

RIAAN H MINNIE versus WJ HATTINGH

CASE NO. CC 146/98

Silungwe, J.

2000.05.08

**CIVIL PRACTICE**

**PARTICULARS OF CLAIM --** Application to amend particulars in terms of Rule 28(4) of the Rules of Court - Application to make substantial amendments to pleadings not for the asking - such application must be supported by affidavit showing reasonable cause.

IN THE HIGH COURT OF NAMIBIA

RIAAN H. MINNIE

PLAINTIFF

and

\V J HATTINGH

DEFENDANT

CORAM: SILUNGWE, J.

Heard on: 1999.06.04

Delivered on: 1999.07.30

JUDGMENT:

SILUNGWE, J.: The plaintiff brings this motion in terms of Rule 28(4) of the Rules of Court for leave to amend his Particulars of Claim as set out in the Notice (pursuant to the said Rule) dated April 6, 1999. The Notice is, however, resisted by the defendant as per his Notice of Objection dated April 13, 1999.

The Particulars of Claim sought to be amended are these:

1. Plaintiff is RIAAN H. MINNIE, an adult agent conducting business at No. 7 Kunene Court, Erospark, Windhoek.

Defendant is WESSEL JOHANNES HATTINGH, an adult businessman care of W H Agencies CC, Michelsons Building, corner of Iscor and Solingen Street, Northern Industria, Windhoek.

On 29 June 1995 and at Windhoek the parties concluded a written agreement in terms whereof Defendant sold to Plaintiff a 40% members interest in W H Agencies Close Corporation at a price of

NS40 000,00 which Plaintiff duly paid to Defendant on 29 June 1995. A copy of the said agreement is annexed hereto marked "A".

It was an express term of the aforesaid agreement that the members interest sold would be transferred by Defendant to Plaintiff within 30 days from 29 June 1995. Alternatively it was an implied term of the aforesaid agreement that the members interest sold would be transferred by Defendant to Plaintiff within a reasonable time.

Defendant despite demand failed to transfer the members interest sold to Plaintiff within 30 days from 29 June 1995, alternatively within a reasonable period.

As a consequence of Defendant's aforesaid material breach of contract Plaintiff during May 1997 cancelled the agreement referred to in paragraph 3 supra and demanded return of the amount of NS40 **000,00** which demand Defendant refused to comply with.

7. In the premises the amount of NS40 000,00 is due and payable by Defendant to Plaintiff.

WHEREFORE PLAINTIFF CLAIMS:

- 1) Payment in the amount of NS40 000,00.
- 2) Payment of interest on the amount of NS40 000,00 at the rate of 20% per annum a *tempore morae*.
- 3) Costs of suit."

Annexure "A" referred to under paragraph 3 of the Particulars of Claim reads:

"29/6/95

TO WHOM IT CONCERNS.

I WESSEL JOHANNES HATTINGH ID No. 550112 00 0120 6 hereby confirm that MR RIAAN HENRY MINNIE ID 70082700193 as from 29/6/95 has got a 40% (fourty percent) share holding in my company W H Agencies cc. Registered Offices at Michelsons Building, c/o Yskor + Soligen Str. Northern Industrial Area.

He has put into the company a R40,000-00 (fourty thousand) Rand contribution today 29 June 95.

This is a temporary document and a final contract between us will be drawn within the next thirty days.

WITNESS: (signed) (signed)

WITNESS: (signed) W. J. HATTINGH"

This is followed by the defendant's Exception as reflected below:

"EXCEPTION

DEFENDANT EXCEPTS TO THE PLAINTIFF'S PARTICULARS OF CLAIM AS AMPLIFIED BY ITS FURTHER PARTICULARS BECAUSE IT DOES NOT DISCLOSE A CAUSE OF ACTION ON THE GROUNDS THAT:

4) Plaintiff relies on an alleged written agreement of sale in terms whereof defendant allegedly sold a membership interest in W H Close Corporation, to the Plaintiff.

5) The written agreement on which Plaintiff relies is annexed to the Particulars of Claim as Annexure 'A' but:

2.1. the alleged written agreement does not contain a purchase price (but refers to a contribution); and

2.2. the parties to the alleged contract have (sic) not been identified in annexure 'A' as the seller and

the purchaser (instead Annexure 'A' seems to be a confirmation of a certain state of affairs).

Without a fixed price and/or identities of a parties to a contract being known, the written contract 'A' to the Particulars of Claim, is null and void in law.

Alternatively, in the event of this Honourable Court finding that Annexure 'A' is not null and void, then Defendant excepts to the Particulars of Claim in that it lacks averments to disclose a cause of action, and on the grounds that:

4.1. Annexure 'A' provides that:

**'This is a temporary document and a final contract between us will be drawn up within the next 30 days.'**

4.2. There is no allegation contained in the Particulars of Claim as to what expired after the lapsing of the 30 days referred to in Annexure 'A'.

