CASE NO.: CA 90/2004

REPORTABLE

SUMMARY

MARTIN OLIVIER versus **AUGUST KAIZEMI**

SHIVUTE, JP *et* DAMASEB, J

13/07/2005

CIVIL PROCEDURE: MAGISTRATE'S COURT

- Rule 55A: Amendment of Pleadings after Rule 17(2)(a) notice of exception given; effect of.

- Dismissal of an exception that particulars of claim do not disclose cause of action. Such an interlocutory order not amenable to appeal.

CASE NO.: CA 90/2004

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARTIN OLIVIER **APPELLANT**

versus

AUGUST KAIZEMI **RESPONDENT**

CORAM: SHIVUTE, JP *et* DAMASEB, J

Heard on: 2004-10-20

Delivered on: 2005-07-13

APPEAL JUDGMENT:

DAMASEB, J: This is an appeal against an order of the District magistrate, Mariental, dismissing an exception. The appellant also filed applications for condonation for non–compliance in respect of the preparation and making available of the appeal record, as well as for late filing of heads of argument. None of these applications is opposed and I am satisfied that good cause has been shown for the grant of condonation as sought. I will therefore not deal with those applications. The exception was heard on the 15th of March 2004 and was dismissed some time later. The magistrate has provided written reasons for dismissing the exception.

The brief history of the matter is as follows. The respondent in this Court, who is the Plaintiff in the Court below, issued summons out of the magistrates' Court, Mariental, praying for the following relief::

a) Cancellation of the agreement;

b) Payment of the amount of N$3 000-00;

c) Interest at the rate of 20% per annum from September 2003 until date of full payment;

d) Costs of suit;

e) Alternative relief.

The relief sought was based on the alleged breach of an oral agreement entered into between the parties in terms whereof the Defendant sold to the Plaintiff a Volkswagen Beatle engine for the amount of N$3000.00. It is alleged to be a term of the oral agreement that the engine is still in good running condition and that it was to be used as a replacement engine in the vehicle of the Plaintiff; that although the engine had an oil leak it could be rectified by the replacement of an oil seal; that the engine was taken out of the Defendant's vehicle in a very good condition and that it could be used for the purpose it was intended . It is further alleged that the Plaintiff duly ''advanced'' the amount of N$3 000.00 and took delivery of the engine, but

subsequently found out that the engine was damaged beyond repair and that it was impossible to stop the oil leak. Based on

that, it is alleged, that the Defendant committed a material breach of the agreement in that he misrepresented to the Plaintiff that the engine was in a good running condition whereas it was in fact beyond repair; that the oil leak in the engine could have been rectified by a mere replacement of an oil seal, while it subsequently transpired that the engine block was worn out to such an extent that it was impossible to use it; more particularly that the condition of the engine block rendered the replacement of the oil seal futile for purposes of fixing the oil leak; and that the engine could be used for the purpose it was intended for, when it was not.

It is alleged that because of these misrepresentations the Plaintiff suffered damages in the amount of N$3 000-00, being the amount *forwarded* for the engine as purchase price.

Subsequent to the Particulars of Claim having being filed of record, the Plaintiff on 11th March 2004, filed a notice of amendment in the following terms:

> *"KINDLY TAKE NOTICE that the Plaintiff intend to amend his particulars of claim by inserting the following:*
>
> *10. The Plaintiff tendered the useless engine back to the Defendant and*

demanded payment of the advanced N$3 000-00 which tender the Defendant refused.

Should you not file notice of objection within ten days from the date hereof the pleadings shall be deemed to be so amended."

The notice of amendment to which I have just referred was necessitated by a notice of exception in terms of rule 17(2)(a) which was filed by the Defendant *a quo* on the 26th day of February 2004 in which Defendant gave notice that he wishes to except to Plaintiff's summons on the ground that the summons does not disclose a cause of action in that:

1. Plaintiff failed to allege that he paid the alleged purchase price of N$3 000-00 to Defendant from whom he now claims it back;

2. Plaintiff failed to allege that he cancelled the agreement;

3. Defendant alleges that Plaintiff's particulars of claim lack averments which are necessary to enable him to base a claim in law for *restitutio in integrum*;

4. Plaintiff failed to tender that which he had received out of the alleged agreement alternatively failed to plead facts which relieve him from tendering as aforesaid.''

