REPUBLIC OF NAMIBIA REPORTABLE

IN THE HIGH COURT OF NAMIBIA

JUDGMENT

Case no: I 982/2011

In the matter between

MOONGOLD PROPERTIES CC	**1ST PLAINTIFF**
DAPHNE SWANEPOEL ESTATE CC	**2ND PLAINTIFF**
DAPHNE SWANEPOEL	**3RD PLAINTIFF**

and

THE NAMIBIA ESTATE AGENTS BOARD	**1ST DEFENDANT**
REGINA BOLUWADE	**2ND DEFENDANT**
JOLIZE GOUS	**3RD DEFENDANT**
MS KOTCHANOVA	**4TH DEFENDANT**
PHELEM LIKE	**5TH DEFENDANT**
THE MINISTER OF TRADE AND INDUSTRY	**6TH DEFENDANT**

Neutral citation: *Moongold Properties CC v The Estate Agents Board (I 982/2011) [2013] NAHCMD 30 (4 February 2013)*

Coram: **Smuts, J**

Heard on: 24 January 2013

Delivered on: 4 February 2013

Flynote Application to amend – principles restated – withdrawal of admission – adequate explanation provided – amendment granted – respondents criticised for unduly argumentative opposing affidavit.

JUDGMENT

SMUTS, J

[1] The first to fourth defendants applied under rule 28(4) to amend their plea. These defendants gave notice in September 2012 of their intention to amend their plea in a number of different respects. The plaintiff responded by raising five objections against certain of the proposed amendments sought. Although the term “grounds” is used to describe the objections, this would not appear to be correct as they each contain separate and specific objections against different proposed amendments.

[2] The first to fourth defendants brought this application in terms rule 28(4) following the filing of the objections. The founding affidavit was deposed to by their instructing legal practitioner. In it she explained that a shift in stance was necessitated because she had prepared a plea on behalf of the first to fifth defendants at an early stage. At that time, the instructing legal practitioner represented first to five defendants. Her firm has since withdrawn as legal practitioner for the fifth defendant.

[3] The instructing legal practitioner for the first to fourth defendants further explained in her founding affidavit that when the original plea was prepared there were certain aspects upon which she had no specific instructions and that the instructions she had at that stage did not cover all the issues raised in their particulars of claim. She further explained that the plea was nevertheless then prepared in haste and under the pressure of a notice of bar. Instead of taking the proper course by applying for an extension to file the plea, a plea based upon imperfect and less than complete instructions was then prepared and filed. The instructing legal practitioner also states that she subsequently briefed counsel. A consultation was held with a member of the first defendant. No doubt the plea was then reviewed by instructed counsel who had not prepared the original plea. Advice was given and the notice of the intention to amend the plea then followed.

[4] The defendants’ legal practitioner further stated that most of the proposed amendments which have attracted the objections have been the consequence of errors made by her in preparing the original plea.

[5] Four of these five objections are based upon the withdrawal of admissions. The fifth objection related to the fact the proposed plea is only on behalf of the first to fourth defendants. The objection to it is on basis that the earlier plea was also on behalf of the fifth defendant. At the hearing of this application, that objection was withdrawn and correctly so. Another objection was also then withdrawn. It concerned the withdrawal of an admission as to the applicability of subordinate legislation in the form of regulations. It was also rightly withdrawn. The remaining objections each concern withdrawals of (deemed) admissions of facts contained in the original plea. This is because the factual matter was not expressly dealt with and was thus deemed to be admitted. These objections are dealt with in turn.

[6] Before referring to these remaining objections and the proposed amendments, the nature of the claims and the principles applicable to the amendments of pleadings are first dealt with.

The claims

[7] The three plaintiffs claim N$4.2 million in damages[1] jointly and severally against the Namibia Estate Agents Board (the board), the first defendant, and three of its members being second to fourth defendants, and an erstwhile employee of that board being the fifth defendant. The Ministry of Trade and Industry is the sixth defendant but no relief is sought against him.

[8] The plaintiffs' action arises from disciplinary proceedings taken by a disciplinary committee of the board against the third plaintiff in which the third plaintiff was found guilty and fined N$3 000,00 and her fidelity fund certificate as an estate agent was withdrawn. It is alleged by the plaintiff that the disciplinary action against the third defendant was wrongful and unlawful. It is alleged that appellate hearing of the board upheld the third plaintiff's appeal against the guilty finding and sanction and set these aside in April 2009.

