CASE NO: I 1176/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BRIGITTE NIPKO (born KöTZLE) **APPLICANT/PLAINTIFF**

and

KLAUS DIETER NIPKO **RESPONDENT/DEFENDANT**

CORAM: GEIER, AJ

Heard: 22 March 2011
Delivered: 12 April 2011

JUDGMENT:

GEIER, AJ.: [1] Two interlocutory proceedings served before the court on 22 March 2011 as a result of which the following orders were granted:

1.1 That the Application to Compel is hereby removed from the roll, no order as to costs;

1.2 That the Rule 30 Application succeeds with costs;

1.3 That the Respondent is authorised to file a further Notice of Objection in terms of Rule 28 (4) within 5 days of this order, if he so elects, failing which the Respondent will be deemed to have agreed to the proposed amendment to the particulars of claim, as indicated per notice on 6 December 2010;

1.4 That the Applicant is thereafter authorised to deliver the so proposed amendment within 5 days after the expiry of the period set hereinabove for the filing of an objection;

1.5 That in the event of Respondent electing to continue to oppose the amendment, the further applicable provisions of Rule 28 of the Rules of this Court shall apply.

[2]On 6 April 2011 the court received a letter dated 25 March 2011, undercover of which the legal practitioner for the respondent/defendant requested written reasons for the abovementioned rulings.

[3] The reasons are as follows:

AD THE APPLICATION TO COMPEL

[4]During April 2009 the applicant herein, as plaintiff, had instituted an action for divorce against the respondent, the defendant. This action was set down for trial for the 25th to the 28th of January 2011.

[5]On 16 December 2010 a request for trial particulars, in terms Rule 21(4) of the Rules of Court, had allegedly been filed on behalf of applicant, as well as a notice in terms of Rule 35 (3) of the Rules of Court, requesting additional discovery from the respondent.

[6]On 13 January 2011 an application to compel a reply to such request and notice was delivered, which application was set down for hearing on 25th of January 2011.

[7]On 19 January 2011 the respondent furnished the requested trial particulars and on 20 January 2011, an affidavit, in terms of Rule 35 (3), was filed in response to the Rule 35 (3) notice. Nevertheless the application was persisted with.

[8]For purposes of facilitating argument on the 22nd of March 2011 applicant's legal practitioners had indexed a bundle of the relevant pleadings for purposes of the hearing. From that bundle it inexplicably appeared that the request for trial particulars was served and filed only on 13 January 2011. That was some two days before the application to compel was launched.

[9]This was in apparent contradiction to the allegations made in the founding papers made in support of the application to compel, were Ms Nambinga, the legal practitioner of record of the applicant, expressly alleged that such request had already been delivered on the 16th of December 2010.

[10]When the court pointed out to Mr Obbes, who appeared on behalf of the applicant, that the annexure and bundle of documentation indicated that the time for the delivery of the requested trial particulars had not yet expired, Mr Obbes felt constrained to concede the point and he thus immediately tendered the removal of the application.

[11]Although some argument had also focused on the question, whether or not, within the parameters of the application, the applicant was also entitled to request further and better trial particulars, and thus debate the sufficiency of the trial particulars delivered on the 19th of January 2011, and after that aspect was abandoned, all that remained was essentially to determine what the cost implications of this application should be.

[12]Mr Vaatz, who appeared on behalf of respondent, merely acknowledged the fact that Mr Obbes had tendered the withdrawal of the application, on the basis of which he submitted that the wasted cost occasioned thereby should be awarded to the respondent.

[13]He did not in oral argument concede or inform the court that the request for trial particulars had in fact been delivered on the 16th of December 2010. Nor did he point out that he had admitted delivery of the request for trial particulars on the 16th of December 2010 in paragraph 5.1 of his heads of argument. Neither did he endeavour to rectify Mr Obbes' misconceptions in this regard.

[14] It was then that Ms Nambinga produced the copy of the delivered trial particulars from her file from which it did indeed appear that such request was served at the offices of A Vaatz and Partners on 16 December 2010 and that it was also filed at the court on that date. This copy was then shown to Mr Vaatz who could not explain this aspect.

[15] In such circumstances it became clear that the request for trial particulars had in all probability been delivered timeously in accordance with the Rules of Court, that the respondent had not responded thereto within the time set by the Rules and that the applicant was thus firmly within her right to bring the application to compel on 13 January 2011.

[16]As it was also common cause that the requested trial particulars were only delivered after the launch of the application to compel, but before the date of set down, the applicant would normally have been entitled to the costs of such application. As however the application to compel, on the one hand, was defective, (in the sense that the all-important main annexure had not been attached, and as the bundle of pleadings, prepared for purposes of argument, did also not contain the correct copy of the request for trial particulars, reflecting the relevant date of delivery correctly), and as, on the other hand, Mr Vaatz's sought a costs order in favour of his client, (while not frankly admitting the date of service of the request on his offices on 16 December 2010 during the hearing, which date he had in any event conceded in his heads), and as, in such circumstances, remissness on both sides became apparent, I deemed it appropriate not to exercise my discretion in respect of costs in favour of either party.

AD THE RULE 30 APPLICATION

[17]By way of a Rule 30 application the applicant also attacked the regularity of a notice of opposition dated 8 December 2010 under cover of which the respondent had objected to certain proposed amendments to the applicant's particulars of claim. In such notice the respondent had advised the applicant that the grounds for his opposition to the proposed amendments were as follows:

"

a) Rule 18 (8) requires the plaintiff to state the date and place where the adultery were committed. Defendant alleges that plaintiff has not stated the date and place. What is meant is the day of the month and precisely the place where the adultery was committed and not merely a vague reference to whole a year and entire town.

b) In paragraph 7.1 plaintiff refers to plaintiff's claim in convention but in fact plaintiff has not made a claim in reconvention. Somehow this reference does not make sense in the circumstances.

c) Plaintiff's notice of intention to amend does not comply with the requirements of Rule 28.

d) Plaintiff does not tender any wasted costs."

