REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 128/2012

In the matter between:

INDEPENDENT ASPHALT SERVICES NAMIBIA CC **PLAINTIFF**

And

NAMIBIA CONSTRUCTION (PTY) LTD **DEFENDANT**

Neutral citation: *Independent Asphalt Services Namibia CC v Namibia Construction (Pty) Ltd* (I 128/2012) [2014] NAHCMD 329 (6 November 2014)

Coram: PARKER AJ
Heard: **7 October 2014**
Delivered: **6 November 2014**

Flynote: Practice – Pleadings – Particulars of claim – Amendment of – When to be granted – Amendment raising no cause of action and therefore excipiable – Court held that 'cause of action' means the fact or combination of facts which give rise to a right of action – In instant case court found that the proposed amendment does not disclose a course of action and is therefore excipiable and would cause irreparably prejudice to the defendant if it was allowed – Based on excipiability of the amendment and attendant irreparable prejudice to the defendant court refused to allow the amendment.

Summary: Practice – Pleadings – Particulars of claim – Amendment of – When to be granted – Amendment raising no cause of action and therefore excipiable –

Plaintiff sought to amend its particulars of claim whereby it would claim payment by defendant of an amount for goods plaintiff did not supply in terms of a contract – On plaintiff's own version it did not supply the bitumen part of asphalt required for the road construction project but the defendant did – Court found therefore that if the plaintiff's amendment was allowed its further conditional claim will not disclose a cause of action, thus rendering the amendment excipiable – Court found further that for that reason irreparable prejudice would be occasioned the defendant if the amendment was allowed – Consequently, court refused to allow the amendment on the basis that the amendment would be excipiable and there would be irreparable prejudice to the defendant – Application was accordingly dismissed with costs.

ORDER

The application is dismissed with costs; such costs include the costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] This is an application for certain amendments that are sought to be made to the plaintiff's particulars of claim. The defendant objected to some of the amendments and has, accordingly, moved to reject the application to amend. The matter concerns an agreement entered into between the parties respecting the supply of mix and paving, asphalt levelling and wearing courses for the upgrading of Walvis Bay Airport.

[2] The amendments which the plaintiff now seeks to make to its pleadings are contained in the notice of amendment. I use the word 'now' advisedly; for, there have been two previous occasions on which the plaintiff sought to amend its particulars of

claim in the summons that was issued from the registrar's office on 26 January 2012. The latest notice to amend, which is the subject matter of the instant proceeding, was filed on 31 January 2014.

[3] In order to appreciate fully the extent and impact of the proposed amendment objected to, it is necessary to set it out. It is contained in para 8 of the notice, and the proposed amendment would be introduced as a new para 49A in the particulars of claim ('the amendment'), and is as follows:

' "**49A. PLAINTIFF'S FURTHER CONDITIONAL CLAIM**

49A.1 In the event that this Honourable Court holds that the Sub-Contract Agreement was not amended as set out in paragraphs 14.2 to 14.14 above, the Defendant remained liable to pay to the Plaintiff the amount of NAD 431.51 per ton in respect of asphalt.

49A.2 As is apparent from annexure "POC8", the amount of asphalt supplied by the Plaintiff in accordance with the provisions of the contract is 49,112.21 tons.

49A.3 The Defendant accordingly became liable to pay to the Plaintiff in accordance with the provisions of the contract the sum of NAD 21,191,918.00.

49A.4 By reason of its belief that the Sub-Contract Agreement had been amended in accordance with the facts set out in clause 14 above, the Plaintiff submitted claims to the Defendant based on the rate of NAD 246.60 per ton in respect of asphalt in a total amount of NAD 12,111,070.00.

49A.5 The balance, being an amount of NAD 9,080,848.00, accordingly remains due, owing and payable by the Defendant to the Plaintiff in accordance with the provisions of the Sub-Contract Agreement".'