[1]The claim would appear to be far more as each plaintiff claims N$300 000 as damage to reputation/contumelia.

[9] The plaintiffs claim that they each had suffered N$300 000,00 in damage to their "reputation/contumalia" (sic), N$3 million as an injury to the goodwill of the first and second plaintiffs and loss of profits in the sum of N$900 000,00.

Principles applicable to applications to amend

[10] The applicable principles to applications for amendment were, with respect, cogently set out by Caney, J in *Trans-Drankensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd*.[2] After a thorough survey of earlier leading authorities, Caney J stated the following:

'The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.

In *Whittaker v Roos and Another*, 1911 T.P.D. 1092 at p. 1102, Wessels, J., said:

"This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

In *Rishton v Rishton*, 1912 T.P.D. 718, the same learned Judge said at p. 719:

"There is, however, another principle in our practice, and that is to allow a party, up to the very last stage of the case, the full right to amend, so that the Court may not be deceived or judgment may not be wrongly given against the party, and also to enable the Court to know exactly the nature of the dispute and the facts of the dispute in a particular case. Now the old English practice was not very favourable to amending. But the practice which has been

[2] 1967(3) SA 632 (D) at 638.

gradually adopted in English Courts, now crystallised by rules and orders, and which has also been followed very largely in our Courts, is to allow amendments to be made provided the other side is not in any way prejudiced by such amendments." In *Tildesley v Harper*, 10 Ch.D. 393, Lord Bramwell said (p. 396):

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise."

Brett, M.R., in *Clarapede and Co v Commercial Union Association*, 32 W.R. 262, said the following (p. 263):

"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

A strong Bench adopted these views in *Macduff & Co. (In Liquidation) v Johannesburg Consolidated Investment Co. Ltd.*, 1923 T.P.D. 309 at p. 310.'

[11] The approach articulated in this judgment has been consistently followed. The trend in reported cases has demonstrated a distinct move away from an overly formal approach to applications of this nature. In referring to this trend, Galgut DJP, speaking for a full court, noted:

'It is a development which is to be welcomed with proper ventilation of the issues in a case is to be achieved and if justice is to done. In line with this approach, courts should be therefore be careful not find prejudice where none really exists.'[3]

[12] As I have already indicated, the basis for four of the five objections is that they involve the withdrawal of admissions. As was correctly submitted by Mr Heathcote SC, who with Mr D Obbes appeared for the plaintiff, where an amendment involves with the withdrawal of an admission, the parties seeking to do so must, when an objection is raised, provide a full explanation so as to convince the court of his or her *bona fides* in seeking the amendment.[4] The underlying reason for this approach which has likewise been consistently reiterated by the courts over the years is that a party would need to explain a change of front which a withdrawal of an admission would entail. The potential prejudice to the other side is self evident. There may be prejudice to a party who is been

[3]Four Towers Investments (Pty) Ltd v Andre's Motors 2005(3) SA 39 (N)at 44 I-J. See also Rosner v Lydia Swanepoel Trust 1998(2) SA 123 (C) at 127; Devonia Shipping Ltd v MV Luis (Yeonan Shipping Coal Ltd) 1994(2) SA 363 (C)at 369 F-I; Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd 2001(4) SA 211 (W) at 218-219.

[4]See Cilliers, Loots, Nel *Herbstein and Van Winsen: The civil practice of the High Courts of South Africa* 5 ed (2009) Vol 1 p 683.

led by the plea to believe that the fact in question would not need to be proven at the trial. As a consequence that party may have omitted to gather evidence necessary to prove that fact.[5] But this would need to be spelt out by a party raising prejudice.

[13] The courts have over the years indicated that an amendment of this nature would usually be granted if the admission had been made in error with examples cited being either of a typographical nature or a misunderstanding of instructions[6]. But, as is also pointed out in Herbstein and Van Winsen, the authorities make it clear that are no hard and fast rules in this context.[7] Each case would need to be considered upon the merits of the explanation provided. As was stressed in Herbstein and Van Winsen after a detailed survey of authorities, the learned authors in this context[8]:

> 'It therefore appears that, while in most cases the reason for wishing to withdraw an admission may be some mistake of fact or law, the court's discretion to grant an amendment involving a withdrawal of an admission is not fettered by the need to find that there has been an error before the amendment can be allowed. The same general principles governing all amendments seem to be of equal application here.'

