REPUBLIC OF NAMIBIA **REPORTABLE**

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 1905/2009

In the matter between:

HELENA ANITA PRINSLOO (Born VISSER) **PLAINTIFF/RESPONDENT**

and

FILIPPUS PRINSLOO **DEFENDANT/APPLICANT**

Neutral citation: *Prinsloo v Prinsloo* (I 1905/2009) [2013] NAHCMD 266 (25 September 2013)

Coram: UEITELE J
Heard: 21 May 2013
Delivered: 25 September 2013

Flynote: Practice - application to amend -amend or vary terms of settlement agreement - parties are entitled to amend or vary the terms of their settlement agreement without formally having to approach the court -amendment granted.

Practice - Pleadings - Amendment to - When granted - Principles restated - Defendant withdrawing admission in plea - Costs**.**

Summary: This is an application in terms of Rule 28(4) of the rules of this Court by the defendant for leave to amend his further amended plea. The plaintiff objects to the amendment sought to be introduced by defendant. The proposed further amendment which the defendant seeks to introduce in essence relates to the donation agreement entered into between the parties in 2007. The plaintiff's main basis of objection to the introduction of the donation agreement is that, the donation agreement was never made an order of court and she contends that the defendant can for this reason not rely thereon in this action.

The issues that fall for decision in this application are: whether or not the parties can amend or vary the terms of their settlement agreement, after such agreement has been made an order of court, without formally applying to court to have the further terms of their agreement recorded in an order of court and if the answer to that question is in the affirmative then the follow up question is whether the plaintiff will be prejudiced by the amendment sought to be introduced by the defendant?

Held that that the parties are entitled to amend or vary the terms of their settlement agreement, after such agreement has been made an order of court, without formally having to apply to court to have the further terms of their agreement recorded in an order of court.

*Held furthe*r that the time the defendant sought to amend the plea the Donation Agreement was in existence and there will therefore not be prejudice if the parties can be put back for the purpose of justice in the same position.

*Held furthe*r that Defendant is granted leave to amend its plea in respects as set out in the notice to amend being Annexure "A" to his affidavit in support of his application to amend.

Held that the defendant is granted leave to withdraw its admission contained in paragraph 5.4 of its plea dated 30 September 2009.

Held that the defendant is ordered to pay the costs of the opposition to this application, which costs shall include the costs of one instructing and one instructed counsel.

ORDER

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1. Defendant is granted leave to amend its plea in respects as set out in the notice to amend being Annexure "A" to his affidavit in support of his application to amend.

2. The defendant is granted leave to withdraw its admission contained in paragraph 5.4 of its plea dated 30 September 2009.

3. That defendant is ordered to pay the wasted costs which are to include the taxed costs of this application. The costs include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE J:

Introduction

[1] In this application the defendant is the applicant and the plaintiff is the respondent, but I will for the sake of convenience refer to the parties as they are in the main action, namely respondent as plaintiff and applicant as defendant. This is an application in terms of Rule 28(4) of the rules of this Court by the defendant for leave to amend his further amended plea. The plaintiff objects to the amendment sought to be introduced by defendant.

[2] The brief background to this application is that: The marriage between the parties to this application was dissolved by order of this Court on 24 October 2005. Incorporated in the final order of divorce is a settlement agreement (I will in this judgment refer to this agreement as the settlement agreement) entered into between the parties which sets out the terms of settlement regarding the custody of and access

to the minor children, the maintenance of the minor children, spousal maintenance, division of the joint estate and ancillary matters. In the divorce proceedings the current plaintiff was also the plaintiff.

[3] In terms of paragraphs 7.2.1 and 7.2.2 of the settlement agreement (which was made an order of court on 24 October 2005):

(a) the plaintiff acquired the right to exclusively use the immovable property (the property was registered in the name of the defendant) situated at No. 218 Sam Nujoma Avenue, Walvis Bay or on erf 739 Walvis Bay;

(b) the defendant had to attend to the cancellation of all the mortgage bonds registered over erf 739 and transfer that property into the plaintiff's name once he had sold his members interest in a close corporation known as Castle Properties CC.

(c) The cost of transferring the immovable property into the plaintiff's name was to be borne equally by both the plaintiff and the defendant.

[4] Erf 739 was, however, not transferred to the plaintiff as agreed but was sold during April/May 2006. Since erf 739 was sold to a third party the plaintiff and the defendant concluded another agreement in terms of which defendant donated Erf 547 to the plaintiff. The Deed of Donation was signed on 12 November 2007.

