REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3499/2011

In the matter between:

1.1.1.1. **SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD**
PLAINTIFF

and

AGGRESSIVE TRANSPORT CC **1st DEFENDANT**
JAN HENDRIK HOFMEYER VAN BLERK **2nd DEFENDANT**

Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC (I 3499/2011) [2014] NAHCMD 19 (22 January 2014)

Coram: Smuts, J
Heard: 17 January 2014
Delivered: 22 January 2014

Flynote: Application to amend at an advanced stage of a trial action. Principles relating to such applications now impacted by judicial case management and rule 37(14). The court is to be more stringent with regard to granting such applications, particularly given rule 37(14) and where it

would entail resiling from an agreement to confine issues.

ORDER

The application to amend is dismissed with costs. These costs include the costs of one instructed and one instructing counsel and include the wasted costs occasioned by postponing the trial action.

JUDGMENT

SMUTS, J

(b) At an advantaged stage of the trial action between the parties, (and after the plaintiff had adduced evidence and closed its case and after the main witness for the defendants had testified), the defendants gave notice of an intention to amend their plea by introducing a new defence. The plaintiff indicated that it would object to the amendment. The trial was then postponed to enable the plaintiff to file its objection and for this opposed application for an amendment in terms of Rule 28(4) to be set down subsequently.

(c) In determining this opposed application to amend, the starting point is to set out the nature of the plaintiff's claim and defences raised by the defendants as set out in the pleadings.

The pleadings

(d) The plaintiff's claim for payment in the sum of N$590 651, 07 arises from two financial lease agreements, with the plaintiff leasing to the first defendant two Scania trucks. The plaintiff alleged that the first defendant had the use and possession of the vehicles but breached the agreements by failing to pay the amounts payable in terms of those agreements. The plaintiff states that it

elected to cancel the agreements and that the trucks were returned to it. The amount claimed by the plaintiff was determined with reference to the arrear rentals and the first defendant's obligations under the agreements in respect of the unexpired terms of the lease agreements less the proceeds from the sale of the vehicles. This method was in accordance with the agreements.

(e) The second defendant is sought to be held liable on the basis of binding himself as a surety in respect of the first defendant's obligations to the plaintiff.

(f) After the defendants entered an appearance to defend, the plaintiff applied for summary judgment. The defendants' main defence contained in the summary judgment proceedings was also raised in the defendants' plea. The defendants pleaded that the plaintiff breached the agreements by failing to properly repair one of the trucks in an efficient and workmanlike manner. As a consequence, the first defendant was not able to use the truck for the purposes for which it was to be acquired through the financial lease agreement. The first defendant claimed that that was entitled to cancel the lease agreement and thus cancelled it. When doing so, the first defendant alleged that it entered into an oral agreement in terms of which the first defendant would deliver the trucks to Scania Truck Namibia Ltd ("Scania Truck Namibia") which would upon delivery effect repairs and then sell each of the trucks for a price no less than N$1,15 million excluding VAT. It was further contended that in terms of this agreement that if a prospective buyer wished to purchase one of the trucks for less than N$1,15 million, then the sale would first have to be approved by the first defendant. The defendants allege that the plaintiff breached the terms of this agreement by selling the trucks below the agreed selling price.

Judicial case management

(g) After the pleadings closed, the matter became the subject of judicial case management. An initial case management meeting was held and a pre-trial conference convened. The parties provided a proposed pre-trial order in advance of the pre-trial conference. The issues between the parties became confined as set out in the pre-trial order and it was then made an order of court

on 13 March 2013.

(h)

(i) The matter was then set down for trial on 3 to 7 June 2013. It did not however proceed to trial at that stage as an application in terms of Rule 21(6) was brought. In the course of that application, the parties reached an agreement the curtailing the issues in dispute between them to paragraph 18 of the defendants' plea which is the defence I have set out above. This further agreement was then made an order of court on 7 August 2013.

The proposed amendment

(j)

(k) The matter thereafter proceeded to trial on 28 October 2013 and became postponed when the defendants gave notice of their amendment after the plaintiff had closed its case and the second defendant had given evidence on behalf of the defendants. In the proposed amendment, the defendants essentially contend, in the alternative to the oral agreement raised in paragraph 18 of the plea, that the plaintiff had failed to take reasonable steps to mitigate its damages and thus acted negligently in failing to act as a reasonable person in order to mitigate its damages by selling the trucks at a price lower than the market value.