The learned authors then proceed to set out the quotation from Wessels, J in the Whittaker judgment contained in the *Trans-Drakensberg Bank* matter quoted above.

[14] Having referred in some detail to the fundamental principles governing applications of this nature, I turn now to the disputed amendments and the explanations provided for the withdrawals of the admissions in question.

First objection

[15] The first proposed amendment objected to concerns the insertion of a new sub-paragraph as subparagraph 5.1 to the plea to replace the existing paragraph 5.1 which contains the following:

> 'In amplification of the aforesaid denial set out above the defendants deny that disciplinary process was materially tainted from the outset and deny that a defective complaint was lodged and the plaintiffs are put to the proof thereof.'

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[5]Supra p 683.
[6]Cilliers, Loots, Nel *Herbstein and Van Winsen: The civil practice of the High Courts of South Africa* 5 ed (2009) Vol 1p 684.
[7]Supra p 684.
[8]Supra p 684.

[16] The amendment seeks to insert a sub-paragraph to precede that sub-paragraph. The new addition would be numbered 5.1 and the existing 5.1 would be numbered 5.2. The proposed amendment in the form of a preceding sub-paragraph is as follows:

'Save for admitting that the first defendant's Disciplinary Committee issued the charges as per annexures DS3 and DS4 on or about 3 September 2007, each and every allegation thereof is denied as if specifically herein traversed and thereafter denied and the plaintiffs are put to the proof thereof.'

[17] Paragraphs 15-17 of the particulars of claim (which paragraph 5 of the plea addresses) contain a number different allegations relating to the disciplinary process contending that it was tainted from the outset in the respects referred to in those paragraphs.

[18] The first to fourth defendants instructing legal practitioner explained that the existing paragraph in the plea was formulated in error. It contains an amplification of an earlier denial. But that earlier denial is not stated. This error would appear to be self evident from the terms of the existing sub-paragraph which after all is in the form of a sub-paragraph and should have been preceded by an earlier denial which is then sought to be amplified. Despite this self evident statement, the plaintiffs in a lengthy and discursive affidavit take issue with this (and the other) statements by the defendant's attorney in unduly vituperative terms. Whilst I certainly hold the view that the conduct of the first to fourth defendants' legal practitioner was far from ideal and should rightly attract criticism by preparing a plea in the absence of full instructions, it would seem to me that the approach of the plaintiffs in the answering affidavit in questioning the integrity and good faith of the defendants and their legal representative in singularly demeaning terms in this and in certain other respects at some considerable length should also attract some criticism, as I set out below.

[19] The defendants' instructing attorney clearly states that she made an error in omitting a more general denial. This error is supported by the fact that the pleading itself would indicate that it should have been preceded by a general denial both as a question of substance and form. The admissions thus made pursuant to the denial contained in the plea (deemed by virtue of not dealing with the allegation) and sought to be

withdrawn by amplifying the ambit of the existing paragraph to include a more general denial should in my view be granted and has been adequately explained for the purpose of withdrawing the admissions in question.

Second objection

[20] Paragraph 25 of the particulars of claim contains the following averment with reference to the findings of the disciplinary committee (in respect of the third plaintiff):

'The aforementioned findings and sanctions were widely publicised in the local media, and became notorious within the industry within which the plaintiffs operated.'

[21] In the existing plea, the first to fifth defendants pleaded to this averment in the following way:

'Save for pleading that the findings and sanctions were publicised, the defendants deny that the sanctions were however widely publicised in the local media.'

[22] The first to four defendants now seek to amend that paragraph to state the following:

'Save for pleading that the findings and sanctions were publicised, each and every further allegation thereof is denied as is specifically herein traversed and thereafter denied and the plaintiffs are put to the proof thereof.'

[23] The plaintiffs again correctly point out that allegations not specifically referred to in the existing paragraph of the plea are deemed to be admitted. An averment in the particulars of claim which the plaintiffs point out was deemed to have been admitted was that the findings and sanction 'became notorious' within the industry within which the plaintiffs operated. They object to that now being withdrawn.