Defendant excepts on the basis jthat it is at least necessary for Plaintiff to state that the temporary document became final by virtue of certain facts and/or the temporary document was replaced by a final document (which allegations are lacking)."

next development is the Notice of Motion as set out hereunder:

**"BE PLEASED TO TAKE NOTICE THAT** Plaintiff intends to amend its Particulars of Claim  
by:

1. Substituting paragraph 3 thereof with the following:

**"3.1 On or about 29 June 1995 and at Windhoek the parties concluded an oral**

agreement which was partly confirmed in writing as set out in annexure 'A' annexed hereto.

**3.2 In terms of the oral agreement, the parties agreed as follows:**

**(i) Plaintiff would buy a 40% membership interest in WH Agencies CC (hereinafter 'close corporation') for an amount of NS40 000.00 and by bringing in all Plaintiffs agency contracts which he had with Holtz & Neumann (Pty) Ltd into the close corporation;**

**(ii) Defendant would see to it that the aforesaid 40% membership interest in the close corporation be transferred to the Plaintiff within 30 days reckoned as from 29 June 1995, alternatively within a reasonable time.**

**(iii) Defendant would draw up a final agreement for signature by both parties within 30 days from 29 June 1995'.**

2. Substituting paragraph 4 thereof with the following:

**'4. Plaintiff has complied with all its obligations in terms of the aforesaid oral agreement.'**

3. Substituting paragraph 5 with the following:

**'5. Defendant has despite demand:**

**(i) failed to transfer the 40% membership in the close corporation to the Plaintiff within 30 days, alternatively within a reasonable period which period has already expired;**

**(ii) failed to draw up a final agreement as is envisaged in the last paragraph of annexure 'A' annexed hereto within 30 days or at all'.**

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4. Substituting paragraph 6 with the following:

**'6. As a consequence of Defendant's material breaches as aforesaid, Plaintiff cancelled the agreement between the parties during May 1997 and demanded return of the amount of NS40 000.00 which demand Defendant refuses to comply with.'**

And then comes the Notice of objection in these terms:

**"PLEASE TAKE NOTICE** that the abovenamed Defendant objects to the Plaintiffs notice of intention to amend its particulars of claim.

**PLEASE TAKE FURTHER NOTICE** that the grounds upon which the amendment will be opposed are the following:

6) the Plaintiff does not tender the Defendant's wasted costs occasioned as a result of the amendment, and more particularly the wasted costs incurred by the Defendant as a result of the filing of the exception.

7) Even if the Plaintiff amends its particulars of claim as set out in its notice in terms of Rule 28, the particulars of claim will be excipiable in that it will not disclose a cause of action alternatively will be vague and embarrassing, and more particularly for the following reasons:





the Plaintiffs cause of action is based on 'an oral agreement which was partly confirmed in writing as set out in annexure 'A' hereto' (See paragraph 1 of the notice in terms of Rule 28);

the oral alternatively partly written and partly oral agreement which will be relied upon by the Plaintiff in the amended particulars of claim is a contract of sale between the parties in respect of a membership interest;

the 'purchase price' of the membership interest (for which 'Plaintiff would buy a 40% membership interest') was for an amount of NS40 000.00 and 'by bringing in all Plaintiffs agency contracts which he had with Holtz and Neumann (Pty) Ltd into the close corporation';

the 'purchase price' of the membership and/or Defendant's obligations in terms of the agreement is therefore not fixed and/or determinable and/or certain and/or ascertainable as 'all the agency contracts' referred to are not identified and/or identifiable. The contract is therefore null and void;

in addition the parties agreed that 'Defendant would draw up a final agreement for signature by both parties within 30 days from 29 June 1995';

vi) such an undertaking and/or term merely constitutes an 'agreement to agree', which is a nullity in law and cannot be enforced, neither can it be used to allege that a party is in material breach of an agreement;

vii) even if the agreement to agree is enforceable, then the terms (including the purchase price, as no allegation is made as to what the terms of the final agreement were to be) of the 'final agreement' could be determined by one of the parties, (being the Defendant) which would also render the agreement 'a nullity in

law';

- viii) the payment of the NS40 000.00 claimed by Plaintiff, is based on the Plaintiffs right to cancel the agreement (as alleged by Plaintiff) during May 1997;
- ix) the Plaintiffs alleged cancellation during May 1997, is of no consequence, force or effect, as it is an impossibility in law to cancel a nullity;
- x) Plaintiffs cause of action (the cancellation of an agreement whereupon a certain amount could be demanded) is therefore also an impossibility in law.