[5] Erf 547 was also not transferred to the plaintiff but was sold (during 2009) by the defendant to a third party. As a result of the defendant selling erf 547 the plaintiff instituted action claiming payment in the amount of N$ 765 500-00 alleged to be damages suffered as a result of the defendant having breached the settlement which was made an order of this court on 25 October 2005. The defendant entered notice to defend the action and pleaded to the plaintiff's particulars of claim. The defendant further amended its plea on two occasions. The plaintiff excepted to the defendant's further amended plea on the basis that the further amended plea does not disclose a

defence to the plaintiff's claim. The defendant then sought to further amend the further amended plea and it is this further amendment that the plaintiff objects to.

[6] The proposed further amendment which the defendant seeks to introduce in essence relates to the donation agreement entered into between the parties in 2007 (I will in this judgment refer to this agreement as the donation agreement). The plaintiff's main basis of objection to the introduction of the donation agreement is that, the donation agreement was never made an order of court and she contends that the defendant can for this reason not rely thereon in this action.

The issue which I am called upon to decide

[7] The issues that fall for decision in this application are:

(a) whether or not the parties can amend or vary the terms of their settlement agreement, after such agreement has been made an order of court, without formally applying to court to have the further terms of their agreement recorded in an order of court? In other words, can the terms of an agreement be novated by the contracting parties after such agreement was made an order of court?

(b) if the answer to the above question is in the affirmative then the follow up question is whether the plaintiff will be prejudiced by the amendment sought to be introduced by the defendant?

Can parties amend a settlement agreement after it has been made an order of court?

[8] The practice to incorporate agreements, and particularly settlement agreements in divorce cases, into the final order of divorce of this court, is firmly established in this Court. This practice is not without its own difficulties. The difficulties that are created by this practice were highlighted by Alkema, J[1]when said:

> "The following difficulties flowing from the terms of a contract being embodied in a court order come to mind in the case of a dispute between two contracting parties regarding the

[1] In the matter of *Thutha V Thutha* 2008 (3) SA 494 (TkH).

> terms of their contract. Is the result that one or both of them is/are in breach of the court order and may such party/parties in these circumstances be compelled to comply with the court order even if non-compliance may be contractually excused? If not, what is the object and purpose of the court order if it cannot be enforced? *Is it expected of contracting parties to approach the court every time they amend or change their contract to apply for an order of variation of the court order*? If the object and purpose of the court order is to allow either or both contracting parties to proceed immediately to execution without resorting to a resolution of their contractual disputes, may any of the parties be deprived of their contractual rights or remedies, including their right to have their disputes settled in a court of law? If not, again the rhetorical question: What then is the purpose and effect of incorporating a contract into an order of court?[2] {My underlining}

[9] The underlined part of Alkema, J's statement of the difficulties confronting the courts is exactly the difficulty confronting me in this matter. I find it appropriate to at this juncture to observe that both the plaintiff and the defendant are agreed that, since the immovable property situated at No. 218 Sam Nujoma Avenue, Walvis Bay or on erf 739 Walvis Bay has been sold to a third party, performance in terms of the settlement agreement is impossible. What then are the consequences?

[10] The consequences following the impossibility of performance of an agreement have been stated by Herbstein, J in the case of *Rossouw v Haumann*[3] in these words:

> 'An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation.'

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[2] *Ibid* at p 499.

[3] 1949 (4) SA 796 (C) quoting from the English case of Hirji Mulji and Others v Cheong Yue Steamship Company, Limited (1926, A.C. 497 at p. 507).

[11] The fact that the settlement agreement was made an order of court does not affect the consequences following from the impossibility of performance. See the reasoning of Herbstein, J[4] where he said:

> 'Now, let me say at once that in this case there is nothing to show that the agreement has been set aside by the Court. Nor am I prepared at this stage, on motion, to hold that the parties have expressly agreed that the terms of the order are no longer binding. Nevertheless, it seems to me, that the position would become farcical if, despite complete *consensus* by the parties that the agreement had become impossible of performance, one party could rely on the agreement and get the advantage of an interdict, until the other party had taken proceedings to set it aside. If that were so, it seems to me it would be subversive of the whole principle stated by Lord SUMNER, that on proof of impossibility of performance, the law provides common relief from the common disappointment and an immediate termination of the obligations as regards future performance. It seems to me, too, that it would be absurd for this Court to hold that while the contract is no longer effective as a contract, it is, nevertheless, effective because it happens to have been made an order of Court.'

[12] I am therefor of the view that even where an agreement has been made an order of court and performance of that agreement becomes impossible, that impossibility of performance terminates the obligations between the parties. But, it seems to me, that this matter can be approached from another angle. The settlement agreement in clause 8 of that agreement provides as follows:

> **'8. Non Variation**
>
> 8.1 This agreement contains all the terms and conditions of the agreement between the parties.
>
> 8.2 No variation of or abandonment or waiver of rights or obligations whether expresses or implied, shall be binding unless contained in this agreement or subsequently reduced to writing and signed by both parties.'

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[4] *Ibid* at 801.