[4] As the title of the proposed amendments indicate, the claim is a conditional claim, and is introduced in the alternative. And the defendant's notice of objection shows that the basis of the objection is predicated primarily on the following as argued by Mr Tötemeyer SC (with him Mr Dicks), counsel for the defendant. The plaintiff's further claim is conditional upon the court holding that the subcontract agreement was not amended as set out in paras 14.2 to 14.14 of the plaintiff's notice of amendment. And the basis of plaintiff's further conditional claim is contained in annexure 'POC8' (annexed to the original particulars of claim). The plaintiff contends that it is apparent from 'POC8' that the amount of asphalt supplied by the plaintiff in accordance with the provisions of the contract is 49,112.21 ton and that the defendant is accordingly liable to pay the plaintiff the sum of N$21,191,918.00 in accordance with the provisions of the contract. This amount is calculated on the basis of N$431.51 per ton of asphalt that incudes bitumen. But it is apparent form para 1 of the plaintiff's rule 28 (now rule 52) notice, particularly subparas 14.7, 14.8 and 14.9 thereof, read with annexure 'POC8', that on the plaintiff's own version, it did not supply bitumen for the project, and that it was the defendant who supplied the bitumen for the project as from or about April 2008. That being the case, so Mr Tötemeyer submitted, the intended amendment is excipiable for the following reasons: The plaintiff's claim is based on a price which includes bitumen and is formulated as if the plaintiff supplied that bitumen. But on the plaintiff's own allegations, the plaintiff did not comply with its obligations in terms of the original (unamended) subcontract agreement to supply bitumen. The plaintiff cannot, accordingly, so concluded Mr Tötemeyer, claim payment of an amount which includes a charge for bitumen. Thus, the bone and marrow of the defendant's objection is that if plaintiff's amendment was allowed, its further conditional claim will not disclose a cause of action, and, *a priori*, the defendant will be prejudiced thereby.

[5] The plaintiff's response, as put forth by Mr Ford SC (with him Ms De Jager), counsel for the plaintiff, in his submission, is primarily this. The defendant cannot have it both ways: the defendant should either accept that the subcontract agreement was amended, notwithstanding the non-variation clause contained in clause 20, read with clause 29, or it should accept that it is liable to pay to the plaintiff the amount of N$431.51 per ton in respect of asphalt. However, if the plaintiff

is granted leave to amend its particulars of claim by the introduction of the conditional claim as set out in the proposed paragraph 49A, then the plaintiff will be able to rely, either on the fact that the subcontract agreement was varied, as alleged and pleaded by the plaintiff, or that the defendant is liable in terms of the agreement, in its admitted form, to the plaintiff for asphalt at N$431.51 per ton. And, further, according to Mr Ford, the plaintiff seeks to introduce a conditional claim if it was found that the subcontract agreement was not varied to the effect that the defendant would supply the bitumen for the asphalt and that the price of the asphalt was accordingly reduced from N$431.51 per ton to N$246.60. Based on this argument, Mr Ford concluded that the objection of the defendant is accordingly entirely without merit and is patently an opportunistic attempt to delay and confuse matters so as to avoid dealing with the merits of the plaintiff's claim, and, further, that there is no prejudice whatsoever to the defendant if the proposed amendment was allowed, and that, in any case, the defendant did not, in answer, contend the occasioning of prejudice.

[6] As to the defendant's contention that the further conditional claim does not disclose a cause of action; Mr Ford says it does disclose a cause of action for the following reasons: According to counsel, the plaintiff's 'conditional claim is based on the contract as it now stands, the unamended subcontract agreement in terms of which the plaintiff was to supply asphalt at an agreed price per ton'. And, further, the specified and agreed price of the asphalt in the unamended subcontract agreement is N$431.51 per ton of asphalt supplied. For Mr Ford, the source of the bitumen used is irrelevant to the defendant's liability in terms of the unamended contract for that agreed amount. And so, he submits that the conditional claim in terms of the unamended subcontract agreement is accordingly sound and enforceable in law should it be found that the agreement was not amended as contended in the main claim, and, therefore, the further conditional claim does disclose a cause of action in terms of the unamended subcontract agreement and is not excipiable.

[7] Mr Ford submits further that the defendant cannot, by precluding the plaintiff from amending its particulars of claim, rely on the plaintiff's non-compliance with its obligations in terms of the subcontract agreement, and that the defendant can only

do so by pleading a breach on behalf of the plaintiff. Counsel states that a party is obliged to plead a breach in order to rely on it; and what is more, in the circumstances of the matter, should the defendant plead a breach on the plaintiff's behalf, the plaintiff will be able to raise estoppel in reply thereto. That may be so; but I do not think the court should at this time of the day concern itself with what the defendant may do and what the plaintiff may be able to do. I, therefore, do not find the passage culled from *Dowles Manor Properties Ltd v Bank of Namibia* 2005 NR 59 at 64H-I, referred to me by Mr Ford, of any assistance on the point under consideration.

