

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Enviro-fill Namibia (Pty) Ltd v Council for the Municipality of Tsumeb</i>	Case No.: I 6045/2014
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 04 February 2020
	Delivered on: 21 February 2020
Neutral citation: <i>Enviro-fill Namibia (Pty) Ltd v Council for the Municipality of Tsumeb</i> (I 6045/2014) [2020] NAHCMD 61 (21 February 2020)	
The Order: Having heard Mrs Mushore on behalf of the Plaintiff and Adv. Chibwana , on behalf of the Defendant and having read documents filed of record: IT IS ORDERED THAT: 1. The defendant’s application for leave to amend its plea, is dismissed. 2. The defendant is ordered to pay the plaintiff’s costs occasioned by opposition to the application for leave to amend such costs are to include costs of one instructing and one instructed counsel. 3. The matter is postponed to 13 March 2020 at 08:30 in chambers for status hearing and	

possible allocation of trial dates.

4. The parties are directed to file a joint status report on or before 09 March 2020.

Reasons: Practice Direction 61(9)

Introduction

[1] Presently before court is an application by the defendant for leave to amend its plea. It appears that the proposed amendment is aimed at the introduction of a special plea of statutory non-compliance in respect of an agreement allegedly concluded by the parties after 13 August 2013.

[2] This matter has a rather long history. The plaintiff caused summons to be issued in December 2014. It went through the judicial case management procedures and was initially set down for trial set to commence on 15 August 2016. On the 15 August 2016 the defendant raised certain “preliminary issues” that led to the vacation of trial dates and a postponement. Subsequently, the court granted the plaintiff leave to amend its particulars of claim and the defendant delivered consequential amendment to its plea. The pleadings closed and ultimately the matter was set down for trial for 12-16 November 2018.

[3] On 12 November 2018 at the commencement of trial, the defendant submitted that there were certain outstanding “preliminary issues” which the court must adjudicate on, before trial commences. The court ruled that there were no outstanding “preliminary issues” for determination by the court and ordered that trial should proceed.

[4] The defendant noted intention to take the matter on review to the Supreme Court. This led to the vacation of trial dates and the matter was postponed.

[5] The defendant delivered a petition to the Supreme Court requesting the latter to exercise its review jurisdiction.

[6] On 5 June 2019 the Supreme Court declined to exercise its review jurisdiction.

[7] On 5 September 2019 the defendant delivered a notice to amend its plea. The

plaintiff opposes the proposed amendment and this led to the present application.

Defendant's application for leave to amend

[8] The defendant indicates that it wishes to amend its plea by addition of the following paragraphs as a special plea:

'Ultra vires:

The defendant is obliged to comply with the provisions of Section 31 A of the Local Authorities Act No.23 of 1992 (the Act), whenever the defendant enters into a contract pursuant to a resolution of the defendant.

There was no resolution by the defendant after 13 August 2013 authorizing the defendant to enter into a contract with the plaintiff.

The defendant pleads that there was no contract signed and co-signed as contemplated by section 31A of the Act entered into between the plaintiff and defendant after 13 August 2013.

There was no tender awarded in terms of the Local Authority Tender Board Regulations 2011-073 (the regulations), awarding the plaintiff a tender to render the purported services allegedly rendered to the defendant by the plaintiff from 13 August 2013.

The purported contract entered into after 13 August 2013 was therefore ultra-vires the Act and the regulations in the manner described above and as a result was null and void.'

[9] During oral argument counsel for the defendant indicated that the defendant abandons paragraphs 4 and 5 of the proposed amended plea. Counsel for the defendant further asserted that the remainder of the proposed amendment would be added to paragraph 3 of the existing plea and that the reference to a "special plea" must be deleted.

[10] Following the abandonment of paragraphs 4 and 5 the remainder of the proposed amended plea should read as follows:

'The defendant is obliged to comply with the provisions of Section 31 A of the Local Authorities Act number 23 of 1992 (the act), whenever the defendant enters into a contract

pursuant to a resolution of the defendant.

There was no resolution by the defendant after 13 August 2013 authorizing the defendant to enter into a contract with the plaintiff.

The defendant pleads that there was no contract signed and co-signed as contemplated by section 31A of the Act entered into between the plaintiff and defendant after 13 August 2013.'

[11] According to the pleadings, the parties entered into a written agreement on 17 July 2009 at Windhoek. The plaintiff pleaded that it rendered services in terms of the agreement during August 2013 to August 2014 and the defendant did not pay for the services rendered in terms of that agreement. The defendant has pleaded that the plaintiff had repudiated the agreement in question and the repudiation was accepted by the defendant on 13 August 2013. The defendant's position is that, the agreement terminated on 13 August 2013.

