



**REPORTABLE**

CASE NO: SA 70/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MUNICIPAL COUNCIL OF WINDHOEK**

**Appellant**

and

**PIONEERSPARK DAM INVESTMENT CC**

**Respondent**

**Coram:** SHIVUTE CJ, SMUTS JA and FRANK AJA

**Heard:** 3 June 2021

**Delivered:** 23 June 2021

**Summary:** The appeal concerns an application to amend which was refused by the High Court. The parties in this matter entered into a lease agreement on 17 March 2003. The appellant purported to cancel the agreement and the respondent instituted an action in 2015 founded upon an alleged breach in the form of a repudiation in which damages in the sum of N\$101 493 807 are claimed. After pleadings were closed, the appellant served and filed a notice to amend (dated 11 March 2016) after making known its intention to do so in a case management report which report was made an order of court. The respondent objected to this notice to amend. The appellant however failed to launch its application to amend in the time period provided for in rule 52(4) of the High Court Rules. On 7 July

2016 when the matter was called for a pre-trial conference, the appellant gave notice in a status report that it intended to further amend its plea, despite not having applied to amend its plea after the objection to its 11 March 2016 notice. The appellant was put on terms to file a 'proper' application to amend by 20 September 2016. It proceeded to file a notice of motion seeking the granting of the amendments sought in the second notice (raising the same two defences contained in the earlier notice – ie that the lease agreement was void *ab initio* because the municipal council resolution had not approved entering into an agreement with the respondent but rather with a certain Mr Mouton; and, that s 63(2)(b) of the Local Authorities Act 23 of 1992 as amended had not been complied with, resulting in an illegality). The notice of motion was however not accompanied by an affidavit and appellant contended - citing a South African authority - that it did not intend to file an affidavit after the court enquired. The respondent again objected to this application.

The High Court dismissed the application, agreeing with the respondent's argument that the appellant was *functus officio* after it conveyed that it will no longer pursue the first notice to amend. The court *a quo* also found that the appellant was required to establish good cause why it should be entitled to revive its earlier notice to amend and that the appellant should have sought condonation for non-compliance with the rules. Further, the court *a quo* found that once the agreement was signed by authorised signatories, the appellant could not rely on a lack of compliance with internal procedures by virtue of the deeming provision in s 31A of the Local Authorities Act. The High Court further found that a stumbling block to the proposed amendment was moreover the approach adopted in *Oudekraal Estate (Pty) Ltd v City Cape Town & others*<sup>1</sup> and that the current dispute fell squarely within the principles determined in *Oudekraal*.

On appeal, the appellant had not filed security when required and respondent raised a preliminary issue of security to be given in respect of appeals against interlocutory orders. The appellant filed a condonation application and also sought reinstatement of the appeal. The issue is whether rule 14(2) is applicable where, as in the present case, the order relating to the amendment can in no manner be

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<sup>1</sup> 2004 (6) SA 222 (SCA) (*Oudekraal*).

regarded as suspended as it was refused, but was accompanied by an adverse costs order against the appellant.

This court must further determine whether the court *a quo* erred in its approach refusing the application for amendment.

*Held that*, the costs order formed part of the judgment and was suspended pending the appeal and hence security in terms of rule 14(2) was required.

*Held that*, the court *a quo* in exercising its discretion to refuse the application to amend did so upon a wrong approach and did not exercise its discretion judicially.

*Held that*, the approach of the Full Bench of the High Court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) on amendment of pleadings finds application.

*Held that*, although the position that 'doing substantial justice between the parties' is no longer the primary consideration, it remains of considerable importance but is now to be considered within the context of the objectives of Judicial Case Management, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice.

*Held that*, although it is not a prerequisite in an application under rule 52(4) to be accompanied by an affidavit for simple and formal amendments (ie to correct arithmetic or clerical errors in pleadings), the position with more substantial amendments (ie withdrawing an admission or a substantial change of front) would need to be done on affidavit.

*Held that*, appellant sought to introduce a substantial change of stance with the amendment. There is therefore a need for an explanation under oath for this, especially when a similarly worded notice to amend had been given and abandoned and was then resurrected five months later.