[8] It has been said that the court is generally inclined to allow an amendment intended to give a proper airing of the disputes between the parties in order to determine the real issues between them so that justice may be done. See *Dowles Manor Properties Ltd*. It has also been held that an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable on the basis that the pleading as amended would not disclose a cause of action or a defence. See *Euroshipping Corp of Monrovia v Minister of Agriculture and Others* 1979 (2) SA 1072 (C).

[9] As I see it, the main source of the present dispute in the instant proceedings centres around whether the original subcontract agreement was amended despite the non-variation clause and around asphalt, with or without bitumen, for the project. The plaintiff contends that 'the source of the bitumen used is irrelevant to the defendant's liability in terms of the unamended contract for that agreed amount' of N$431.51 per ton. That may be so; but the fact remains undisputed that that amount is for asphalt and bitumen. On the evidence placed before the court, I find that on the plaintiff's own version, the plaintiff did not supply the bitumen; the defendant did supply the bitumen for the project as from April 2008 or thereabouts. But the plaintiff's claim under the amendment is in respect of asphalt with bitumen, that is, bitumen which the plaintiff admits it did not supply; bitumen which the plaintiff admits the defendant supplied. It follows that the plaintiff cannot by any stretch of legal imagination claim payment for an amount – any amount – which includes a charge or price for bitumen. With the alternative claim the plaintiff seeks to claim as if the

plaintiff delivered the bitumen which, as I have said more than once, on its own version, it never did; but the amount involved is a claim for the bitumen. Mr Tötemeyer put it sagaciously thus: ‘All that the plaintiff alleges regarding delivery of bitumen is that it did not deliver bitumen’. But the claim includes a charge for bitumen, as I say.

[10] For these reasons, Mr Tötemeyer argues that if the plaintiff’s amendment was allowed its further conditional claim will not disclose a cause of action. In *Read v Brown* 22 QBD128 at 131, Lord Esher defined ‘cause of action’ to be ‘every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but each fact which is necessary to be proved. Put simply, ‘cause of action’ is ‘the fact or combination of facts which give rise to a right of action’. (Roger Bird, *Concise Law Dictionary*, 7th ed (1983))

[11] In the instant case, on the facts which I have found to exist, I conclude that if the amendment was allowed the further conditional claim contained therein would not generate a ‘fact or combination of facts which give rise to a right of action’, that is, the plaintiff’s right of action. Consequently, I accept Mr Tötemeyer’s submission that the amendment does not disclose a cause of action. It is for the reason that the amendment does not disclose a cause of action that Mr Tötemeyer argues that the amendment is excipiable. On the authorities, I accept Mr Tötemeyer’s argument. The amendment is excipiable. But that does not end the matter. A consideration of whether the amendment, if allowed, would occasion prejudice to the other side is relevant in determining an application to amend pleadings. The plaintiff contends that no prejudice would be occasioned the defendant if the amendment was allowed. The defendant contends contrariwise. The defendant says that if the amendment was allowed it would be prejudiced because the amendment would not disclose a cause of action.

[12] In this regard, I understand ‘prejudice’ to mean that the amendment would cause an injustice to the defendant which cannot be compensated by an order of costs or a postponement. See E*uroshipping Corp of Monrovia v Minister of*

Agriculture and Others, which approved the approach enunciated in *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29. On the evidence, I find that the defendant would be irreparably prejudiced by the amendment sought, if granted.

[13] I have carefully considered the arguments put forth so ably by both counsel and the evidence placed before me. Having done that I conclude that the plaintiff has not made out a case for the relief sought in the notice of motion; whereupon, the application is dismissed with costs; such costs include the costs of one instructing counsel and two instructed counsel.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	E A S Ford SC (assisted by B de Jager) Instructed by Fisher, Quarmby & Pfeifer, Windhoek
DEFENDANT:	R Tötemeyer SC (assisted by G Dicks) Instructed by Koep & Partners, Windhoek