REPUBLIC OF NAMIBIA NOT / REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case no: I 4162/2011

In the matter between:

ONDANGWA HARDWARE CC t/a BUILD IT **PLAINTIFF**

and

NDAHAFO & FILHOS **1st DEFENDANT**
MARTIN JOHANNES MANASSE **2nd DEFENDANT**
MARTHA MANASSE **3rd DEFENDANT**

Neutral citation: *Ondangwa Hardware CC v Ndahafo & Filhos (I 4162/2011) [2013] NAHCMD 100 (15 April 2013)*

Coram: SMUTS, J
Heard: 10 April 2013
Order: 10 April 2013
Reasons 15 April 2013

Flynote: Application to amend – withdrawal of admission – court will require a sales factory explanation for withdrawal of admissions and court to consider prejudice to the other side – applicant's failed to provide a satisfactory application – application for

amendment dismissed.

ORDER

That the application to amend in terms of Rule 28(4), is dismissed with costs, including the costs of one instructing and one instructed counsel.

REASONS

SMUTS, J

[1] Shortly after the conclusion of argument in this opposed application to amend in terms of Rule 28(4), heard on 10 April 2013, I made an order dismissing the application with costs, including the cost of one instructed and one instructing counsel and postponing the matter for a pre-trial conference on 17 April 2013 at 09h00.

[2] What follows are my reasons for this order. The second and third defendants are the first and second applicants in this application to amend their respective pleas. This application is opposed by the plaintiff who is cited as the first respondent. The first defendant is cited as second respondent. In these reasons I refer to the parties as in the main action.

[3] The second and third defendants filed a notice to amend on 13 February 2013, having indicated their intention to do so at a case management meeting on 6 February 2013. On that date, the trial was provisionally set down for hearing on the continuous roll for the week 3 to 7 June 2013 and the matter was postponed for a pre-trial conference on 20 March 2013.

[4] The notice to amend was met by an objection on 27 February 2013. Two grounds are raised in the objection. The two grounds relate to different aspects of the amendment. In both grounds, the plaintiff objects to the amendment for the reason that it seeks to withdraw admissions.

[5] The first ground is in respect of an admission by the first and second defendants concerning an acknowledgement of debt annexed to the particulars of claim as annexure "A". This acknowledgement of debt had, according to its terms, been signed on 1 July 2010 by the second and third defendants for the amount of N$750,000. The second and third defendants admit having signed the acknowledgement in their separate pleas but in the notice to amend now seek to deny all the allegations in certain paragraphs of the particulars of claim relating to that acknowledgement of debt and deny that either of them ever signed the acknowledgement of debt or annexure "A". They both now aver that a completely different document had instead been signed by them as prepared on behalf of the plaintiff and allege that this was a surety.

[6] The second ground to the objection concerns the withdrawal of an admission by the third defendant that cement would be delivered to Ondjiva in Angola and had in fact been delivered to the first defendant at its premises.

[7] On the morning of the planned Rule 37 conference on 20 March 2013 the application to amend was filed. It was then postponed to 10 April 2013 for argument. I directed at the time that the plaintiff must file its answering affidavit by 3 April 2013 and the applicant was to file a replying affidavit by no later than 8 April 2013. The plaintiff duly filed an opposing affidavit in meeting the deadline in question but the second and third defendants did not file any replying affidavit. At the hearing of the application I asked Mr Rukoro who represented them, to confirm that they had not done so and to enquire whether there would be any replying affidavit. He answered that the first and second defendants would not be filing a replying affidavit.

[8] I turn to the allegations contained in the founding and answering affidavits in the context of this action as a whole.

[9] In the founding affidavit, the second defendant states that he is an insurance broker of some 15 years standing and is currently in the service of Sanlam. He further states that the third defendant, who would appear to be his wife, runs a business with their daughter. Its nature, name and location are not specified in his affidavit. Nor did the third defendant and their daughter provide any further details in their supporting and confirmatory affidavits of this business.

[10] In this affidavit, the second defendant briefly touches upon his relationship with the first defendant which he says he "knows ….. fairly well" because the first defendant "used to assist" the third defendant with the importation of scrap metal from Angola. The second defendant also stated that the third defendant would make payment to the first defendant's suppliers on the latter's behalf and also delivered documents on its behalf. The second defendant however denied that he and the third defendants were "business associates" of the first defendant or ever acted as its agents, despite stating that payments and documents were delivered on its behalf.

