

CASE

NO:989/98

IN THE HIGH COURT OF NAMIBIA

IN the matter between :

**SOUTH AFRICAN SUGAR ASSOCIATION**

**PLAINTIFF/APPLICANT**

and

**NAMIBIA  
SUGAR**

**DISTRIS (PTY) LTD  
DEFENDANT/**

**RESPONDENT**

brought an intended

this

by amendment to

instance

**CORAM:  
LEVY, AJ**

Applicant Defendant's Plea

was

(Plaintiff) which Respondent

brought

Heard on: 2000-

asking (Defendant)

about by

03-24

the Court purports to have

Respondent.

to given Applicant.

nt.

Delivered on: 2000-

condone Unlike the usual

04-07

its failure application where

to object the failure to act

**JUDGMENT**

timeously timeously is due to

**LEVY, AJ:** This is

to at the Applicants own

an application

notice of fault, the failure in

Advocate D F

the and Advocate R

for

Smuts appears for

applicant Heathcote appears

the The

Applicant herein, is the Plaintiff in an action instituted against Defendant for damages in excess of NS6 million. That action was due to be heard in November 1999, but, when it was called, by agreement it was postponed *sine die*, Defendant to pay the costs of the postponement. Before the matter was called, Defendant sought to amend its plea with a pleading dated 19<sup>th</sup> November 1999 without invoking Rule 28. This provoked a

notice allegation that one dated of the intended 13<sup>th</sup> amendments Decembe constituted the r 1999, in withdrawal of an terms of admission. Rule of Court 30 This notice in terms on the of Rule 30, was grounds duly served at the that the offices of proposed Respondent's/Defendant's Attorney. nt was an irregular This notice resulted in Respondent, g. The purporting to act in notice set terms of Rule 28, out in "serving" a notice to detail the amend on 17<sup>th</sup> alleged December 1999, not irregularity on the offices of ies Applicant's including Attorney but at the an offices of the Law

Society, where most of the Attorneys practising in Windhoe k, have agreed that for convenience of other practitioners service may be effected there, as well at their offices. It is the

"serving' of this notice to amend that has led to this application. It is alleged by Applicant that by reason of the grounds set out in Rule 30 proceedings, Respondent was aware that Applicant would have objected to the proposed amendment and that Respondent's legal representative acting in bad faith, then devised a scheme to prevent Applicant from objecting timeously within the Rules to the proposed

amendment to object to which the said proposed would amendment.

then *ipso*

*facto* It is necessary to become quote *in extensa* an two paragraphs in amendment the affidavit of nt of its Attorney Angula Plea. made in support of Applicant the application for 's condonation:

objection

filed on 21<sup>st</sup>

January

2000, was

out of

time, and

Applicant

now

applies

for

condonati

on in

"6. As is apparent from Annexure "B", this notice to amend was not served at the offic

es of my firm but at the office of the Law Society where most firms of legal practitioners have agreed to accept service. As is apparent from the notice itself, this service was performed in the afternoon of 17 December 1999 (at 14h00). This was after my firm had closed for the year (at 13h00 on 17 December 1999) for the customary Christmas and New Year recess. The fact that our office closed between 17 December and 5 January was well known to all other firms of legal practitioners in Windhoek and to the Respondent's legal practitioners of record in particular. Indeed, the respondent's legal practitioner, Ms Katja

Klein  
herself  
subsequently  
informed  
me that  
her firm  
also closed  
for the  
recess  
on that  
date.  
7. I  
was in  
office  
on 17  
December  
until our  
firm closed  
at 13h  
00 that  
day. The  
Respondent's

legal  
practitioners  
of record did  
not alert me to  
the fact that  
service of this  
notice would  
be given. I am  
aware that the  
notice was  
drafted by the  
Respondent's  
counsel on 15  
December  
already. This  
is also the  
original date  
given on the  
notice itself,  
which was  
subsequently  
changed by  
hand to 17  
December  
1999. In the  
absence of an  
explanation,  
which has not  
to date been  
forthcoming, I  
am  
constrained to  
infer in the  
circumstances  
that service of  
this notice was  
held back until  
the afternoon  
of the 17  
and then  
served on the  
Law Society  
office with the  
knowledge  
that it would  
not come to  
my attention  
until after the  
resumption of  
legal business  
in January

200  
0. I  
also  
point out  
that  
a  
Rule  
35(3)  
)  
notice  
dated 16  
December  
was  
served  
by the  
respondent's  
legal  
practitioners  
at the  
Law Society  
on the  
morning  
of 17  
December  
1999 at  
09h  
43  
but that

the notice to  
amend,  
prepared on 15  
December was  
curiously  
subsequently  
served at  
14h00 on 17  
December. I  
annex the Rule  
35(3) notice,  
marked 'C'."