The said ‘’notice of exception’’ was set down by the appellant (defendant a quo) by way of notice filed on 3 March 2004. It was then heard on 15th March 2004 and, as I said, was dismissed.

That the order of the learned magistrate dismissing the exception is the subject of appeal is clear from the Notice of Appeal filed of record on the 22nd of April 2004. It states as follows:

“The grounds of appeal are as follows:

“1. The learned Magistrate erred in law:

(i) *to have had regard to the Notice of Amendment where the dies induciae to have objected to the amendment not having expired at the time of hearing the exception and the deeming provision contained in Rule 55A not having taken effect;*

(ii) *not to have found*

(a) *that it was necessary for the Respondent to have alleged in his particulars of claim that*

(aa) *the Appellant had committed a material breach of the terms of the contract, and that Respondent had cancelled the contract;*

(bb) *he had tendered delivery of the engine to the Appellant;*

(b) *that Respondent's Notice of Amendment was a concession that his particulars of claim lack averments which are necessary to sustain a cause of action;*

(c) *mero motu that the Plaintiff had confused the principles of breach of contract with the legal concept of misrepresentation as alleged in paragraph 7 of Plaintiff's particulars of claim with the effect that the particulars of claim lack averments which are necessary to sustain a cause of action on earlier contract or misrepresentation;"*

In the above quoted notice of appeal the only ground which is in effect not an appeal against the dismissal of the exception is that contained in 1 (i) of the Notice and seems to me to amount to a complaint that the magistrate erred in having had regard to the respondent's (plaintiff a quo) notice of amendment at all in adjudicating upon the exception. I understand this ground as saying that the magistrate, during the proceedings of 15 march 2004, should have proceeded on the basis that the amendment did not exist and decided the exception on that basis. The appellant appears to be suggesting that the issue of the amendment should then have been dealt with later. How that could have been possible is not immediately apparent either from the

pleadings or the arguments given on appeal; for, as the appellant says, if the magistrate had approached the matter in that way, he should have allowed the appeal- meaning that the notice of amendment would not have been of any consequence.

Although there was no appearance on the part of the respondent in this appeal at the hearing, he filed written heads of argument prior to the hearing of the matter. In those heads, apart from taking 4 points *in limine, he* also raises the point that a dismissal of an exception is not amenable to appeal. The respondent cites the following authority:

> *Zweni v Minister of Law and Order 1993 (1) SA 523 (A); Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council 1995 (3) SA 827 (A); Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) at page 869 C – 869 C.*

The authorities cited are in point and I adopt the reasoning underpinning them. The point *in limine* that the dismissal of the exception *in casu* is not appealable needs no detailed treatment. It has merit. The dismissal of the exception *in casu* is only an interlocutory order which cannot be appealed against; accordingly, the parts of the *notice of appeal* directed at the dismissal of the exception have no basis in law and must fail. The only issue therefore that remains for consideration is that which I have indicated appears in 1(i) of the notice of appeal.

This point is taken up in the heads of argument in the following way.

"1. The respondent's notice of amendment was delivered on 11th March 2004, one Court day prior to the hearing of appellant's exception on 15th March 2004.

2. Respondent's notice afforded appellant 10 days within which to object to the proposed amendment whereafter not only in the event of no objection being made, respondent's particulars of claim would have been deemed to be so amended.

3. Rule 55 A(2) of the rules of the magistrate's court affords the parties 7 days within which to object to a propose amendment failing which the amendment will only take effect after the expiry of the said period.

4. In terms of respondent's notice, appellant had time until 26th March 2004 (10 days), alternatively until 23March 2004 (7 days) to object to the proposed amendment.