In applying the approach of the Full Bench in *IA Bell* that a substantial change of front requires an explanation under oath for a court to access, especially at a late stage of proceedings, means that the application for amendment cannot be granted in the absence of such an explanation.

*Held that*, the failure to specify in what respects a conflict with s 63(2) is alleged to have occurred would furthermore render the pleading excipiable as being vague and embarrassing.

*Held that*, the application to amend in the respects set out in the notice cannot be granted and the appeal thus does not enjoy prospects of success.

The application for condonation and reinstatement is to be dismissed with costs.

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## APPEAL JUDGMENT

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THE COURT:

[1] This appeal concerns an application to amend which was refused by the High Court. The appellant approaches this court after obtaining leave to appeal against this interlocutory order. This appeal also raises the question of security to be given in respect of appeals against interlocutory orders.

[2] As a preliminary issue, we first turn to the question of security.

### Security

[3] Counsel for the respondent in their heads of argument took the point that appellant had not filed security for the respondent's costs of appeal pursuant to rule 14(2) of the rules of this court. This issue arose in the following context. The registrar of this court wrote a letter to the appellant pointing out that no security

was in place on 18 December 2019. In February 2020, the appellant's legal practitioner responded stating that 'as the order appealed against (refusal to grant an amendment) is an order put into operation without the execution . . .' of the judgment, security was not required and rule 14 is not applicable. Counsel for respondent submitted that the rule was applicable as the pending appeal suspended the execution of a costs order in the respondent's favour. Because of the respondent's stance as set out in the heads of argument, the appellant lodged a condonation application to seek condonation 'if necessary' for non-compliance with rule 14.

[4] In the course of the hearing, the appellant's counsel tendered security in the name of his firm and lead counsel on behalf of the respondent accepted the tender. (We interpose to point out that written security by the appellant's legal practitioner was indeed filed by close of business on the day of the hearing). This meant, and it was so accepted by respondent's counsel, that if the appellant could show prospects of success on the merits, the appeal would be reinstated. Conversely, of course, if there were no prospects of success on the merits, the matter would not be reinstated and would instead be struck from the roll.

[5] To avoid any uncertainty as to the question of the furnishing of security in cases such as the present, it is necessary to briefly refer to this aspect as the parties clearly disputed the position and only for the sake of finalising the matter did the respondent agree that the matter proceed on the basis already set out.

[6] The relevant portion of rule 14 reads as follows:

**'Security in case of appeals**

14. (1) If the judgment appealed from is carried into execution by direction of the court appealed from, the party requesting execution must, before such execution, enter into good and sufficient security *de restituendo*.

(2) If the execution of a judgment is suspended pending appeal, the appellant must, before lodging copies of the record, enter into good and sufficient security for the respondent's costs of appeal, unless –

- (a) the respondent waives the right to security within 15 days of receipt of the appellant's notice of appeal; or
- (b) the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant's notice of appeal or such longer period as that court on good cause shown, has allowed the appellant to be released wholly or partially from that obligation.

(3) If the execution of a judgment is suspended pending appeal, the appellant must, when copies of the record are lodged, inform the registrar in writing whether he or she –

- (a) has entered into security in terms of this rule; or
- (b) has been released from that obligation, either by virtue of a waiver by the respondent or release by the court appealed from, as contemplated in subrule (2),

(4) Failure to inform the registrar in accordance with subrule (3) within 21 days is deemed to be a failure to comply with the provisions of that subrule.

(5) The registrar of the court appealed from must, whenever the parties are unable to agree as to the amount of security to be entered into under this rule, determine and fix the amount.

(6) ...

(7) ...'

[7] In the condonation application for the failure to provide security, a legal practitioner acting for the appellant (not counsel who appeared in this court) stated that after a perusal of a South African case, she concluded that security for costs was not necessary because the refusal to allow an amendment 'was not the sort of order that one executes'. The South African case that caused her to come to this conclusion was *Beecham Group Plc v South African Druggists Ltd.*<sup>2</sup> This case however is not relevant to the present matter as it dealt with a case falling within rule 14(1), namely where a respondent (not an appellant) seeks to execute on a judgment pending an appeal. In other words, where the successful party *a quo* wishes to execute the order given by the court *a quo* pending the appeal which, in terms of the common law is automatically suspended.<sup>3</sup>

[8] The issue in the present case is whether rule 14(2) is applicable where, as is the case here, the order relating to the amendment can in no manner be regarded as suspended as it was refused, but was accompanied by an adverse costs order against the appellant.