These  
paragraphs  
contain  
serious  
allegations  
from  
which it  
could be  
inferred  
that there  
was a  
scheme  
calculated  
to avoid  
an  
objection  
being  
lodged

timeously to the notice of amendment which Respondent should have known, Applicant would have made as it had been raised in the Rule 30 application.

Mr Smuts argued that in the absence of a denial by Respondent the facts alleged by Mr Angula are taken to be admitted as well as the inference which Mr Angula has drawn from the facts. Mr Smuts relies on the well-known cases of: **Stellenbosch Farmers' Winery**

**Limited** vs but has conceded **Stellenva** in its affidavit, as **le Winery** did its counsel in **(Pty) Ltd** argument, that the 1957(4) reason advanced by SA 234 Applicant as to why (C) at 235 the objection was E-G; filed late is **Plascon-** reasonable.

**Evans** However, **Paints** Respondent says **Ltd v Van** that notwithstanding **Riebeeck** the foregoing, **Paints** Applicant is not **(Pty) Ltd** entitled to an order 1984(3) condoning the late SA 623 filing of its (A). objection because Applicant must show; Respondent has not only not denied these allegation

"  
.....  
that  
its  
opp  
ositi  
on  
to

the Respondent's proposed amendment is **bona fide** and that the Respondent does not have reasonable prospects to succeed with an application to amend its pleadings in the manner as indicated in its Rule 28 notice, even if the Notice of Objection has been filed in time by the Applicant."

Had Applicant objected timeously in terms of Rule 28, Respondent would have had to apply by way of notice of

motion supported  
by affidavits for  
leave to amend.

The desired  
amendments relate  
firstly to amend an  
amendment of its  
pleadings dated 19  
November 1999 and  
secondly to amend  
the pleading as it  
was when filed on  
12 December 1997.

The affidavits  
which Respondent  
would have had to  
file in order to  
obtain the  
amendment would  
have had to explain:

1. Why the  
most recent  
amendment

o er at the  
f time it was  
1 filed;

9 2. Why the  
N pleading of

o 12  
v December  
e 1999 was  
m not in order

b when it was  
er filed and  
1 why it has  
9 taken two  
9 years before

9 an  
w amendment  
a was applied  
s for;

n 3. Why both  
o amendment  
t s are  
i material;

n 4. Why  
o Applicant  
r has not  
d

b  
e  
e  
n  
p  
re  
ju  
di  
c  
e  
d  
p  
ar  
ti  
c  
ul  
ar  
ly  
b  
y  
th  
e  
d  
el  
a

y in the making of the application after two years. This prejudice includes satisfying the Court that evidence necessary and available to Applicant in December 1997 is still available today.

Respondent contends that in order to get

condonated conduct. Having on, the onus is on Applicant from Applicant objecting to its to prove proposed that amendment, it is Respondent trying to take not will advantage thereof not by throwing the succeed onus on Applicant. in its The principle is applicatio clear that no-one n for can benefit from its amendme own bad faith or nt. mistakes. Whether Respondent the inference of bad nt is faith which Mr therefore Angula says can be trying to drawn, is or is not, benefit drawn, Respondent from it cannot gain any own advantage irregular therefrom. and prejudicia Furthermore there is

in law of contract, the doctrine of fictional fulfilment . Where a party to a contract deliberate ly and in bad faith prevents the fulfilment of a condition in order to escape the conseque nces of a contract, the law

considers the unfulfilled condition fulfilled as against the party guilty of bad faith.

**Koenig v**

**Johnsen &**

**Co Ltd**

1935 A.D.

262.

The present inquiry is certainly not of a contractual nature but on a parity of reasoning, it is clear that if the conduct of Respondent's legal representative was in bad faith and it obstructed the timeous objection by Applicant, this application should be granted forthwith.

nt wasted more time  
In its by not bringing a  
opposing counter application  
affidavit for the amendment.  
Respondent Nevertheless,  
nt has Respondent insists  
emphasis on the Court dealing  
ed that to with the proposed  
grant the amendments.  
applicatio Should condonation  
n would be granted the Court  
be a will not confine  
waste of Applicant to the  
time grounds of  
because opposition  
the mentioned in its  
oppositio Notice of 21  
n to the January 2000.  
amendme  
nt will The law reports are  
not studded with cases  
succeed. dealing with  
Neverthel applications to  
ess, amend pleadings  
Respondent from which it is

clear that  
the  
granting  
of an  
amendme  
nt is not a  
formality.  
There are  
certain  
essential  
legal  
requireme  
nts which  
an  
applicant  
for an  
amendme  
nt must  
fulfil.  
  
In  
**Krogman**  
v **Van**  
**Reenen**  
1926



O.P.D. 191 at 194-5,

De Villiers JP said:

"

.....

even

if

the

party

is

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  
In **Euro-shipping**  
direct  
prejudice to  
**Corporation** **Of**  
the other party  
as regards his  
**Monrovia** **of** **The**  
prospects  
succeeding in  
**Minister**, that **of**  
the action, that  
will not entitle  
**Agriculture** **and**  
him  
an amendment  
**Others** 1979(2) S A  
he will have to  
show (C), the Court  
reasonable  
grounds, he the  
must show for  
issues, that to  
the matter  
whether it should  
the  
amendment is the  
of sufficient  
importance to  
justify him in  
particular of  
Claim  
Court and the  
other party  
was a  
the manifold  
delay of at  
most 5  
days of a  
postponement,  
and that the  
necessity for  
The  
application,  
the  
Court held that the  
has arisen  
through some  
not  
reasonable  
cause, even if  
it be only  
**bona fide**, to the  
prejudice to  
the  
mistake,  
which would,  
I take it be the  
minimum  
reasonable  
cause  
admissible with  
this  
connection."

question

of

prejudice

the Court

said that

"if there

was real

doubt

whether

or

not

prejudice

or

injustice

will be

caused.....

if the

amendme

nt is

allowed,

it should

be

refused."

Where

there is a

lengthy delay the likelihood of prejudice is greater than otherwise. The nature of the prejudice, is that because of the delay, the other party may not be able to get the evidence it would have been able to get had the pleadings been in proper form originally. Consequently in *Obowitz Bros v Guardian Insurance Co. Ltd* 1924 CPD 64 where Defendant applied to amend its plea after the lapse of 18 months the Court

refused to allow the amendme nt. In *Rosenberg v Bitcom* 1935 WLD 115, the Court held that delay was unreasona ble and rejected the applicatio n. (See also *arkes vPark es*

192 0 WL D 1 at 4-5; *G M FK ont rak teu rs (Ed ms) Bp k an d An oth er v Pre tori*

*a City Coun cil* 1978( 2) SA 219 T; *Van Aswe gen & Anoth er v Fecht er* 1939 OPD 78 at 88-89) Responde nt has fded, in response to this applicatio n, an

affidavit dealing with certain issues which should have accompanied its application for an amendment. It has not counterclaimed for an amendment but in any event, even at this stage, its affidavit falls far short of what is required.

Applicant contends that Respondent is withdrawing an admission. Respondent says at most its plea is ambiguous. If it is ambiguous, it is vague and embarrassing and capable of being

excepted n, allowed to. Applicant to labour Failure tounder a false have impression and once excepted again, it may well by thebe that Applicant Applicant has been prejudiced can resultin not gathering the in aevidence timeously, special which it would have order asgathered had the to costs.pleading been in If theorder.

pleading (C.f. *President-Versekeringsmaats kappy Bpk v Moodley* 1964(4) SA 109 (T) at

meaning 11 allocated 0H to it by Applicant 111 , A)

Respondent has then by In its opposing affidavit even at this late stage, its own Respondent says: derelictio

"..... I point out that Applicant does not advance a single reason as to why it will be prejudiced if the amendment will be allowed."

As already stated the onus is on Responde nt to show there will be no prejudice and if there is doubt, the

amendment will be refused.

For these reasons the order of the Court is:

5. Condonation is granted to Applicant for failing to object timeously in terms of Rule 28 to the proposed amendment of its plea by Respondent dated 17 December 1999;

6. Leave is

granted its Notice of Objection if it so

desires; Defendant shall pay the

costs of this application.

Plaintiff-Applicant:  
Advocate D F Smuts

Instructed by:  
Messrs Lorentz & Bone

Defendant/Respondent:  
Advocate R

Heathcote

Instructed by:

M  
e  
s  
s  
r  
s  
P  
F  
K  
o  
e  
p  
&  
C  
o