5. *Provided appellant did not object to the said amendment, same would only come into effect on 26th March 2004, alternatively on 23 March 2004.*

6. *Appellant's exception in terms of Rule 17(2)(a) of the Rules of the Magistrate's Court was heard on 15 March 2004.*

7. *In comparing the grounds whereupon appellant accepted to the respondent's particulars of claim the court a quo erroneously based its claim as if same had already been amended at the time the exception was heard.*

8. *In dismissing paragraph 2 of the appellant's exception the magistrate stated that the Court take notice of the amendment notice to the particulars of claim filed on the 11th March 2004 and received by the defendant on the same day. The amendment notice inserted paragraph 10 which reads as follows: "The*

Plaintiff tendered the useless engine back to the Defendant and demanded payment of the advanced N$3 000-00 which tender the Defendant refused."

9. *In dismissing paragraph 3 of appellant's exception the court a quo dismiss same on the basis that when the summons read together with the particulars of claim as amended the Plaintiff had made the appropriate averments in that way to sue.*

10. *Paragraph 4 of appellant's exception is completely disregarded with the court a quo on the erroneous assumption that the respondent's particulars of claim had been amended.*

11. *By virtue of the provisions of Rule 55 A of the rules of the magistrates court and that stated herein before, it is submitted that the court a quo not entitled to take cognisance of the respondent's notice to amend but should have applied its mind to appellant's exceptions to respondent's particulars of claim as it stood at the time of the hearing of the exception".*

The magistrate was in error, the argument goes, in assuming, when dealing with the exception, that the particulars of claim had been duly and properly amended. This ground of appeal is in reality a complaint that the filing of the notice of amendment was an irregular step. That raises the question what did the appellant do when he had notice of the amendment, aware that the exception had already been set down for argument. It also requires a consideration of what actually transpired at the hearing of the exception.

It seems to me that the appellant is labouring under the belief that once he had set down an exception, it was not open for the respondent to amend his particulars of claim. I am not able to find any authority for such a proposition, and none has been cited by the appellant.

Rule 55A of the Rules of the Magistrates' Court, in relevant part, provides as follows:

> *"(1) Any party desiring to amend any pleading filed in connection with any proceedings, shall give notice to all other parties of his intention so to amend and the particulars of such amendment.*
>
> *(2) Such notice shall state that unless objection in writing is made within 7 days after the delivery of the notice to the proposed amendment, the pleading shall be deemed to be so amended.*

(3) If any objection be made within the said period, the party wishing to pursue the amendment shall act in accordance with the procedure prescribed in rule 55.

…

(5) A party giving notice of amendment shall, unless the court otherwise orders, be liable for the costs thereby occasioned to any other party''.

I wish to say the following about Rule 55A: the first is that I am unable to find any restriction as to the timing of an amendment. It appears that an amendment may be made at any time. The second is that any pleading may be amended. According to Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa , 8th ed, Vol 11 (at 411): *"It would appear that the particulars of the plaintiff's claim endorsed in terms of rule 6 (1) (a) constitute a 'pleading' which may be amended by the procedure prescribed by rule 55A".*

I think that sub rule 5 of Rule 55A is significant for present purposes, for it seems to recognise that the fact of the amendment may occasion inconvenience and expense to the other party which ought to be compensated by way of an automatic costs order, unless the Court directs otherwise.

I proceed to next consider whether Rule 17 in terms of which the exception was taken is of any assistance. It seems to me that if a party takes an exception (as the appellant did) that the particulars do not disclose a cause of action, he need not give notice to the other party to remove the cause of complaint. (See Rule 17(2) and (5) (c).) Such notice, it seems to me, is only required if the exception taken is that the summons is *"vague and embarrassing''*. In terms of sub rule 5 (a) of Rule 17, however, *"The Court shall not uphold any exception unless it is satisfied that the defendant would be prejudiced in the conduct of his defence if the summons were allowed to stand".*

