of plaintiff's objection of 22 November 2017 and did so at their peril.

[32] At the end the court was faced with legal arguments from both sides on the alleged objectionable nature of the amendments sought and how it should be resolved on the basis of applying *inter alia* the tests applicable in exceptions. The court chose not to pronounce thereon in the circumstances of this case.

[33] Matter of fact is that the defendants did not tender reasonable explanations for the belatedness of their proposed amendments as they were required, and their application for amendment fails on that score alone.

[34] The parties have litigated the proposed amendments on equal terms and both represented by senior counsel. The complexity of the submissions and arguments advanced and the extent of the amendments sought, do not warrant the capping of costs provided for in Rule 32(11) of the Rules of Court.

[35] The court awards costs to the plaintiff, not limiting plaintiff's costs in terms of Rule 32(11), which costs will include the costs of one instructing and two instructed counsel.

[36] Therefore, the court orders that —

> [36.1] Defendants application for leave to amend their existing plea and counterclaim in accordance with their Notice of Intention to Amend dated 26 October 2017, is dismissed.

[36.2] Defendants shall pay the costs of the plaintiff occasioned by their application for leave to amend, which costs will include the costs of one instructing and two instructed counsel and not to be limited by Rule 32(11).

GH Oosthuizen

Judge

APPEARANCES

PLAINTIFF:	Tötemeyer (with him Schickerling) instructed by Francois Erasmus & Partners, Windhoek

DEFENDANT:	Marais instructed by Ellis & Partners Legal Practitioners, Windhoek