[12] In its founding affidavit, the defendant explains that the proposed amendment seeks to raise a defence to the effect that, after 13 August 2013 there was no new agreement entered into between the plaintiff and the defendant. The basis for such contention is that there was no compliance with the provisions of section 31A of the Local Authorities Act 23 of 1992.

[13] The deponent to the defendant's founding affidavit relates that it became evident when considering the pleadings in preparation for trial that the logical conclusion of the defence premised on termination of the agreement had not been pleaded.

[14] When probed as to precisely when did it become evident that an amendment was necessary, counsel for the defendant could only surmise that perhaps it was after the Supreme Court declined to exercise its review jurisdiction.

Plaintiff's opposition

[15] The plaintiff objects to the proposed amendment on various grounds. The plaintiff contends that the proposed amendment is belated and brought at an advanced state of the

proceedings, when the matter is ready to be set down for trial. The defendant fails to offer any explanation for the lateness of the proposed amendment. Given the lateness of the proposed amendment coupled with the defendant's failure to provide an explanation relating thereto, the plaintiff argues, the proposed amendment is not *bona fide* and is prejudicial to the plaintiff. The plaintiff further contends that the amendment introduces a change of stance by the defendant, in that the defendant seeks to belatedly introduce a defence of statutory non-compliance. The plaintiff argues that such amendment is in contradiction with the terms of the written agreement and is excipiable.

Legal principles

[16] The general rule is that the court may at any stage before judgment, grant leave to amend a pleading. However, leave to amend cannot be obtained merely for the asking. The litigant seeking to amend, craves an indulgence and must offer some explanation why the amendment is required, and more especially when the amendment is sought at a late stage, a satisfactory account for the delay must be given. Where a proposed amendment will not contribute to the determination of the real issues between the parties, it ought not to be granted.¹

Application of legal principles to the facts

[17] The essence of the defendant's proposed amendment is to the effect that there was no contract signed by the parties after 13 August 2013.

[18] In my view the proposed amendment is not pertinent to a specific allegation made in the plaintiff's particulars of claim. There is no allegation in the particulars of claim that the plaintiff relies for the relief it claims, on a contract entered into by the parties after 13 August 2013. It appears that the defendant seeks to address, through the proposed amendment, a fictional contract not alleged by the plaintiff in the particulars of claim.

[19] Insofar as the defendant seeks to rely for its defence on non-existence of a contract whose existence is not asserted or pleaded by the plaintiff, the defendant's plea would be

¹ Coertzen v Neves Legal Practitioners I 3398/2010 [2013] NAHCMD 283 (14 October 2013) per Parker AJ.

rendered excipiable. The basis for such excipiability is that defendant's plea would lack statement of material facts on which the defendant relies for its defence with sufficient particularity to enable the plaintiff to reply thereto.

[20] In addition, it is common cause that the proposed amendment is being sought belatedly. The defendant has not given a satisfactory account for the delay in applying to amend. The only reason for the delay given by the defendant is that *"it became evident when considering the pleadings in preparation for trial that the logical conclusion of the defence premised on termination of the agreement had not been pleaded."*

[21] The defendant has not explained precisely when, during the preparation for trial, did it become evident that the amendment was necessary. As indicated earlier on, the matter was initially set down for trial set to commence on 15 August 2016. Later, the matter was set down for the trial set to commence on 12 November 2018. Subsequently the defendant noted intention to take the matter on review to the Supreme Court.

[22] If the defendant only started preparation for trial after the Supreme Court declined to exercise its review jurisdiction, as surmised by counsel for the defendant, then it follows that the *bona fides* of the defendant in seeking for the amendment are seriously in question. It would appear that the defendant had not been prepared for the trial set down for 15 August 2016, as well as for the trial which was subsequently set down for 12 November 2018.

Conclusions

[23] The upshot of the foregoing is that, the defendant did not bring the application to amend, timeously. The defendant has not placed before court a satisfactory account for the delay. In the circumstances. I am persuaded by the contention put forth by the plaintiff that the proposed amendment would prejudice the plaintiff to the extent that same cannot be remedied by a costs order.

[24] For the foregoing reasons the defendant's application for leave to amend, stands to be dismissed with costs.

[25] In the result, I make the following order:

1. The defendant's application for leave to amend its plea, is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by opposition to the application for leave to amend such costs are to include costs of one instructing and one instructed counsel.
3. The matter is postponed to 13 March 2020 at 08:30 in chambers for status hearing and possible allocation of trial dates.
4. The parties are directed to file a joint status report on or before 09 March 2020.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Defendant
Adv. CE Van der Westhuizen Instructed by Etzold-Duvenhage	Adv. T. Chibwana Instructed by Ueitele & Hans Legal Practitioners