Plaintiff's objection

(l) The plaintiff objected to the introduction of this amendment. In the notice of objection, it was contended that the failure to take reasonable steps to mitigate damages was not raised in the course of the case management and it was also not one of the disputed factual and legal issues stipulated in terms of the agreement between the parties as set out in the proposed pre-trial order which became an order of court on 13 March 2013. The plaintiff further pointed out that the second defendant had also under oath stated that their defence would be confined to paragraph 18 of the plea in the course of the subsequent Rule 21(6) opposed application. This then resulted in an order of court on 7 August 2013 by agreement in terms of which this court directed that the first and second defendants' defence was confined to paragraph 18 of their plea.

(m) The plaintiff accordingly contended that the defendant's could not resile from the agreements made to confine issues by means of by introducing an amendment of their pleadings.

(n) The plaintiff further took the point in its objection, as was also raised in the opposing affidavit and in argument, that the defendants had not made out a case for the amendment at a late stage and that the proposed amendment did not introduce a triable issue. In support of this contention the plaintiff referred to the oral agreement contended for in the defendants' defence in which it was contended that Scania Truck Namibia had breached the agreement entered into between the first defendant and Scania Truck Namibia by selling the trucks for the price of N$950 000 without first reverting to the first defendant. The plaintiff contends that the defendants did not make out a case in their founding affidavit to show upon what evidence this new defence could be sustained in view of the evidence already led by the second defendant. It was contended that his evidence would contradict reliance upon the mitigation defence sought to be raised in the amendment. It was pointed out that should the defendants establish the agreement, the complaint about the lower price would be a matter between them and Scania Truck Namibia for which the plaintiff could not be held liable. There was nothing in the founding affidavit, so contended Mr P Barnard on behalf of the plaintiff, as to any basis for the defendants to make out a case that the plaintiff had not acted reasonably to mitigate damages in view of the agreement contended for between the defendants and Scania Truck Namibia.

(o)

(p) These aspects are dealt with in turn after first referring to the approach to be adopted in applications for amendments.

Principles applicable to applications to amend

(q) Prior to the introduction of judicial case management, the principles relating to applications to amend pleadings had become well settled. The fundamental principle followed by the courts in Namibia has been that amendments should be allowed in order to ensure a proper ventilation of the

real disputes between the parties so that justice may be done, following the often cited case of *Trans-Drakensburg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another*[1] to that effect. This principle is subject to an opposing party not being prejudiced by the amendment if that prejudice can not be cured by an appropriate costs order and, where necessary, a postponement. This approach was recently reaffirmed by the Supreme Court in *DB Thermal (Pty) Ltd and Another v Council of the Municipality of the City of Windhoek*[2]. As was further stressed by the Supreme Court in that matter:

> 'As mentioned above, the main purpose of amendments is to permit the proper ventilation of the issues between the parties. Where the proposed amendment will not result in the ventilation of such issues because it does not disclose a cause of action, it will be rare for it to be appropriate to grant the amendment. As Selikowitz J stated in *Benjamin v Sobac South African Building and Construction (Pty) Ltd*, "[i]f the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment".'[3]

(r) In the *Trans-Drakensburg Bank* matter, the court made it clear that:

> 'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable (Cross v Ferreira, supra at p. 450), or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares (Florence Soap and Chemical Works (Pty.) Ltd v Ozen Wholesalers (Pty.) Ltd., 1954 (3) SA 945 (T)), or of obtaining a tactical advantage or of avoiding a special order as to costs (Middleton v Carr, 1949 (2) SA 374 (AD) at p. 386).'

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[1]1967 (3) SA 632 (D) at 638.

[2]Case no SA 33/2010 unreported 19 August 2013.

[3]Supra at par 38.

(s) The courts have also stressed that a litigant who seeks to add new grounds for relief at the eleventh hour does not claim an amendment as of right but rather seeks an indulgence.[4] As I indicate below, an applicant for an amendment faces an even more stringent hurdle in seeking that indulgence at a late stage of the proceedings after the advent of judicial case management and where agreement has been reached to confine issues and by virtue of the provisions of rule 37(14) discussed below.