[24] In providing her explanation, the first to fourth defendant's legal practitioner accepts that the averment in question was not specifically admitted but states when deposing to her affidavit she was aware that when this is not done that the allegations would be deemed to be admitted. It is not clear to me that her awareness of this legal position prevailed at the time when the existing plea was prepared, given the way it was drafted. But she does proceed to state that her instructions from first to fourth

defendants are that the findings and sanctions did not become notorious as alleged. This averment is in the context of the claim on the part of each of the plaintiffs for N$300 000,00 for damage to their reputations and contumelia.

[25] This explanation is to be viewed within the context of the preparation of the existing plea to have been in great haste and without proper instructions.

[26] Whilst the explanation exhibits a degree of recklessness – in preparing a plea without requisite instructions, it does not in my view amount to *mala fides* as is contended for by the plaintiffs. Whilst the reason underlying explanation is founded upon poor practice by a lawyer and was of course not the correct course for a practitioner, it does demonstrate a degree of error on the part of the drafter. It would in any event seem to me that by denying that the sanction and findings received wide publication in the local media and thus requiring the plaintiffs to lead evidence on that, the plaintiffs would not be unduly prejudiced by the withdrawal of the admission of notoriety of the same sanctions and findings within the industry. The plaintiff does not contend that witnesses and evidence will no longer be available. On the contrary, affidavits by two estate agents are attached to the opposing affidavit in this application in support of the averment in the particulars of claim. The prejudice contended for is that unnecessary evidence would need to be led. It would thus not appear to me that there is any prejudice on this issue which cannot be cured by appropriate cost order. Indeed a special cost order may be warranted in a trial action if it were to emerge that the defendants in question should have admitted the averment that the findings and sanctions became notorious within the industry. The prejudice raised of unnecessary evidence being led and undue protraction of the proceedings, thus capable of being addressed in costs, should not stand in the way of this amendment being granted.

[27] It follows that the objection to this proposed amendment should not be sustained and that the amendment should be granted.

Third objection

[28] The third objection relates to the portion of the plea to paragraph 29 of the particulars of claim. The latter paragraph avers:

'In and as a result of the aforementioned wrongful and unlawful conduct of the first defendant, the disciplinary committee appointed by it (and comprising the second, third, fourth defendants) and the fifth defendants, the business operations of the plaintiffs ceased.'

[29] In paragraph 15 of the existing plea, the following was stated in respect of paragraph 29:

'Save for pleading that the business operations of the plaintiffs ceased to operate, the defendants deny any wrongful or unlawful conduct on their behalf.'

[30] In the notice to amend the first to fourth defendants seek to amend this paragraph by the addition of the following words at the end of it:

'. . . and further deny the remainder of the allegations made and put the plaintiff to the proof thereof.'

[31] The plaintiffs' objects to the amendments because, they point out that the existing plea only denies any wrongful or unlawful conduct on the part of the defendants in question and that the remaining averments are deem to be admitted because they are not dealt with.

[32] In the application to amend, the first to fourth defendants' legal practitioner states that her instructions were to deny wrongful and unlawful conduct on their part but also causation in the sense of the alleged wrongful or unlawful conduct having the consequence referred to in this paragraph. The plea was accordingly ineptly drafted and was thus in error. As it is clear from the context of the rest of the plea that, it would seem to me the defendants seek to deny to further allegations not referred to. This is also apparent from the way in which paragraph 15 of the plea was originally drafter in the form of specifying the items admitted and then following that with a denial.

[33] The prejudice complained of by the plaintiff is that the proposed amendment would 'put in issue facts and issues are virtually common cause between the parties, alternatively put the plaintiffs to the proof of facts and issues which can clearly not be placed in dispute by any conscientious litigants'. It is not clear to me what is meant by a 'conscientious' litigant in this context where it is stated that the practitioner had erred in the sense set out. It would seem to me that the plaintiffs have approached this application to amend in the

way Wessels, J cautioned should not be done – as a game where, if a mistake is made, it is pounced upon and a forfeit claimed. The plaintiffs further complained that the amendments would serve to unnecessarily protract the proceedings although it is not explained in precisely in what way and what would appear to be the extent of the prejudice complained of in this context. Causation may well be an inference to be drawn from facts which the plaintiffs need to prove. Should there be any undue protraction of proceedings as a consequence of this amendment, this could likewise be adequately dealt with by an appropriate costs order.