[11] The second defendant further states that the first defendant had approached him and the third defendant for assistance in July 2010 concerning the supply of steel mesh for a construction project in Angola and stated that the first defendant had turned to them "for assistance in providing surety" (to the plaintiff). The second defendant further stated that they had agreed to provide such assistance and that Mr Robberts on behalf of the plaintiff had provided a surety document in the Afrikaans language to them for signature as neither the second nor third defendants were fluent in the English language.

[12] The second defendant then proceeded to state that the third defendant and his daughter had mistaken the document annexed to the summons and marked "A", as the document signed in Mr Robberts' office in July 2010 as the surety. He further states that they had advised their erstwhile legal practitioner to plead as such. He then states:

> "Subsequent to that the so-called annexure "A" was shown to me and I without

> hesitation remembered that it was not the document we signed. I simply remember that we could not have signed the said document as we cannot read and understand English so well and I would simply not have signed a document that I did not understand".
>
> And
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> "The applicants (referring to himself and the third defendant) sat in Robberts' office while he typed the said document and given the fact that Robberts' own command of the English language is also not very good the so-called annexure "A" can also not be the document that the applicant signed on that particular day and I demand that the original copy be shown to us as I believe that the applicants' signatures were forged."

[13] This is the mistake thus contended for by the second and third defendants in respect of the admission made that they had signed the acknowledgement of debt. The second defendant thus concluded that the plea admitting their signature to this document, made by each of them separately, had been entered in error.

[14] The second defendant proceeded to deny that there would be any prejudice if the amendment were to be granted or in the alternative that there would be no prejudice which could not be adequately compensated for through an appropriate cost order.

[15] The third defendant filed a brief confirmatory affidavit. In doing so she did not make cause with the bringing of the application but merely confirmed the references to her contained in the affidavit.

[16] In the answering affidavit, the plaintiff reiterates the basis of its opposition set out in the objection. The plaintiff specifically takes issue with the explanation provided by the second and third defendants that their admissions contained in their previous pleas had been erroneously made. In essence, the plaintiff denies that a satisfactory explanation has been provided for the change in these defendants' stance and attacks the reasons advanced for the withdrawal of the

admissions.

[17] The plaintiff also raises the point of prejudice. The plaintiff points out that if their amendment were to be granted, it would need to secure the services of a handwriting expert to confirm the signatures on the acknowledgement were those of the second and third defendants and fears that the trial, provisionally set down for 3 to 7 June 2013, would in all likelihood need to be postponed. The plaintiff also referred to the prejudice in having to secure evidence on issues which had not been previously placed in issue. In argument, there was reference to one of the witnesses of the defendants' signature is now in Cape Town.

[18] In the answering affidavit on its behalf, the plaintiff's Mr Robberts points out that the second and third defendants only sought to deny signing the acknowledgment in late 2012. The action had been instituted in December 2011. The acknowledgement was attached to the particulars of claim as annexure "A". It had not been previously denied. In their opposition to the summary judgment applications, the plaintiff points out that the second and third defendants both did not dispute signing the acknowledgement and in fact both of them expressly admitted the acknowledgement in the following way:

> "On the 1st of July 2010, I undertook to settle the first defendant's debts in terms of the said open account for an amount of N$750,000.00 and which acknowledgement was initiated by Mr Robberts acting on behalf of the applicant/plaintiff."

[19] Annexure "A", being the acknowledgement, was in fact signed on 1 July 2010. It also has a court heading with the plaintiff's name reflected as such and the second and third defendants beneath its name. Below the reference to the parties is a prominent heading in the following terms:

> "Acknowledgement of debt and consent to judgment in terms of section 58 of Act 32/44."

[20] It then proceeds to set out the identity numbers of both second and third defendants, their addresses and contains an acknowledgement of debt by them to the plaintiff in the amount of N$750,000. The acknowledgement purports to bear the signatures of both defendants, showing striking resemblances to those on the affidavits in support of this application.

[21] Mr Robberts also refers to the extremely vague manner in which the business conducted by the third defendant and her daughter is referred to – without disclosing any name, location or nature of the business. Mr Robberts proceeds to state that these defendants in fact informed him that they conduct business in Angola in the name of the first defendant and further states that they had made orders with the plaintiff for a business entity with that name.

[22] The plaintiff's Mr Robberts also disputes the professed inability on the part of the second and third defendants to read and comprehend English. He points out that all the plaintiff's documentation is in the English language and that it had been signed by the defendants. He denies that he did prepare any Afrikaans or that he would have done so given the fact that the plaintiff's documentation is in the English language. He further stated that the second and third defendants acted on behalf of the first defendant. He also denies that any surety was prepared by him. He confirmed that the acknowledgement was signed by both himself and by the second and third defendants in his presence. He referred to the identity of both witnesses to the signatures of the second and third defendants on annexure A. Those two witnesses also confirmed that the defendants had signed the acknowledgement in their presence in affidavits in opposition to this application for amendment.