Impact of judicial case management upon applications to amend

(t) The objectives of case management are spelt out in rule 1A of the amendment to the rules introducing judicial case management in May 2011. These include ensuring and promoting the speedy prompt and economic disposal of actions or applications, the efficient use of the available judicial legal and administrative resources, the identification of issues in dispute at an early stage, the curtailment of proceedings and the reduction of delay and expense brought about by interlocutory processes. These objectives also brought about obligations for parties and their legal practitioners to assist the managing judge in curtailing proceedings by complying with rule 37 and other rules regarding judicial case management.

(u)

(v) I do not propose to refer in detail to rule 37 in its amended form save to briefly refer to the process of case management which ensues after pleadings have closed and docket allocation has been place.

(w)

(x) Rule 37 provides for an initial case management report to be considered at the initial case management conference. There follows a pre-trial conference which must occur prior to a trial or hearing of any matter. The parties are obliged to jointly submit a proposed pre-trial order prior to a pre-trial conference which is required to identify all issues of fact and law to be resolved during the trial and to set out all relevant facts not in dispute.

(y)

(z) Upon completion of the pre-trial conference, the managing judge is then

[4] *Gollach & Gomperts, v Universal Mills Produce Co* 1978 (1) SA 914 (A) at 928D.

required to issue a pre-trial order based on the parties' proposed pre-trial order. The order thus specifies the issues of fact and law to be resolved during the trial and which facts are not in dispute and the further matters raised in rule 37(12)(c). Central to this exercise is the curtailment of proceedings so that they are confined to the issues of fact and law which remain in dispute between the parties following judicial case management which culminates in the pre trial conference, and thus ensuring the economical and speedy disposal of the action and thus more efficiently using available judicial, legal and administrative resources in doing so.

(aa) Rule 37(14) reinforces the importance of confining issues at the pre trial conference by attaching consequences to that process. It provides that:

> 'Issues, evidence and objections not set in a managing judge's pre-trial order are not available to the parties at the trial or hearing.'

(bb) The approach of the courts with regard to applications to amend are now subject to the rules relating to case management and to rule 37(14) in particular. This is because judicial case management would ordinarily entail the parties reaching agreement to confine issues and the compelling need to hold parties to such agreements as is reinforced by rule 37(14).

(cc) In this instance, the matter was allocated for judicial case management after the pleadings had been closed. An initial case management conference was held and followed by a pre-trial conference. At the pre-trial conference, an order was made on 13 March 2013 referring to the issues in dispute between the parties in accordance with the proposed joint pre-trial order prepared by the parties. The issues did not include a defence raised by the defendants that the plaintiff had failed to mitigate its damages. Mr Wylie who appeared for the defendants correctly accepted that such a defence would need to be specifically pleaded.[5]

(dd) As I have already pointed out, the defendants subsequently in a rule

[5]Whitfield v Phillips and Another 1957(3) SA 318 (A) at 336 G-H.

21(6) application agreed to further confine their defence to paragraph 18 of its plea. This paragraph likewise does not contain a defence raising to failure on behalf of the plaintiff to mitigate its damages.

(ee) Mr Barnard, who appeared for the plaintiff, contended that the defendants were not entitled to introduce the further mitigation defence by reason of the agreement reached between the parties to confine issues as well as by virtue of the provisions of rule 37(14). I turn to deal with these contentions.

(ff)

(gg) The Supreme Court has made it clear that where parties have elected to limit the ambit of a case by agreement, the election is usually binding and that a party cannot resile from an agreement of that nature without the acquiescence of the other party or the approval of the court on good cause shown. This was spelt out in *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd*[6] in the following terms:

> '[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in Filta-Matix (Pty) Ltd v Freudenberg and Others 1998 (1) SA 606 (SCA) ([1998] 1 All SA 239) at 614B - D:
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> > "To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding." [Footnotes omitted.]
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> In F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van

[6] 2009 (1) NR 331 (SC).