Mr Swanepoel appears for the Plaintiff and Mr Heathcote represents the defendant.

There is much argument as to the merits and counter merits of the proposed amendments, buttressed by certain authorities. A few of the issues raised are fit to be canvassed at a subsequent stage (i.e. at the trial). But, to put it mildly, those particulars of claim leave much to be desired, hence the plaintiffs step to amend them.

Mr Swanepoel contends that the proposed amendments are not *mala fides* neither do they cause injustice and that, as such, they should be permitted. He goes on to say that if the proposed amendments are allowed, there will be a proper cause of action. He maintains that the proposed amendments are neither vague nor embarrassing and that an affidavit in support thereof is not necessary. He thus urges the Court to exercise its discretion in favour of his client by granting him the relief sought.

As for Mr Heathcote, he makes the point, *inter alia*, that the proposed amendments are not clerical or trivial but substantial and, as such, they should be explained by way of an affidavit. He submits that

the onus to show that the proposed amendments are *bona fide*, being given, rests on the applicant and that this can be achieved by means of an affidavit.

The issue before me is whether the plaintiff has made out his case to warrant the grant of the relief sought.

It is trite law that the decision whether to grant or refuse an application to amend pleadings rests in the Court's discretion which must be exercised judicially.

I feel it is important to stress that leave to effect substantial amendments to pleadings is not there for the asking. To seek an amendment of pleadings is in fact to crave an indulgence and the applicant must, therefore, furnish a reasonable explanation to show why such amendment is sought. As De Villiers, JP, aptly observed in *Krogman v van Rccmen* 1926 OPD 191 at 194-5:

"[E]ven if the party applying for an amendment tenders to pay wasted costs and to consent to a postponement and to other conditions and terms which will avoid all direct prejudice to the other party as regards his prospects of succeeding in the action, that will not entitle him to claim an amendment as of right, but he will still have to show reasonable grounds; he must show, for instance, that the matter involved is the amendment is of sufficient importance to justify him in putting the Court and the other party to the manifold inconveniences of a postponement, and that the necessity for an amendment has [arisen] through some reasonable cause, even if it be only *bona fide* mistake, which would, I take it, be the minimum reasonable cause admissible in this connection."

With these observations, I am in full in agreement.

The explanation referred to in the preceding paragraph envisages an affidavit. That this is so is evident from Rule 6(1) of the Rules which provides as follows:

"6(1) Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

The matter before us has been instituted via the Notice of Motion and the plaintiff is, therefore, obliged to support his notice of motion by an affidavit showing the facts upon which he relies for relief. This he has failed to do.

In any event, it is not disputed that the amendments sought to be made are of a substantial nature. In the circumstances, they need to be supported by affidavit evidence. In the words of Claasen, J., which he expressed in *Swart: v/ an der Walt t/a Sentraten* 199S (1) SA 53(W) at 57A-C:

"Amendments to pleadings can be of a wide variety. Some are simple and purely formal in nature, i.e. to amend arithmetical and clerical errors in pleadings. Other amendments may be more substantial, for example, amendments seeking to withdraw an admission made on pleadings. It is trite law that amendments constituting the withdrawal of an admission have to be done on affidavit. However, it would, in my view, be absurd to interpret the new Rule 28(4) as prescribing the use of Rule 6 procedure in all cases of applications for leave to amend pleadings. In cases where a mere word or figure requires amendment, it will be totally absurd to file a notice of motion supported by an affidavit to secure such amendments.

Affidavits would only be necessary in more substantial amendments ..."

*In casu*, the proposed amendments are irrefutably substantial with the result that they must be supported by an affidavit. As previously shown, this has not been done. On this ground alone, the matter cannot advance forward unless and until the proposed amendments are supported by affidavit.

Having arrived at this conclusion, it is unnecessary to consider other aspects of the motion.

The outcome of this motion is, of course, that it fails. The

following order is made:

- 8) the motion is dismissed with costs;
  
- 9) the plaintiff is put on terms to file an affidavit within 14 days of the order in support of his proposed amendments with liberty to refine, amplify or curtail them;
  
- 10) the affidavit and the grounds (but only if these will have been amended in any form or shape) shall at once be served on the defendant who shall thereafter file an answering affidavit within 14 days;
  - 4) the plaintiff shall file a replying affidavit (if any) within 10 days of receipt of the answering affidavit.

SILUNGWE,

**ON BEHALF OF THE PLAINTIFF**

**Instructed by:**

**MR SWANEPOEL**

**Weder, Kruger & Hartmann**

**ON BEHALF OF THE DEFENDANT**

**Instructed by:**

**ADV R HEATHCOTE**

**van der Merwe & Greeft'**