[23] Mr Robberts also takes issue that with the error contended for. He refers to the fact that there was no affidavit provided by the second and third defendants' erstwhile legal practitioner in support of this error. Not only is this correct, but their former legal practitioner in fact made an affidavit in support of their opposition to the summary judgment application, confirming that he had advised that they had a defence as set out in their affidavits opposing summary judgment in which both defendants separately in their own affidavits expressly

admitted the acknowledgement.

[24] As I have pointed out, the second and third defendants elected not to file a replying affidavit. I take this into account in considering the explanation provided by them relating to their purported error, particularly in view of their failure to deal with the statements made by Mr Robberts concerning their ability in the English language and that the acknowledgement had been signed in his presence and those of the two witnesses who each made their affidavits. Furthermore, I also take into account the failure on the part of the third defendant to provide any further information of the business referred to in the face of the clear challenge made by the plaintiff to the paucity of information contained in the founding papers about that business. This is significant for two reasons. Firstly, it would shed light upon the third defendant's professed inability in the English language. In the second instance and more importantly, I would have thought that the third defendant would seek to explain the nature of that business and its relationship with the first defendant in view of what is stated in the answering affidavits and her previous affidavit concerning the reason for the acknowledgement in expressly admitting it, in order to further explain the purported error in the light of the square challenge to it contained in the answering papers and the failure on their part to provide an affidavit by their erstwhile legal practitioner confirming their explantion.

[25] The principles applicable to applications of this nature were recently referred to in a judgment of this Court. [1] The authorities referred to in that judgment were referred to by both counsel. Although Mr Rukoro referred to an earlier edition of the work, the position is neatly summarised in Herbstein & van Winsen: *The Civil Practice of the High Court of South Africa* [2] where the learned author state:

'An amendment to a pleading involving the withdrawal of an admissions stands

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[1] *Moongold Properties CC and two others v The Namibia Estate Agents' Board* (I 982/2011) unreported 4 February 2013.

[2] 5th ed by Cilliers, Loots & Nel Vol 1 (2009) at 683.

> in a somewhat different position from other amendments and is more difficult to achieve because it involves a change of front, which requires a full explanation to convince the court of the *bona fides* of the parties seeking the amendment. Also it is more likely to prejudice the other party who has been led by the admission to believe that the fact in question need not be proven and who may, for that reason have omitted to gather the necessary evidence[3].'

And further:

> 'Where a proposed amendment involves the withdrawal of an admission, the court would generally require a satisfactorily explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it. In addition the court must consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn is to cause prejudice or injustice to the other party to the extent that a special order as to cost will not compensate him, then the application to amend will be refused[4].'

[26] Mr van Vuuren, who appeared for the plaintiff submitted that the explanation provided by the second and third defendants was wholly unsatisfactory and further referred to the prejudice suffered by the plaintiff to which I have already referred. He pointed out that the third defendant's affidavit did not make cause with the application at all. Nor did the second defendant state that he sought the amendment on her behalf as well. While this is strictly speaking correct, it would seem to me in the totality of the facts and the nature of the interlocutory application in question that the third defendant would appear to seek the amendment and support the application.

[27] Mr van Vuuren pointed out that the notice to amend was only forthcoming in February 2013 as the trial approached. Mr van Vuuren also correctly pointed out that the second ground referred to in the objection had not been referred to at all. No explanation had been provided whatsoever for the withdrawal of the admission in question. Given the objection and the fact that

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[3] Supra at p 685.

[4] Supra at p 685 (footnotes excluded).

the second and third defendants' seeks to withdraw an admission which has not even been referred to in the application, it would follow that the admission sought to be withdrawn in that part of the amendment will not be permitted.

[28] Mr van Vuuren also, with justification, criticised the explanation contained in the second defendant's affidavit. He referred to annexure "A" and the clear heading contained on it. He also referred to the fact that nowhere had there been any reference to a surety in the prior affidavits (opposing summary judgment) and in the earlier pleas filed on behalf of the defendants. Nor had this been referred to in case management. He further referred to both defendants' discovery affidavits which, in the first schedule, expressly referred to the acknowledgement of debt. That item was expressly referred to by both defendants individually in their affidavits. They were thus then aware of an acknowledgement of debt being discovered by each of them (and not a deed of surety). I also have had regard to the two separate pleas filed by each of them. In no less than three places is annexure "A" expressly referred to as an acknowledgement of debt. They also each explain their admission of that acknowledgement in two places in one such reference, it is stated:

> 'In amplification of the above denial the defendant pleads that the acknowledgement of debt signed by the second defendant was for a total of N$750,000.00 only and that same was not part of the initial agreement between the plaintiff and first defendant as alleged in paragraph 5 of the particulars of claim.'