[9] It seems to be clear that under the common law rule that where the whole order contained in the judgment is appealed against the costs order is also suspended pending the appeal, ie the respondent as successful party *a quo* cannot execute the costs order while the appeal is pending. The successful party is not entitled to 'obtaining the fruits' of his or her judgment or order as to costs in

<sup>2</sup> 1987 (4) SA 869 (T).

<sup>3</sup> *Beecham* at 871J–872A. See also *Oliphants Tin "B" Syndicate v De Jager* 1912 AD 477.

such case.<sup>4</sup> This is so because 'judgment' means judgment or order and hence refers to all the orders, including the costs order that follows upon a judgment.<sup>5</sup>

[10] Rule 14 must also be read in conjunction with s 18 of the High Court Act<sup>6</sup> which deals with appeals from the High Court. This section distinguishes between appeals as of right<sup>7</sup> and those where leave is required to appeal to this court.<sup>8</sup> When an appeal lies as of right to the Supreme Court and the High Court Act does not address the issue of security at all, security is required in accordance with rule 14 (2) as the judgment is suspended pending the appeal.<sup>9</sup>

[11] Where the High Court sits as a court of appeal, eg from a decision made in a magistrates' court, an appeal to the Supreme Court is only possible with leave from the High Court (or if this is refused, from the Supreme Court). Where leave is granted in this situation, 'the court granting leave' must order the applicant for leave to appeal to furnish security for costs of the appeal.<sup>10</sup> It follows that in this scenario rule 14(2) does not apply as the High Court Act provides for security to be determined by the court granting leave to appeal and the security (if any) must be filed pursuant to the determination by that court.<sup>11</sup>

[12] This leaves a third category of appeals, namely in interlocutory orders or orders as to costs only which can only occur with leave from the court which gave

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<sup>4</sup> *Reid v Godart* 1938 (AD) 511 and *Mavromati v Union Exploration Import (Pty) Ltd* 1947 (1) SA 604 (T).

<sup>5</sup> *Holland v Deysel* 1970 (1) SA 90 (A).

<sup>6</sup> Act 16 of 1990.

<sup>7</sup> Section 18(2)(a).

<sup>8</sup> Section 18(2)(b) and 18(3).

<sup>9</sup> *Rogers & Hart (Pty) Ltd v Parkgebou-Beleggings en Wynkelders Beperk* 1956 (3) SA 329 (A) and *Blou v Lampert and Chipkin, NNO, & others* 1973 (1) SA 1 (A).

<sup>10</sup> Section 18(2)(b) read with 18(5).

<sup>11</sup> *Blou v Lampert and Chipkin, NNO, & others* above.



such order or failing which, from the Supreme Court. In this category, as with the first category (appeals as of right), s 18 does not deal with security at all.

[13] To summarise the provisions of s 18 of the High Court Act dealt with above: In respect of appeals as of right [s 18(2)(a)] and in respect of appeals in respect of interlocutory decisions and appeals against costs orders only [s 18(3)], the High Court Act is silent as to the issue of security. In respect of appeals from the High Court where it sat as a court of appeal [s 18(2)(b)] the issue of security must be addressed by the court granting leave to appeal.

[14] When reading s 18 of the High Court Act together with rule 14 of the Supreme Court Rules, it follows that it is only in appeals from the High Court where it sat as a court of appeal that the issue of security is to be addressed in the court which grants leave to appeal to the Supreme Court. In all other cases security must be furnished pursuant to rule 14 where the rule is applicable. We caution against a rigid and unqualified reliance on South African authorities because, although the Namibian High Court Act was modelled on its South African counterpart when promulgated, the South African Act has since undergone fundamental changes. The current position in South Africa is that security for costs is determined by the court granting leave to appeal to the Supreme Court of Appeal and there is, generally speaking, no appeal as of right to the Supreme Court of Appeal.<sup>12</sup>

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<sup>12</sup> *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) and Herbstein & Van Winsen *The Civil Practice of the High Court of South Africa* 5 ed vol II at 1167.