> Suidelike Afrika Bpk 1999 (1) SA 515 (SCA) ([1998] 4 All SA 480) at 524F - H this principle was reiterated. The judgment is in Afrikaans and the headnote to the judgment will suffice (at 519D):
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> > ". . . a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the appellants should be released from their agreement".' [7]

(hh) This approach has now been trenchantly reinforced by rule 37(14) when a matter is the subject of case management and for good reason. The parties have after all agreed upon the issues of fact and law to be resolved during the trial and which facts are not to be dispute. That agreement, as occurred in this matter, is then made an order of court. Plainly, litigants are bound by the elections they make when agreeing upon which issues of fact and law are to be resolved during the trial and which relevant facts are not in dispute when preparing their draft pre-trial order. It is after all an agreement to confine issues which is binding upon them and from which they cannot resile unless upon good cause shown. It is for this reason that the rule-giver included rule 37(14). To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an interlocutory application and compromise the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice.

(ii)

(jj) In this matter, as I have pointed out, the defendants had agreed to confine the issues in dispute to paragraph 18 of their plea. This did not include a mitigation defence. The defendants are thus bound by that agreement and by rule 37(14) unless good cause is shown by them why they should not be bound

[7]Supra at par [21]; see also *Bella Vista Investments v Pombili and Another* 2011 (2) NR 694 (HC) at par [41].

their agreement to confine the issues.

(kk) In their founding affidavit in this application to amend, the defendants have not set out any circumstances which would justify them from resiling from their earlier agreements to confine issues and also to undo the operation of rule 37(14). This would in any event have been incumbent upon an applicant when applying to amend pleadings, particularly at a late stage as has occurred in this matter. But their agreement to confine issues and the provisions of rule 37(14) elevate this requirement to a more stringent level.

(ll)

(mm) The defendants have provided no explanation as to why the amendment was sought at such a very late stage of the proceedings. It is clear from both the facts raised in the application to amend as well as those presented in the trial thus far that the defendants were fully aware of the factual position relating to quantum (which would give rise to a possible mitigation defence) when filing an expert summary as to the value of the trucks in early June 2013. As I have already said, it is also well established that this defence is to be raised on the pleadings.[8]

(nn) It follows that, as the applicant has not set out a proper explanation to establish good cause for the filing of an application to introduce a further defence at this very late stage and thus resiling from the agreement and seeking to undo the effect of the court orders granted in the course of case management and rule 37(14), this application should, in the exercise of my discretion, fail.

(oo)

(pp) But there is further reason why the application to amend should fail. That is because it does not in my view raise a triable issue on the facts of this case. It is well settled that a triable issue is a dispute which, if established on evidence foreshadowed by an applicant to amend, will be viable or relevant or a dispute which would probably be established by the evidence thus foreshadowed.[9]

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[8] *Whitfield v Phillips and Another* supra at 336 G-H; see generally Christie, *The Law of Contract in South Africa*, 6th Ed at 578-579.

[9] Erasmus, *Superior Court Practice*, (loose leaf edition) at B1-183 and the authorities collected;

(qq)

(rr) The defendants have not in the founding affidavit made out a case upon which evidence this further alternative defence could be sustained. No further facts are foreshadowed or anticipated in the founding affidavit. Given the facts already placed on record and the defendants' reliance upon the oral agreement to which I have referred, it would be incumbent upon the defendants to set out further facts and explain quite how a defence of mitigation would arise in the context of the facts already on record. That they have failed to do. A case has thus not been made out how the mitigation defence sought to be introduced can be sustained and would constitute a triable issue.

Conclusion

(ss) It follows that the application to amend is to be dismissed with costs. The parties had agreed that a costs order should include the costs of one instructing and one instructed counsel. I accept that this matter warrants an order of this nature. The costs order should also include the costs consequent upon the postponement of the trial action.

(tt) I accordingly make the following order:

(a) The application to amend is dismissed with costs. These costs include the costs of one instructed and one instructing counsel and include the wasted costs occasioned by postponing the trial action.

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DF Smuts

Judge

See also *Trans Drakensberg Bank* supra at 641 A-C; *Caxton Ltd and Other v Reeva Foreman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565 G-I; *Meyer v Deputy Sheriff* 1999 NR 146 (HC) at 149G.

APPEARANCES

PLAINTIFF:	P. Barnard Instructed by Van Der Merwe-Greeff Andima Inc, Windhoek
1st AND 2nd DEFENDANTS:	M. Wylie Theunissen, Louw & Partners, Windhoek