



*'Unreportable'*

**CASE NO.: I 4358/2009**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**MURRAY & ROBERTS NAMIBIA LIMITED**

**Plaintiff**

and

**ROADSTONE QUARRIES CC**

**Defendant**

**CORAM: PARKER J**

Heard on: 2011 October 18

Delivered on: 2011 October 26

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**JUDGMENT**

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**PARKER J:** [1] The plaintiff instituted action against the defendant in the Court in December 2009. The defendant pleaded to the plaintiff's claim in June 2010. Before that; in February 2010 the defendant had requested further particulars to the plaintiff's particulars of claim, and to which the plaintiff replied in May 2010.

[2] In July 2011 the defendant gave notice of its intention to amend its plea; and the plaintiff objected to the proposed amendment on the basis that the 'proposed amendments will render the plea, if amended, excipiable ...' and gives reasons for so contending. Thus, according to the plaintiff the proposed amendment in paras 4.4 and 7 'will render the plea ... excipiable ...'

[3] I now proceed to consider the proposed amendment to para 7. The argument in support of the plaintiff's objection to para 7 is that the defendant avers that the plaintiff owes it an additional amount of N\$501,358.32 without stating to what amount this amount is additional. That being the case, according to Mr. Mouton, counsel for the plaintiff, 'the plaintiff is consequently left in the dark' and is not placed in a position to establish the alleged basic amount claimed by the defendant and so the plaintiff will consequently 'not be able to plead to such allegations should the proposed amendments be allowed'.

[4] In its present form, para 7 of the defendant's plea, which is in response to the plaintiff's particulars of claim, is that 'the allegations in these paragraphs (that is, paras 8 and 9 thereof) are denied.' It is important to note that the proposed amendment to para 7 is an amendment by addition.

[5] I have juxtaposed the original para 7 and the proposed amendment thereto to paras 8 and 9 of the plaintiff's particulars of claim and I have also read all those paragraphs intertextually, as I should, as they are part of the pleadings in this case. Having done all that, I, with respect, fail to see in what manner the proposed amendment leaves the plaintiff in the dark – as the plaintiff avers – respecting the true meaning of the defendant's contention in the proposed amendment that 'the plaintiff owes it an additional amount of N\$501,358.3'. In all

the figures tabulated in paras 8 and 9 of the particulars of claim, I see that it is only the amount of N\$176,525.00 that is due to the defendant; and in virtue of the fact that only N\$176,525.00 stands in the defendant's favour, the defendant's indebtedness to the plaintiff is calculated to be N\$370,604.75. And if the defendant pleads that the allegations in these paragraphs (i.e paras 8 and 9) are denied, that plea, to my mind, is not vague or embarrassing: it means the figures and their legend in paras 8 and 9 of the plaintiff's particulars of claim are denied by the defendant and the defendant expands the plea in the proposed amendment.

[6] In the proposed amendment the defendant seeks to amplify, that is, 'add detail to' or 'expand what is said or written' (see *Concise Oxford Dictionary*, 10<sup>th</sup> edn) in the original para 7. Thus, what the amendment seeks to do is, therefore, to expand what the defendant had said or written in para 7 where it denies the correctness of the alleged figures and their legend in paras 8 and 9, and pleads that the amount of N\$501,358.32 should be added to N\$176,525.00, which the plaintiff itself has put down as being due to the defendant (in the particulars of claim), as aforesaid. In this regard, as Ms Bassingthwaighe, counsel for the defendant, submitted – correctly, in my view – the amount of N\$176,525.00 has already been mentioned by the plaintiff itself as due to the defendant; and the defendant denies the correctness of the figure and its legend. And so, as I see it, if the pleadings are read contextually and globally, as one should – leaving nothing out – the only amount that can have real relevance to the clause 'the plaintiff owes it an additional amount of N\$501,358.32' can only be the aforementioned amount of N\$176,525.00, as I have explained previously.

[7] Keeping the foregoing in my mind's eye and relying on *South Bakels (Pty) Ltd v Quality Products* 2008 (2) NR 419 and keeping in view also the facts of the present case, I do not think the proposed amendment 'would become excusable' on the basis, as Mr Mouton contends, that it is vague and embarrassing. The reason is that, as I have demonstrated previously and as submitted by Ms Bassingthwaite, it is clear from the proposed amendment what case the plaintiff is to meet; and the amendment, if allowed, would not prejudice the plaintiff in the sense of injustice being occasioned to it.

[8] I pass to consider the plaintiff's other objection. Mr Mouton's argument respecting the objection is two-pronged, namely, first, the proposed amendment will not contribute to the determination by the Court of the real issues between the parties and, second, the proposed amendment 'would render the amendment excusable'. With respect, I do not think the first element of this ground has merit. The proposed amendment raises the issue of repudiation by the plaintiff of the agreement between the parties and the acceptance by the defendant of the repudiation. That is a real triable issue and its determination will indubitably contribute to the determination of a dispute between the parties – as respects their agreement.

[9] With regard to the second element, Mr Mouton submitted that upon the authority of *Amler's Precedents of Pleadings*, 7<sup>th</sup> edn at p 340, for the defendant to rely on such repudiation, the defendant must allege and prove: (a) the repudiation of a fundamental term of the agreement; (b) an election by the defendant to terminate; and (c) the conveyance of the election to the other party. According to Mr Mouton the defendant has not (1) alleged 'whether the Defendant has elected to accept such repudiation and to terminate the agreement or to hold the Plaintiff

to such agreement and (2) alleged 'whether the election has been conveyed to the plaintiff'. In other words, for Mr Mouton, the proposed amendment has failed the (b) and (c) *Amler's* requirements. Consequently, according to counsel, the proposed amendment 'would therefore render the Defendant's plea excipiable and the Plaintiff has not and will not know which case to meet should the proposed amendment be allowed.' On this point Mr Mouton relies on authority that an amendment which would render a pleading excipiable should not be allowed (see *South Bakels (Pty) Ltd v Quality Products supra* at 423E-H).

[10] I accept Ms Bassingthwaighte's submission that the allegation that the defendant accepted the repudiation is made in the proposed amendment in para 4.4 thereof. I, therefore, find that para (a) and (b) of the *Amler* requirements are met by his proposed amendment. What about requirement (c)? It is Ms Bassingthwaighte's submission that the question as to whether and when the election was conveyed to the plaintiff are issues that can be clarified in further particulars if the plaintiff was minded to request further particulars on those aspects; and in view of such prospect being open to the plaintiff, so argued counsel, the proposed amendment would not render the plea excipiable. I accept counsel's submission. It would have been a different matter if the proposed amendments are sought to be allowed during the trial of the matter. In any case, Ms Bassingthwaighte submitted, it is nowhere stated in the authorities relied on by *Amler's Precedents on Pleadings* that the conveyance of election must in all circumstances be conveyed to the other party. I accept Ms Bassingthwaighte's submission as correct in respect of all the case law authorities, including what I can gather from the Headnote in *Van Rooyen v Minister van Openbare Werke & Gemeenskapsbou* 1978 (2) SA 835 (A).

[11] For all the foregoing reasoning and conclusions I am impelled to the conclusion that I should exercise my discretion judicially in favour of the granting of the amendments sought. Whereupon, the application is granted with costs; such costs to include costs of one instructing and one instructed counsel.

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**PARKER J**

**COUNSEL ON BEHALF OF THE PLAINTIFF:**

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**COUNSEL ON BEHALF OF THE DEFENDANT:**

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