[15] It thus follows that the costs order formed part of the judgment and was suspended pending the appeal and hence security in terms of rule 14(2) was required.

#### Background facts

[16] The background facts giving rise to this appeal can be shortly stated.

[17] The parties entered into a lease agreement on 17 March 2003. The appellant, the Municipality of Windhoek, purported to cancel the agreement and the respondent instituted an action in 2015 founded upon an alleged breach in the form of repudiation in which damages in the sum of N\$101 493 807 are claimed.

[18] The Municipality defended the claim and filed a plea in January 2016. After pleadings were closed, the Municipality served and filed a notice to amend dated 11 March 2016 after making known its intention to do so in a case management report filed on 25 February 2016 which was made an order of court on 3 March 2016. The respondent timeously objected to this notice to amend in a detailed objection.

[19] The Municipality did not however launch an application to amend in the time period provided for in rule 52(4) of the High Court rules. Nor did it do so thereafter in respect of that notice to amend.

[20] The matter was then postponed for a pre-trial conference on 7 July 2016. In the meantime, witness statements were to be exchanged and filed by 20 May 2016 and expert summaries to be exchanged on 3 June 2016. On the day of the

scheduled pre-trial conference, the Municipality gave notice in a status report dated 7 July 2016 that it intended to further amend its plea, despite not having applied to amend its plea after the objection to its 11 March 2016 notice. In its status report, the Municipality proposed filing its new notice to amend by 8 August 2016. It also sought a postponement of the pre-trial conference as a consequence and the court postponed the matter for a status hearing on 8 September 2016. The second notice to amend was duly filed on 8 August 2016. It was met with an objection.

[21] At the status hearing on 8 September 2016, the Municipality was put on terms to file a 'proper' application to amend by 20 September 2016. It proceeded to file a notice of motion seeking the granting of the amendments sought in the second notice to amend. The notice of motion was not accompanied by an affidavit.

#### The proposed amendment

[22] The second notice to amend essentially sought to raise the same two further defences to the action raised in the earlier notice to amend which had not been persisted with.

[23] The first further defence raised was that the lease agreement was void *ab initio* because the municipal council resolution had not approved entering an agreement with the respondent but rather with a certain Mr Mouton.

[24] The second further defence sought to be inserted in the plea is that s 63 (2) (b) of the Local Authorities Act<sup>13</sup> as amended had not been complied with resulting

<sup>13</sup> Act 23 of 1992 ('the Act').

in an illegality. Section 63(2) requires in peremptory terms that before a local authority can sell or let immovable property, it is required to advertise (in two newspapers circulating in its area) its intention to do so, providing the details of such lease or sale as specified in the section. Interested parties are afforded the opportunity to object to the proposed sale or lease within a specific time.

[25] The respondent's objection to the second notice to amend was in terms similar to its objection to the earlier notice, although adding that the Municipality was precluded from raising substantially the same issue raised in the earlier notice and was also *functus officio* in relation to its previous decision not to pursue the earlier amendment.

[26] The respondent's objection further contended that the plea would be rendered vague and embarrassing by failing to specify the respects in which s 63(2) had not been complied with. The respondent also objected to the amendment on the grounds that the intended amendment would be contrary to the deeming provision relating to the authority of local authority signatories embodied in s 31A of the Act. The intended amendment was also objected to on the ground that it would be in breach of the principle determined in *Oudekraal Estate (Pty) Ltd v City Cape Town & others*.<sup>14</sup> In support of this ground, the respondent contended that the decision to grant authority to the signatories to enter into the agreement, taken in 2003, existed as a fact and that the Municipality had not applied to set aside that decision in the intervening thirteen years and in the intended amendment sought to do so as a collateral challenge to the enforcement of the agreement, which the Municipality was precluded from doing.

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<sup>14</sup> 2004 (6) SA 222 (SCA) (*Oudekraal*).

### The approach of the High Court

[27] The High Court found that the Municipality was required to establish good cause why it should be entitled to revise its earlier notice to amend. In reaching this conclusion, the High Court referred to the respondent's argument to the effect that, after the Municipality conveyed that it no longer pursued the first notice to amend, it was *functus officio* and could not seek the second amendment and further on the strength of *Rothe v Asmus & another*,<sup>15</sup> it was incumbent upon the appellant to show good cause why it should be entitled to revive the first notice. The court below then expressed its agreement with this submission and further stated that the appellant, by seeking to circumvent the rules, should have sought condonation for non-compliance with the rules.