[34] It would seem to me that an adequate explanation is provided for the withdrawal of the admissions in question. Given the nature of the imperfect pleading and the nature of the error in the preparation of the plea, it would follow that this amendment should also be allowed.

Costs

[35] Given the fact that the first to fourth defendants seek to withdraw certain admissions, the plaintiffs are my view entitled to require explanations for the withdrawal of these admissions. It would follow that the plaintiffs are in my view entitled to their costs of the notice of objection to the notice of amendment and the costs of considering the application to amend which resulted from the objection.

[36] Those costs should, in the exercise of my discretion, the costs of only one instructed counsel and not of two instructed counsel. The costs of two instructed counsel would in my view not readily arise in interlocutory applications, even where two instructed counsel are engaged in the action itself. These costs would in my view only arise if an interlocutory application were to raise issues of complexity or magnitude or of such importance to a party so as to justify the costs of two instructed counsel. This application certainly does not in my view remotely raise such issues.

[37] The question arises as to the costs of opposition to the application to amend.

[38] A court has a wide discretion in cost awards concerning opposition to applications of this nature. Where opposition is unreasonable and is engaged in to inconvenience a

litigant or compelling a litigant to incur costs unnecessarily, a respondent can be ordered to pay the costs of opposition – and even of the entire application.[9] But even where opposition has been found to be reasonable, that would not necessarily entitle a respondent to the costs of opposition. Each case would depend upon its merits. In this matter, the persistence with the majority of the objections in opposing this application was in my view unreasonable. In this regard, I refer to the first, fourth and fifth objections. The latter two objections were persisted with up to the date of the hearing. Given the unreasonableness of the opposition demonstrated in the majority of the objections, this factor alone should in my view disentitle the plaintiffs to their costs of opposition to this application. There is a further factor which would also militate against the unsuccessful opposition to this application resulting in a favourable costs order for the plaintiffs.

[39] The opposing affidavit was unnecessarily lengthy and contained a great deal of argumentative matter and is replete with gratuitous and unnecessary descriptive comment demeaning of the first to fourth defendants and their attorney, including casting aspersions upon the integrity of the deponent without proper substantiation. Whilst criticism of the preparation of a plea without adequate instructions is entirely justifiable – and called for – the unsupported and thus unjustified calling into question the honesty and bona fides of parties or their legal representative – unfortunately not infrequently encountered – warrants censure. This forum of censure may in the exercise of a court's discretion result in an adverse cost order or even the imposition of a punitive scale. But in this matter, the ineptitude with which the plea was drafted should not, in the exercise of my discretion, result in the first to fourth defendants being awarded the costs of this application. As a mark of my displeasure at the manner in which the plea was originally drafted, the first to fourth defendants should not be awarded the costs arising from their opposition to this application. In short the parties have not been well served in this unproductive exercise – the first to fourth defendant by the recklessness of a plea being prepared without adequate instructions and the plaintiffs by an overly formalistic approach in opposing the application to amend and their descent to an unduly argumentative opposing affidavit compounded by calling into question the integrity of its deponent with substantiation.

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[9]Clliers, Loots, Nel *Herbstein and Van Winsen: The civil practice of the High Courts of South Africa* 5 ed, (2009) Vol 1 p 684.

[40] In the result, I make no order as to the costs of opposition to the application.

[41] I accordingly make the following order:

a) The first to fourth defendants are granted leave to amend their plea in the respects set out in their notice to amend of September 2012.

b) The plaintiffs are awarded the costs of raising the objection to the notice and to consider the founding papers in the application. Those costs include of one instructed and one instructing counsel.

c) There is no order as to the costs of opposition to this application.

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DF SMUTS

Judge

APPEARANCE

FIRST TO FOURTH APPLICANTS /DEFENDANTS:	P. Barnard Instructed by Koep & Partners
RESPONDENTS/PLAINTIFFS:	R. Heathcote SC (with him D Obbes) Instructed by Engling, Stritter & Partners.