And also:

> 'In amplification of the above denial, the defendant pleads that the acknowledgement of debt signed by the second defendant was for a total of N$750,000. only.'

Similar statements are made in the third defendant's existing plea.

[29] Mr van Vuuren also referred to the detailed case management report

provided in terms of Rule 37(12) by the parties jointly in August 2012 where the following is stated under the heading 'Relevant facts not in dispute':

> 'That the second and first defendants signed and/or concluded annexure "A" to the plaintiff's particulars of claim are not in dispute.'

[30] That presumably meat to be a reference to the second and third defendants. Nowhere is this or the admissions contained earlier affidavits by the second and third defendants explained in this application. This failure is compounded by the failure to reply to the plaintiff's express challenge with reference to their earlier affidavits.

[31] When I raised the nature of the error contended for by the defendants with Mr Rukoro, he said that it was an error in judgment. When this proposition was tested, he had difficulty in further explaining what was meant by that. It would rather seem to me that the error contended for in the founding affidavit is that the defendants mistook annexure "A" for the surety agreement prepared by the plaintiff as is stated by them. But when this purported error is further examined, it raises more questions than answers. Firstly, it is obvious from annexure "A" that it is in the English language and not Afrikaans. This aspect alone is telling. They averred that they had signed a surety agreement in Afrikaans on 1 July 2010 and not the acknowledgement. The acknowledgement itself is, as I have already pointed out is clearly identified by its heading as acknowledgement of debt, containing as it does the identity numbers of the defendants and refers to their acknowledgement of debt in the sum referred to. It is also self evidently in the English language. Quite how it could be mistaken for a deed of surety in the Afrikaans language is not further explained.

[32] Mr Rukoro also referred to the defendants' lack of proficiency in English which gave rise to the error. But he was unable to explain why there was no reference in their affidavits that the affidavits had been explained to and interpreted to them. Nor was any reference of this nature contained in their earlier affidavits. As against this, that the second defendant is an insurance broker of 15 years' standing, in the services of Sanlam. During that entire

period, he would need to be conversant with insurance agreements which would for the large part be in the official language. Any insurance broker would at the very minimum need to have some appreciation for the terms contained in insurance agreements. Even if the second defendant may experience difficulties with regard to fluency in speaking the English language, I cannot accept that his ability in the context of all the facts of this case is of such a nature that he would fail to understand what was meant by an acknowledgement of debt, particularly given the fact that he had previously expressly referred to that very document in a prior affidavit and in his discovery affidavit and in expressly dealt with it is a plea filed on his behalf.

[33] The third defendant provided no evidence as to her ability or otherwise in English except the statement by the second defendant with reference to her not being able to read and understand English "so well". When challenged on this issue and particularly in the context of the nature of the business she conducts, nothing further is stated, I take into account that no replying affidavit was made. I also take into account the failure in the founding affidavits in this application to deal with or even refer to the prior statements made by both defendants under oath expressly admitting the acknowledgement and what was expressly stated in case management on their behalf and the failure for their explanation to be supported in any way whatsoever by their erstwhile legal practitioner who made the admission on their behalf in case management and prepared their pleas where it was expressly admitted. I also take into account the vagueness of the explanation on issues where far more would have been expected from the applicants satisfy this court of their *bona fides* in withdrawing admissions. In short, the explanation provided for is wholly unsatisfactory to such an extent that it adversely reflects upon the bona fides of the applicant. I also accept that there would be prejudice to the plaintiff if the amendments were to be granted given the fact that evidence not previously required would now need to be secured, including that of an expert witness to give evidence as to the authenticity or otherwise of the signatures of the second and third defendants on annexure "A". I further take into account that no explanation whatever was tendered for the withdrawal of the admission raised in the second ground of the objection.

[34] This application for an amendment is thus singularly unmeritorious in failing to provide a satisfactory explanation for the change of stance and if granted would give rise to prejudice to the plaintiff.

[35] In the result, I gave an order refusing the application with costs and that the costs in question included those occasioned by the engagement of one instructing and one instructed counsel.

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SMUTS, J

Judge

APPEARANCES

PLAINTIFF:	(advocate) (with him (advocate/attorney)) Instructed by Government Attorney, Windhoek
FIRST DEFENDANT:	(attorney) Diedericks Incorporated, Windhoek
SECOND and THIRD DEFENDANTS:	(advocate) Instructed by (attorney firm, town)