[13] This is exactly what the parties have done in the present matter and I am therefore of the view that the parties are entitled to amend or vary the terms of their settlement agreement, after such agreement has been made an order of court, without formally having to apply to court to have the further terms of their agreement recorded in an order of court. The other ground upon which the plaintiff opposed the amendment is that the she will be prejudiced by the amendment and the prejudice is incapable of being cured by an order of costs.

Will the plaintiff be prejudiced by the amendment sought to be introduced by the defendant?

[14] The amendment of pleadings is governed by Rule 28 of this Court's Rules. Rule 28(1) to (4) provides as follows:

> '28. (1) Any party desiring to amend any pleading or document other than an affidavit, filed in connection with any proceeding, may give notice to all other parties to the proceeding of his or her intention so to amend.
>
> (2) Such notice shall state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.
>
> (3) If no objection in writing be so made, the party receiving such notice shall be deemed to have agreed to the amendment.
>
> (4) If objection is made within the said period, which objection shall clearly and concisely state the grounds upon which it is founded, the party wishing to pursue the amendment shall within 10 days after the receipt of such objection, apply to court on notice for leave to amend and set the matter down for hearing, and the court may make such order thereon as to it seems meet.'

[15] This Court and South African courts have in a line of cases set out the general legal principles relating to amendments of pleadings. I will below briefly outline the principles so set out by the courts. In the matter of *Stolz v Pretoria North Town Council*[5] Ramsbottom, J said:

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[5] 1953 (3) SA 884 (T) at 887.

'I think that the way to approach the question of how the discretion ought to be exercised is this. The general rule, as I understand it, is that an amendment to pleadings ought to be allowed if that can be done without prejudice to the other side or without any prejudice which cannot be remedied by an appropriate order as to costs.'

[16] In the matter of *Zarug v Parvathie*, NO[6] Henochsberg, J said:

'…the following legal principles can be gathered from the decisions quoted to me:

1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.

2. With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.

3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake.

An amendment cannot, however, be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted.'

[17] In this Court Manyarara, AJ said[7];

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[6] 1962 (3) SA 872 (D) at 876.

[7] South Bakels (Pty) Ltd and Another v Quality Products and Another: 2008 (2) NR 419 (HC) at page 421:D-H.

> 'In deciding whether to grant or refuse an application for an amendment the court exercises discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them. An amendment which would render the relevant pleading excipiable cannot lead to a decision of the real issues and should not be granted…An amendment must raise a triable issue-i.e., it may be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the issue is viable and relevant or ***will probably be covered by the available evidence***. It will normally not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject-matter of the litigation. . . <u>There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading which is sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment.'</u> {My Emphasis}

[18] The question that one has to ask here is, what is the position for the purposes of justice in which the parties were, when the plea (which is sought to be amend was filed)? I am of the view that at the time that the defendant sought to amend the plea the Donation Agreement was in existence and there will therefore not be prejudice if the parties can be put back for the purpose of justice in the same position.

Costs*:*

[19] Rule 28(7) of this Court's rules provide as follows:

> '(7) A party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party.'

[20] The wording of Rule 28 (7) makes it clear that the granting of cost is in the discretion of the court. The principle on which the Court acts in exercising its discretion was laid down by Watermeyer, J in *Moolman v Estate Moolman and Another*[8], in which he stated:

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[8] 1927 CPD 29

'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, or, 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.'

[21] In the present case I am disposed to exercise my discretion on the lines laid down by Watermeyer, J., in that case, and, as I am unable to hold that this is a *mala fide* defence, and as I have held that any prejudice which the plaintiff will suffer by the granting of the amendment can be rectified by an order as to costs, I am prepared to grant the amendment subject to defendant paying the wasted costs. The plaintiff was perfectly entitled to place before the Court the arguments that she did and she, and any other respondent in similar applications where the opposition is fair and reasonable, as it is here, ought not to be put into a position that they oppose the granting of an indulgence at their peril in the sense that if the amendment is granted they cannot recover their costs of opposition or they may even have to pay such costs as are occasioned by their opposition. In my view an applicant for indulgence should pay all wasted costs and the costs of a reasonable opposition are part of such wasted costs. I therefore direct that defendant is to pay the wasted costs and that such costs are to include the taxed costs of the present application.

[22] As a result I make the following order:

(a) Defendant is granted leave to amend its plea in respects as set out in the notice to amend being Annexure “A” to his affidavit in support of his application to amend.

(b) The defendant is granted leave to withdraw its admission contained in paragraph 5.4 of its plea dated 30 September 2009.

(c) That defendant is ordered to pay the wasted costs which are to include the taxed costs of this application. The costs include the costs of one instructing and one instructed counsel.

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Judge

APPEARANCES:

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DEFENDANT/APPLICANT	G Dicks Instructed by Petherbridge Law Chambers