[18]I immediately point out that the applicant's notice to amend was absolutely compliant with the requirements of Rule 28 (1) and (2), an aspect that was soon conceded by Mr Vaatz.

[19]Also the absence of a costs tender in such notice was not pursued in argument. Such tender is in any event not customarily incorporated into a notice of amendment, as this aspect is governed expressly by the provisions of Rule 28 (7) of the Rules of Court.

[20]The attack on the reference as to 'plaintiff's claim in convention' was another non-starter, and this ground was, correctly in my view, also not persisted with.

[21]The only remaining ground of opposition to the proposed amendment was the alleged non-compliance with Rule 18 (8) in the proposed amendment.

[22] In this regard Mr Obbes mounted his attack on the respondent's non-compliance with the requirements of Rule 28 (4) of the Rules of High Court which made it incumbent on respondent to:

> " **... clearly and concisely state the grounds upon which ...** *(his objection was)* **... founded**"

[23]The phrase 'clearly and concisely state the grounds upon which the objection is founded' was commented upon in *Erasmus's Superior Court Practice* by the learned authors as follows:

> " ... *the sub-rule enables a party, who wishes to amend a pleading, to know the basis upon which objection to such a proposed amendment is made and to avoid a situation where such party has to endeavour to deal with every conceivable complaint when applying for amendment. In terms of sub-rule 2 any objection to a proposed amendment must be in writing, and in terms of this sub-rule such objection must state clearly and concisely the grounds upon which it is founded ... ".*

[24]The rationale for requiring a notice of objection to a proposed amendment to clearly and concisely state the grounds upon which the objection is founded, was succinctly stated in the matter of *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE at 1157 D-H were it was said:

> *"Prior to the amendment of Rule 28 during 1987 it was not a requirement that a notice of objection should set out the grounds upon which the objection was*

based. However, this is now a requirement, and it is my view that the amendment to the Rule was introduced in order to enable a party who wishes to amend a pleading to know the basis upon which objection to such proposed amendment is made, and to avoid the situation which previously frequently arose, namely that the party seeking to amend did not know what the basis of the objection was and therefore, when applying for an amendment, had to endeavour to deal with every conceivable complaint that the other party might have. As is pointed out in Erasmus Superior Court Practice at B1—178, the requirement that the grounds of objection must be stated was probably introduced as a result of the remarks in Jacobsz v Fall 1981 (4) SA 871 (C) at 872G—H. It is further to be observed that it is only if an objection 'which complies with subrule (3)'[1] is delivered, that an application for leave to amend would have to be lodged." (my underlining)

[25]It was pointed out that the applicant had simultaneously, with the notice to amend her particulars of claim, also delivered a notice to amend her plea to respondent's counterclaim. It was only in regard to the notice of amendment brought in respect of the particulars of claim that objection was made.

[26]In regard to the issue of adultery, both notices of amendment, inter alia, endeavoured to introduce the following, identical, allegations to the pleadings:

"Since 2009 to date hereof, at Windhoek, Swakopmund and at such other places as are to the plaintiff presently unknown, the defendant wrongfully and unlawfully committed adultery with a certain Ms Dietlinde Pascheka, with whom the defendant currently lives as man and wife."

[27]As no objection was made in respect to the intended amendment of the applicant's plea to the respondent's counterclaim, the consequent amendment to the plea to the counterclaim has since been delivered, which admitted the now objected to allegations into the pleadings as of 13 January 2011.

[1] The South African Uniform Rule 28(3) is the equivalent to the Namibian High Court Rule 28(4)

[28]In such circumstances the situation was created that, respondents legal practitioner, on behalf of respondent, on the one hand, and by way of a notice in terms of Rule 28(4) had objected to applicant's intended amendment on the ground of the applicant's purported non-compliance with Rule 18(8), while on the other, he had allowed precisely that same 'objectionable' amendment to applicant's plea to the counterclaim onto the record.

[29]In this fashion the respondent had thus become author of an inhererently contradictory and inexplicable situation on the pleadings.

[30]A ground of objection which is inexplicable, and which, so-to-speak, creates a '*vague and embarrassing'* situation *vis a vis* the pleadings cannot be 'clear and concise'.

[31]In such circumstances it can by no stretch of the imagination be held that the respondent was compliant with Rule 28(4).

[32]It was already held in *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* that it is only in respect of an objection 'which complies with sub-rule 28(4), that an application for leave to amend would have to be lodged.

[33]The resultant situation, in which the respondent would thus have been permitted to persist with a non-compliant and therefore irregular objection in terms of Rule 28(4), was thus clearly prejudicial to the applicant, particularly in circumstances of the imminent trial at the time of the launch of the Rule 30 application, which trial has again been set down for a hearing in June 2011 and for purposes of which it remains important that the pleadings be closed.

[34]I thus acceded to the application in terms of Rule 30 and deemed fit to also grant the further relief set out in the rulings given on 22 March 2011.

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GEIER, AJ

Counsel for Appellant **Adv D Obbes**

Instructed by:

LorentzAngula Inc

Counsel for Respondent: **Mr A. Vaatz**

Andreas Vaatz & Partners