[28] The High Court also agreed with the respondent's two further submissions. Firstly, that once the agreement was signed by authorised signatories, the Municipality could not rely on a lack of compliance with internal procedures by virtue of the deeming provision in s 31A of the Act.

[29] The High Court also found that a stumbling block to the proposed amendment was moreover the approach adopted in *Oudekraal* and that the current dispute fell squarely within the principles determined in *Oudekraal*.

### Submissions on appeal

[30] Counsel for the Municipality contended that the High Court misdirected itself by finding that condonation was required. Counsel also submitted that by

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<sup>15</sup> 1996 NR 400 (HC).

granting dates for the filing of the application to amend, the High Court had by implication condoned the failure to proceed with the first notice to amend. It was further submitted that all that remained was for the court to consider whether the pleading in its amended form would be excipiable.

[31] Counsel for the Municipality argued that the two defences raised by the notice were not excipiable. The first further defence raised an issue as to whether the lease agreement with the respondent as opposed to Mr Mouton was authorised. The second defence raised an illegality by virtue of non-compliance with s 63 (2). Counsel contested the application of the principle in *Oudekraal* and argued that the question was debatable and that the amendment should have been granted.

[32] Counsel for the respondent reiterated the contentions raised in and accepted by the High Court. Counsel argued that condonation was required and that the Municipality had not provided any explanation by way of affidavit to establish good cause. It was also contended that the intended amendments would be excipiable by virtue of a conflict with the principle decided in *Oudekraal* and furthermore that s 31A precluded a denial of authority. It was also contended that the reliance upon s 63(2)(b) was hopelessly unspecified and that the pleading would be vague and embarrassing in the absence of setting out in what respects it was contended that the section had not been complied with.

#### Principles governing the granting of amendments

[33] Rule 52 of the rules of the High Court governs the amendment of pleadings. The actual procedure to be followed in doing so does not substantially depart from

that previously provided for in rule 28 of the erstwhile rules. A party desiring to amend a pleading must give notice of the intention to do so. The other parties to the litigation are afforded the opportunity to object within ten days. In that event the party seeking an amendment is required to bring an application to amend within ten days (or such period as is directed by a managing judge in judicial case management (JCM)).

[34] A court may grant an amendment at any stage of the proceedings<sup>16</sup> on terms considered suitable or proper by the court.

[35] What has however changed since the advent of JCM is that the previously liberal attitude to granting amendments has been found by a Full Bench of the High Court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*<sup>17</sup> to no longer apply because it is inimical to the ethos of JCM, with the emphasis shifting 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.<sup>18</sup> We endorse this approach except to add that ‘doing substantial justice between the parties’ although no longer being the primary consideration, remains of considerable importance but is now to be considered within the context of the objectives of JCM, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice.

[36] The Judge President, writing for the Full Court in *IA Bell*, reached this conclusion after considering recent decisions of the High Court on the issue since

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<sup>16</sup> Rule 52 (9).

<sup>17</sup> (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

<sup>18</sup> Para 37.

the introduction of JCM in Namibia in 2011 and after an exhaustive survey of the approach followed in Australia after that jurisdiction introduced JCM. The Full Court stressed that a new approach to amendments under JCM was underpinned by the following overriding objectives of JCM:

- ‘(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 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.’<sup>19</sup>

[37] The Full Court in *IA Bell* proceeded to provide detailed guiding principles applicable to amendment of pleadings under JCM which are neatly summarised by the Judge-President in his recent work *Court Management Civil Procedure of the High Court of Namibia: Law, Procedure and Practice*.<sup>20</sup> Relevant for present purposes are the following:

- ‘Although the court has 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.
- A litigant seeking an amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought.

<sup>19</sup> Para 50 as embodied in the erstwhile Rule 1A, now replaced and expanded in rule 1 (3) of the current rules of the High Court.

<sup>20</sup> Petrus T Damaseb *Court Management Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* (2020) at p 102-103.



- The case for an explanation of why the amendment is sought and the form it will take will also be determined by the nature of the amendment: whether or not an explanation under oath would be required will thus depend on the circumstances of each case; the more substantial an amendment, the more compelling the case for an explanation under oath. Correcting a typographical error would thus not require an explanation under oath.
- (The need for) 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.'

[38] The Full Court in *IA Bell* further held that if a party has failed to provide an explanation on oath or otherwise in circumstances where one was called for, the proposed amendment should be disallowed.<sup>21</sup>

[39] The Judge-President in *IA Bell* stressed that amendments should less readily arise following the introduction of JCM:<sup>22</sup>

'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 Finance Southern Africa (Pty) Ltd v Aggressive Transport CC* and *Jin Casings & Tyre Supplies CC v Hambabi*.'<sup>23</sup>

<sup>21</sup> Para 55 and *Damaseb op cit* p 145.

<sup>22</sup> Para 59.

<sup>23</sup> 2014 (2) NR 489 (HC) (*Scania*) and (I 3499-2011) [2014] NAHCMD 57 (19 February 2014).

[40] In considering an explanation for an amendment, a court would in our view, in addition to the guiding principles enumerated by the court in *IA Bell*, require that an applicant establish that it did not unduly delay its notice to amend after becoming aware of the evidentiary material upon which it proposes to rely. The applicant would also need to show, as was stressed in *Scania* that the proposed amendment raises a triable issue, which is a dispute which, if established on evidence foreshadowed by the proposed amendment, will be viable or relevant. Following the advent of JCM, where an amendment is sought at a late stage of proceedings, an applicant should also be required to indicate how it proposes to establish its amended case and its prospects of succeeding with the new cause would properly be elements in the exercise of the court's discretion, as was expressed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & another*<sup>24</sup> where the court concluded, (as is accurately translated in the headnote):<sup>25</sup>

'The greater the disruption caused by an amendment, the greater the indulgence sought and, accordingly, the burden upon the applicant to convince the Court to accommodate (it).'<sup>26</sup>

#### Application of the principles

[41] The High Court refused the amendment on three enumerated grounds. The first of these is that the Municipality was required to seek condonation for its failure to comply with the rules in seeking its amendment, relying upon *Rothe*, and was *functus officio* and could not pursue the second notice, having decided not to proceed with the first. Similar argument was advanced by the respondent in this court. This approach unfortunately conflates two separate issues and is unsound in both respects.

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<sup>24</sup> 2002 (2) SA 447 (SCA).

<sup>25</sup> At 450 C-D.

<sup>26</sup> Para 42.

[42] In the first instance, the doctrine of *functus officio* does not arise. Decisions in the course of litigation (including its institution) do not constitute administrative action on the part of the Municipality but rather a procedural step 'open to any member of the public'.<sup>27</sup> *Functus officio* would thus not arise in these circumstances.

[43] In the second place, *Rothe*, relied upon for holding the need to seek condonation, concerned an application for condonation for non-compliance with the erstwhile rule 28 (4) where an applicant failed to bring his application for amendment within the peremptory period of ten days as prescribed in that sub-rule. The court in *Rothe* found that the applicant failed to discharge the onus of establishing good cause to establish condonation for his non-compliance with that sub-rule, given both the inadequacy of the explanation tendered and the lack of prospects of success. In that matter there had been a previous inept application for a similar amendment which was brought and withdrawn. That aspect was but one of the factors taken into account in the history of delays which plagued that matter.

[44] In this matter the High Court had in the course of case management provided dates for the filing of an objection and the subsequent bringing of the application to amend. The appellant had met the deadline provided by the High Court in case management (of 20 September 2016) for filing its application to amend.

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<sup>27</sup> *Smith v Kwanquebela Town Council* 1999 (4) SA 947 (SCA) at 952; *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661(W).

[45] The question of condonation for non-compliance with the rules accordingly does not arise. But that does not dispose of the question as to whether the absence of an explanation for the late attempt to amend could and should have been a factor in the exercise of the court's discretion under rule 52(5) in view of the approach of the Full Bench of the High Court in *IA Bell*.

[46] The second ground for the court's refusal of the amendment was that the Municipality could not rely on a lack of compliance with internal procedures once the agreement had been signed by the authorised signatories.

[47] Although not specifically cited, this ground is supported by the deeming provision relating to authority in s 31A of the Act.