I see nothing either in the Rule or in principle which should debar a party from applying to amend a pleading once the other party has taken an exception on the basis that the particulars of claim do not disclose a cause of action. In any event such an exception is not had for the asking. The court must be satisfied that it would work hardship to the excipient unless upheld. As Jones and Buckle , op cit (Vol 1), comment (at 387): ''*applications for amendments have been entertained and allowed even after both sides have closed their cases and in certain cases even after the conclusion of argument. There can, therefore, be no objection in principle to entertaining one during the hearing of an application for absolution. An amendment to a magistrate's court summons, or other pleading, may even be allowed at the appeal stage by the court of appeal.''*

That is the very liberal approach taken by the courts to amendments. Of course,

there was a time when the Courts were reluctant to grant amendments and there was even a prohibition against granting amendments 'material to the merits of the case'. Amendments which allowed a new cause of action were also not allowed, but no more. The strict approach to amendments no longer represents the law and the only consideration for a magistrate's court in determining whether or not to allow an amendment is that it should not cause prejudice to the other party that cannot be cured by an appropriate costs order even if an adjournment is given. *(See Jones and Buckle (Vol 1) at 384-385.)*

In the words of Watermeyer J in *Moolman v Estate Moolman* 1927 CPD 27 at 29:

> *'' ...the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would*
>
> *cause an injustice to the other side which cannot be compensated by costs , in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed''.*

These days, an amendment is granted even to substitute parties. (See Jones and Buckle (Vol 1) at 389 and authorities there cited.) Now what objection could there possibly be to an amendment in casu which is aimed at perfecting a cause of action so that the issues between the parties are properly ventilated? I am unable to conceive of any circumstance in which the appellant

could have raised a valid objection to the amendment filed by the respondent. I think the only purpose in proceeding to have the exception heard after the notice to amend was filed, was to try and gain some tactical advantage. Even if the exception were upheld, nothing barred the respondent from issuing a fresh summons in the matter. Now in those circumstances what prejudice could the appellant have suffered if on the date of the hearing of the exception he had asked for the matter to be postponed for him to consider what to do about the notice to amend? Costs were guaranteed to him in any event in terms of Rule 55A (5). That the exception was heard at all on the 15th March 2004 by the court *a quo* was appellant's own doing. It did not have to be heard had he asked for time, as he should have, to consider his position in respect of the notice to amend. The appellant was entitled to a postponement and in fairness to both parties that is what should have happened. For the avoidance of doubt I need to make clear that I am not suggesting that the Magistrate was entitled to have had regard to the premature notice to amend. All I am saying is that justice demanded that the exception not be proceeded with when it was. Appellant should have asked the

matter to be postponed, with costs to the respondent, for him to consider if he needed to object to the amendment on any of the bases recognised in law. Having said that, I need to say too that even if he had stood the matter down to enable him time in terms of the *dies induciae* of the notice to amend, I do not see how different the result would have been as, on the authorities to which I have referred, a court properly directing itself, should have allowed the amendment even if opposed. Once the amendment was allowed, the exception, if persisted with, would doubtless have failed, as it did.

I am satisfied that 1(i) of the Notice of appeal is not well taken and must fail. The question that has greatly exercised my mind is whether, in the circumstances of this case, it would not be a more appropriate order to remit the matter to the court *a quo* with the direction that the matter be there dealt with as if the *dies induciae* for the appellant to object had not yet run out and thus afford an opportunity to the appellant to object, if he so desired, to the notice to amend on any of the bases recognised in law. Reluctantly I have decided against doing that for I think it will only add unnecessary costs to the litigation as I am unable to conceive of any credible basis on which an objection to the amendment can be upheld, however inelegantly it is worded.

I am satisfied that this is an appropriate case where, in its discretion, this Court must make an adverse costs order against the appellant to mark its disapproval of the conduct of the appellant.

In the premises it is ordered as follows:

The appeal is dismissed. The appellant is ordered to pay such costs of the respondent as were incidental upon his opposition of the appeal.

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DAMASEB, J

I agree

_____

SHIVUTE, JP

ON BEHALF OF THE APPELLANT: **Ms L Briers**

INSTRUCTED BY: **Dr Weder, Kruger & Hartmann**

ON BEHALF OF THE RESPONDENT: **No appearance**

INSTRUCTED BY: