

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Trustco Group International (Pty) Ltd and Atlanta Cinema CC Joseph Johannes Becker Petrus Lodewikus Ludwig Damon Ian Van Der Merwe Municipal Council of Windhoek Minister of Regional and Local Government	Case No: (P) I370/2012 and (P) I 3268/2010 Division of Court: Main Division Heard: 19 August 2021 & 21 January 2022
Plaintiff	1st Defendant
	2nd Defendant
	3rd Defendant
	4th Defendant
	5th Defendant
	6th Defendant
Heard before: Honourable Mr. Justice Usiku, J	Delivered: 11 February 2022
Neutral citation: <i>Trustco Group International (Pty) Ltd v Atlanta Cinema CC & 5 Others</i> ((P) I 370/2012 and I 3268/2010) [2022] NAHCMD 49 (11 February 2022)	
Order:	
<ol style="list-style-type: none">1. The applicant in the application for leave to amend is Trustco Group International (Pty) Ltd.2. The application by Trustco Group International (Pty) Ltd, for leave to amend its particulars of claim, is refused.3. Trustco Group International (Pty) Ltd is ordered to pay the costs of the First, Fourth and Fifth Defendants, occasioned by the said defendants' opposition to the application. These	

costs include costs of one instructing and two instructed counsel and the costs are not subject to the limit imposed in terms of rule 32 (11).

4. The matter is postponed to 16 March 2022 at 15h15 for Status Hearing.
5. The parties are directed to file a joint status report on or before 9 March 2022.

Reasons for order:

USIKU J:

Introduction

[1] In this matter, the plaintiff seeks leave to amend its particulars of claim.

[2] The precise identity of the plaintiff that seeks leave to amend, is a subject of controversy in the present proceedings. In view of the fact that the issue of the identity of *the applicant* has the potential to dispose the application in whole, I am of the view that this issue be determined first.

Background

[3] In 2010, Trustco Capital (Pty) Ltd initiated action, as the plaintiff, under case number (P) I 3268/2010 against Atlanta Cinema CC, Joseph Johannes Becker, Petrus Lodewikus Ludwig and Damon Ian Van der Merwe as first, second third and fourth defendants, respectively. In that matter, the plaintiff alleged that, it (as “lender”) entered into a written loan agreement with the first defendant (as “borrower”), in terms of which the plaintiff lent and advanced to the first defendant an amount of N\$ 12 000 000. The plaintiff further alleged that the second, third and fourth defendants bound themselves, jointly and severally, as sureties and co-principal debtors in favour of the plaintiff, in respect of the first defendant’s alleged liability in terms of the loan agreement. The plaintiff claims N\$13 638 852.52 from the defendants in respect of the alleged loan agreement.

[4] In 2012, Trustco Group International (Pty) Ltd, initiated action against the same four defendants, under case number (P) I 370/2012, in which the plaintiff claims delivery of certain twelve quad bikes, on the basis that the plaintiff is the owner of the quad bikes, alternatively payment in the amount of N\$ 288 000.

[5] The defendants defend both actions. The two actions are consolidated in terms of the provision of rule 41 of the Rules of the High Court of Namibia.

[6] In 2019 the first, third and fourth defendants sought, and were granted, leave to have the Municipal Council of Windhoek and the Minister of Urban and Rural Development joined as the fifth and sixth defendants in the consolidated action.

[7] In July 2020, Trustco Group International gave notice of intention to amend its particulars of claim dated 13 April 2015. The first, fourth and fifth defendants filed notice of objection to the proposed amendments. However, during the course of argument in the application, counsel for the first, third and fourth defendants asserted that the third defendant does not oppose the application.

[8] In January 2021, Trustco Group International applied for leave to amend its particulars of claim as identified and in the manner provided for, in the Notice of intention to amend, dated 27 July 2020.

The nature of the proposed amendments

[9] The proposed amendments seek to:

- (a) impose liability on the fifth and sixth defendants, in the event that the written agreement entered into between “Trustco Groups Holdings (Pty) Ltd” and the fifth defendant, is found to be a nullity for want of compliance with the provisions of s 30 (1) (t) and s 63 (1) of the Local Authorities Act 23 of 1992 and, in the event that the plaintiff has, for that reason, no contractual claim against the first to the fourth defendants;
- (b) impose liability on the second to the fourth defendants, jointly and severally, with the first defendant, for payment of N\$10 000 000, allegedly being a loan lent and advanced by the plaintiff to the first defendant; and
- (c) insert a new prayer, holding all the defendants liable to the plaintiff, jointly and severally, in the amount of N\$10 000 000.

Defendants' objection

[10] The first and the fourth defendants object to the proposed amendments on the basis,

among other things, that:

- (a) the amendment seeks to introduce new claims and debts, which have become prescribed and extinguished in terms of ss 10 and 11 of the Prescription Act 68 of 1969;
- (b) the plaintiff is described as “Trustco Group International”, and is alleged to have lent and advanced N\$10 000 000 to the first defendant. There is no particularity given in regard to the alleged loan and that the absence of such particularity renders the proposed amendment irregular, vague and embarrassing and excipiable.

[11] The fifth defendant objects to the proposed amendments on the basis, among other things, that:

- (a) the proposed amendments are bad in law and lack averments necessary to sustain an action and render the particulars of claim excipiable, and that,
- (b) the fifth and sixth defendants did not owe any duty of care to the plaintiff for the non-compliance with the applicable regulations.

The identity of the applicant, in the application for leave to amend

[12] The plaintiff contends that the applicant in the present application, is Trustco Capital (Pty) Ltd.

[13] The plaintiff argues further that the court “determined” the “above-mentioned heading” for use for the purposes of both actions in the consolidated matter. The parties, including Trustco Capital, the plaintiff argues, continued to litigate on the heading chosen by the court. According to the plaintiff, there is no doubt that the applicant in the application for leave to amend, is Trustco Capital.

[14] The plaintiff further asserts that, the notice of intention to amend refers to the particulars of claim to be amended, stating: *“B. By inserting a new prayer after prayer (c) on page 8 of the plaintiff’s amended particulars of claim dated 13 April 2015 to read as follows: . . .”* According to the plaintiff, the intended amendment will not make logical sense if inserted after prayer (c) on page 8 of Trustco Group International’s amended particulars of claim under case number (P) I 370/2012, but will make perfect sense if inserted after prayer (c) on page 8 of Trustco Capital’s amended particulars of claim under case number (P) I 3268/2010.

[15] The plaintiff submits that the court should, in deciding the question of the identity of the

applicant, be guided by the procedure as determined in the *Supreme Court in Mans NO and Others v Coetzee and Others 2019 (1) NR 1¹*, where the Supreme Court confirmed that the High Court has an inherent jurisdiction to regulate its own procedure and that the overriding objective of the rules of court is to “facilitate the resolution of the real issues . . . speedily, efficiently and cost effectively”.

[16] The first and fourth defendants contend that, to determine the identity of the applicant, the court should consider the papers filed of record in the application. According to the first and fourth defendants, the plaintiff is described in the notice of intention to amend as “Trustco Group International” and the notice signals an intention of the “*said plaintiff to amend its particulars of claim dated 13 April 2015*”. The notice of motion, contended by the first and fourth defendants, states that the “*above-named plaintiff intends to make application*”. The “*above-named plaintiff*” is described in the notice of motion (and in the founding and replying affidavits) as “Trustco Group International”. The founding affidavit is deposed to by Mr Barend Jacob van der Merwe, the legal practitioner of record for the “*above-named applicant*”. The deponent further alleged that “*the plaintiff has paid rent in terms of the agreement called the ‘Lease Agreement’ since the inception of the Agreement until now*”.

[17] The first and fourth defendants contend further that Trustco Capital (Pty) Ltd is not reflected as, (or alleged to be), a party to the said agreement and is not alleged to have paid “*the rent in terms of the agreement . . .*” The lease agreement was, *ex facie* its content, concluded between the fifth defendant and “Trustco Group Holdings (Pty) Ltd” (not Trustco Capital (Pty) Ltd).

[18] The first and fourth defendants submit that the applicant’s papers do not demonstrate that the “*actual applicant is indeed Trustco Capital*” as the plaintiff contends.

[19] The fifth defendant submits that irrespective of whether the amendment is sought on behalf of Trustco Capital (Pty) Ltd or Trustco Group International, the exception taken by the fifth defendant stands and that the amendment sought to be introduced does not disclose a cause of action against the fifth or sixth defendant.

Analysis

[20] The issue that must be determined at the outset is the identity of the applicant in the

¹ Paras 12 and 13.

present proceedings.

[21] It is common cause that Trustco Group International and Trustco Capital (Pty) Ltd have separate and distinct claims, as set out in their respective amended particulars of claim, both dated 13 April 2015.

[22] I agree with the argument put forth by counsel for the first and fourth defendants, Mr Totemeyer, that the determination of the identity of the applicant should be considered on the papers filed of record in the application.

[23] For obvious practical reasons, certainty about the identity of an applicant is required to appear on the papers launching the application. The precise citation of the applicant is a matter which is within the knowledge of the applicant itself. A respondent, and the court, would only know who the applicant is, from the papers filed of record, in the application.

[24] In the present matter, the notice of intention to amend bears the following heading: "*Plaintiff's notice of intention to amend its particulars of claim dated 13 April 2015*". The plaintiff is described as "*Trustco Group International*". The notice of motion states that "*the above-named plaintiff intends to make application to the above Honourable Court for an order in the following terms . . .*" The plaintiff mentioned above is *Trustco Group International*. And the notice of motion indicates that the plaintiff makes application to be granted leave "to amend **its** particulars of claim". There is nowhere in the applicant's papers where it is mentioned, or from where it may be deduced, that applicant is someone else other than Trustco Group International.

[25] The plaintiff contends that the heading of the consolidated matter was chosen by the court and that the plaintiff merely used the heading so chosen. Even if one were to assume that the court chose that heading that does not absolve the parties from the obligation to identify the correct applicant. Furthermore, counsel for the plaintiff, Mr Heathcote, urges the court to take guidance of the decision of the Supreme Court in *Mans NO and Other v Coetzee and Others 2019 1 NR 1* at paras 12 and 13.

[26] The facts in the *Mans NO* matter were briefly as follows: default judgment was granted in favour of a plaintiff against a certain close corporation and a certain Mr Van der Merwe. Van der Merwe launched a rescission application to set the judgment aside. Prior to the hearing of the rescission application, the plaintiff, with agreement between the parties, gave notice to abandon

the default judgment and to grant Van der Merwe leave to defend the action. Later, certain third parties and Van der Merwe raised a special plea of *res judicata*, on the basis that judgment by default was not rescinded. It was also argued that the matter could not proceed under the same case number and in the same action. The court *a quo* dismissed the special plea.

[27] On appeal, the third parties and Van der Merwe argued that the judge *a quo* should have directed the plaintiff to issue summons afresh against Van der Merwe, so that a new case number could be allocated to the matter.

[28] The Supreme Court observed that the agreement between the parties, relating to the abandonment of the default judgment, sought to achieve the resolution of real issues speedily, efficiently and cost effectively. The court further stated that the judge *a quo* assisted the parties to have their disputes determined without incurring additional costs and without wasting time unnecessarily.

[29] I am of the opinion that the issues and the facts in the *Mans NO* case are distinguishable from the present case. In the *Mans NO* case, the issue in my opinion, was whether it would serve purpose to direct the plaintiff to issue summons afresh, just for the sole purpose of getting a new case number. In the present case, the issue, in my opinion, is the identity of a party who invokes the provisions of rule 52 for the purposes of amending its particulars of claim.

[30] The plaintiff's argument, to the effect that this court takes guidance from the *Mans NO* case, could have carried weight if, in the present case, the court was confronted with an application for leave to amend the citation of the "plaintiff/applicant". There is no application to amend the citation of the applicant, in the present matter.

[31] On the papers before me, the applicant in the application for leave to amend is Trustco Group International and the applicant applies for leave to amend its particulars of claim. Trustco Group International may only amend a pleading already filed by it. It may not invoke the provisions of rule 52 for the purposes of amending a pleading filed by Trustco Capital. Having so found, it is no longer necessary to deal with other grounds of objection raised by the defendants, as it would be futile to do so.

[32] It, therefore, follows that the application by Trustco Group International, for leave to amend, in the respects set out in the notice of motion, cannot be granted.

[33] As regards the issue of costs, there is no reason for the costs of this application not to follow the outcome of the application. I am persuaded that the costs should include costs of one instructing and two instructed counsel and that such costs should not be subject to the limit imposed by rule 32 (11).

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

1. The applicant in the application for leave to amend is Trustco Group International (Pty) Ltd.
2. The application by Trustco Group International (Pty) Ltd, for leave to amend its particulars of claim, is refused.
3. Trustco Group International (Pty) Ltd is ordered to pay the costs of the First, Fourth and Fifth Defendants, occasioned by the said defendants' opposition to the application. These costs include costs of one instructing and two instructed counsel and the costs are not subject to the limit imposed in terms of rule 32 (11).
4. The matter is postponed to 16 March 2022 at 15h15 for Status Hearing.
5. The parties are directed to file a joint status report on or before 9 March 2022.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	First & Fourth Defendants:
R Healthcote SC Instructed by Van Der Merwe Greef-Andima Inc. Windhoek	R Totemeyer SC (assisted Mr D Obbes) Instructed by Fisher Quarumby & Pfeifer Windhoek
	Fifth Defendant:
	G Narib Instructed by Dr Weder, Kauta & Hoveka Incorporated (Dr WKH Inc.)

	Windhoek
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