[48] Whilst this court in *Walvis Bay Municipality & another v Occupiers of the Caravan Sites at Long Beach Caravan Park, Walvis Bay*<sup>28</sup> reaffirmed the applicability of the rule in the *Turquand* case<sup>29</sup> to municipalities, this court further stated:

'As was pointed out by learned judge in the *Potchefstroomse Stadsraad* case a prerequisite for the enforcement of the *Turquand* rule is that the council could legally, through the mayor and the town clerk, conclude the agreement of lease without being bound to the compliance with certain statutory preconditions or directions.'<sup>30</sup>

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<sup>28</sup> 2007 (2) NR 643 (SC) para 102.

<sup>29</sup> *Royal British Bank v Turquand* (1856) 119 ER 886 (Ex Ch) (6 E & B 327); [1843 – 1860] All ER 435.

<sup>30</sup> *Walvis Bay Municipality & another v Occupiers of the Caravan Sites at Long Beach Caravan Park, Walvis Bay* 2007 (2) NR 643 (SC) at 664 para 103. See also *Potchefstroomse Stadsraad v Kotze* 1960 (3) SA 616 (A).

[49] It follows that the reference to non-compliance with s 63(2)(b) of the Local Authorities Act cannot be excluded by reference to internal procedures as it contains 'statutory preconditions'. As is usefully summarised in *Lawsa*:<sup>31</sup>

'Because the rule in *Turquand*'s case is not an absolute and unqualified rule of law, but applies only in favour of persons dealing with the company in good faith, it is not a mere plea of law which does not have to be pleaded. Rather, it is a plea of mixed fact and law, therefore, it is at the very least incumbent on the person invoking it to plead that he did not know of the irregularity and was entitled to assume that the relevant provisions of the company's constitution had been properly and duly complied with.'

[50] This ground would however not be strictly confined to a question of law which can necessarily be determined on exception solely with reference to s 31A. The court *a quo* could thus not assume that good faith was not an issue in the matter. The contents of the resolution as well as the reference to the contract being changed by the Municipality's Mr Engelbrecht at the request of Mr Mouton are indications that the change in parties to the contract may raise an issue of lack of faith. This ground could not thus properly found a refusal to the application to amend.

[51] In the third instance, the court held that *Oudekraal* found application and precluded the granting of the amendment. There is however an insufficient basis in our view to reach this conclusion, given the paucity of material in the record concerning this issue. In the absence of establishing a sufficient basis for the application of the principle articulated in *Oudekraal*, we consider that the court erred in finding that *Oudekraal* precluded the granting of the application to amend.

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<sup>31</sup> *Lawsa* (First Reissue) Vol 4, Part 2 para 184 at 333.

[52] In view of the insufficiency of material pertinent to that issue before us, we decline to express a view on the applicability of the principle in *Oudekraal* in this disputed application to amend.

[53] It follows that the High Court in exercising its discretion to refuse the application to amend did so upon a wrong approach and thus did not exercise its discretion judicially. This does not however mean that the appeal should succeed as this court should consider the application afresh upon the principles governing the granting of amendments to pleadings.

[54] The pleadings had already been closed when the Municipality filed its first notice to amend dated 11 March 2016. After an objection was timeously delivered, no application to amend was forthcoming. Witness statements were thereafter to be delivered on 20 May 2016 and expert summaries by 3 June 2016. On the day scheduled for a pre-trial conference on 7 July 2016, the Municipality gave notice of an intention to amend its plea. It undertook to provide a notice to amend by 11 August 2016. The second notice was then filed on that date in substantially similar terms to its previously abandoned notice - raising the same two further defences contained in that earlier notice. At the ensuing status hearing, the Municipality was directed to file its application to amend by 20 September 2016. When it did so, it was not accompanied by an affidavit.

[55] A status hearing followed where the court enquired as to whether the Municipality intended to file an affidavit. Its legal representative responded that the

Municipality did not intend to do so after citing South African authority in the form of *Herbstein & Van Winsen*<sup>32</sup> in support of its position taken not to do so.

[56] The learned authors correctly point out with reference to *Swartz v Van Der Walt t/a Sentraten*<sup>33</sup> that it is not a prerequisite in an application under (the previously applicable) rule 28 (4) that it should be accompanied by an affidavit. *Swartz* however makes it abundantly clear that this procedure would suffice in respect of simple and formal amendments where needed to correct arithmetic or clerical errors in pleadings but more substantial amendments, such as withdrawing an admission, would need to be done on affidavit. The court in *Swartz* concluded (as quoted in *Herbstein & Van Winsen*)<sup>34</sup> that affidavits would be necessary in more substantial amendments.

[57] In this instance, the proposed amendment sought to introduce a substantial change of stance on the part of the Municipality. An agreement previously admitted is now said to be entered into without authority and would further and in any event be illegal for want of compliance with s 63(2).

[58] The authority thus relied upon on behalf of the Municipality does not support its stance that an affidavit would not be required. On the contrary, the need for an explanation under oath by reason of amounting to a substantial change of stance is compounded by the fact that a prior notice of a similarly worded amendment had been given and was subsequently abandoned, only to be resurrected some five months later. This plainly called for an explanation as well.

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<sup>32</sup> Cilliers, Loots, Nel *Herbstein & van Winsen - The Civil Practice of High Courts of South Africa* 3 ed (2009) Vol 1 at p 677.

<sup>33</sup> 1998 (1) SA 53 (W) at 57 (*Swartz*).

<sup>34</sup> Vol 1 p 677.

[59] Not only did the South African authority raised not support the Municipality's position, but more importantly this approach contended for is entirely inapposite and fails to take into account applicable Namibian authority and the different legislative landscape applicable in Namibia in the form of High Court rules premised upon the objectives of JCM, not applicable in South Africa. The applicable Namibian authority in the form of the Full Bench decision in *IA Bell* and earlier Namibian authority stressing the need for providing an explanation for amendments sought at a late stage were inexplicably and incorrectly overlooked.<sup>35</sup>

[60] Applying the approach of the Full Bench in *IA Bell* that a substantial change of front requires an explanation under oath for a court to access, especially at a late stage of proceedings, means that the application for amendment cannot be granted in the absence of such an explanation.

[61] There is a further difficulty which besets the proposed amendment. The failure to specify in what respects a conflict with s 63(2) is alleged to have occurred would also render the pleading excipiable as being vague and embarrassing. Section 63(2) posits several jurisdictional facts which are to be met. The notice merely alleges non-compliance with s 63(2)(b) without specifying which of the several respects which can conceivably arise of non-compliance with s 63(2) are contended. This is impermissibly vague and does not meet the standard for pleadings set in rule 45 of the High Court rules, requiring a defendant to clearly and concisely state all material facts upon which a defendant relies for its defence.

Following the approach in *Bowring Barclays & Genote (Edms) Bpk v De Kock*<sup>36</sup>

<sup>35</sup> *Scania Finance South Africa (Pty) Ltd v Aggressive Transport CC & another* 2014 (2) NR 489 (HC) para 29.

<sup>36</sup> 1991 (1) SA 145 (SWA) at 151B-H.



that once it is accepted that the proposed plea would be impermissibly vague and embarrassing, a court would only permit it in exceptional circumstances ‘in which the balance of convenience or another similar reason necessitated such a case’. Counsel for the Municipality did not contend for any exceptional circumstances, save that further particulars could be sought and given. But this is not an exceptional circumstance for the purpose of the approach set out by Strydom, J in *Bowring Barclays*<sup>37</sup>, compounded by the fact that the rules no longer contemplate or provide for the need for further particulars in view of rule 45 expressly requiring a level of specificity to dispense with such requests.

[62] An amendment seeking to introduce non-compliance with s 63(2) would need to specify in what precise respects there was non-compliance.

[63] It follows that the application to amend in the respects set out in the notice cannot be granted and the appeal thus does not enjoy prospects of success.

[64] It further follows that the application for condonation and reinstatement is to be dismissed with costs.

[65] The following order is made:

- (a) The application for condonation and reinstatement is dismissed with costs, including the costs of one instructing and two instructed counsel;

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<sup>37</sup> At 151.

- (b) The matter is struck from the roll and is referred back to the High Court for further case management consistent with this judgment.

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**SHIVUTE CJ**

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**SMUTS JA**

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**FRANK AJA**

## APPEARANCES

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