REPORTABLE

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case No: I 1024/2009

In the matter between:

KAITIRA E KANDJII — **PLAINTIFF**

and

EBEN TJINGAETE — **DEFENDANT**

and

Case no: I 4579/2009

In the matter between:

TJINGA'S GOLD FARMING — **PLAINTIFF**

and

ESEGIEL KAZANDU TJINJEKE — **1ST DEFENDANT**

KAITIRA E KANDJII — **2ND DEFENDANT**

Neutral citation: *Kandjii v TjingaeteTjinga's Gold Farming v Tjinjeke* (I 1024/2009 I 4579/2009) NAHCMD 35 (06 February 2014)

Coram*:* DAMASEB, JP

Heard: **26 September 2013**

Delivered: **06 February 2014**

Flynote: Practice and procedure – Interlocutory proceedings – Application to amend –– Party seeking to amend a pleading must give a satisfactory explanation for seeking the amendment late in the proceedings – Application to amend brought close to four years after the plea filed – Prejudice not only to the opponent but also to the administration of justice – Parties to be prompt and diligent in the prosecution of a case and not to sit back idly waiting to take advantage of the inaction and mistake of the opponent – Inaction causes unreasonable delay in the speedy finalization of cases – Underlying objective of the civil litigation process is the early identification of the real issues in the case and the speedy and economical disposal of cases – Legal practitioners have a duty and are expected to take full instructions from clients before committing their cases to paper in the form of pleadings – It is a dereliction of duty to fail to do so.

ORDER

---

a) The two applications for leave to amend are hereby dismissed with costs, including the costs of one instructing and one instructed counsel.

b) The matter is postponed to **11 February 2014 at 8h30** for status hearing in order to fix trial dates in the second term.

c) For the convenience of the court the party which is *dominus litis* in respect of either case, is directed to prepare the record in the following manner:

i) FILE A: First case

ii) Part 1: pleadings in chronological order;

iii) Part 2:Interlocutory motions in chronological order;

iv) Part 3: Case management orders in chronological order up to consolidation

v) FILE B: Second case;

vi) Part 1: pleadings in chronological order;

vii) Part 2:Interlocutory motions in chronological order;

viii) Part 3: Case management orders in chronological order up to consolidation;

ix) FILE C: Part 1: First case: returns and notices in chronological order;

x) Part 2: Second case: returns and notices in chronological order;

d) Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 37(16) (e) (i)-(iv);

e) A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation thereof within a reasonable time before the next scheduled hearing, by notice to the opposing party.

JUDGMENT

Damaseb, JP:

[1] This is an opposed application to amend a plea close to four years after the defendant (applicant in these proceedings) filed the original plea.[1] The case has become mired in satellite interlocutory litigation disproportionate to the value of the claim and the legal dispute involved which is largely factual. The simple issue in this case is to determine the reason (and to whom) some 37 heard of cattle and their offspring were given by its owner to another. Trial dates were set and vacated more than three times[2] and the case has made a staggering number of at least 14 appearances on the court's case management roll.[3] Every time that a trial was to take place someone had one or the other excuse why it could not take place. The enormouse expense incurred by the litigants is not difficult to imagine. The time has now come to stop the waste and delay and to get on with the trial of the case on its merits.

[2] Plaintiff, Mr Kaitira Kandjii, had combined summons dated 10 March 2009 (in case No: I 1024/2009) served on the defendant (Mr Eben Tjingaete) on 23 September 2009. That is now over four years ago. Hereafter I shall refer to that case as the first case. In paragraph 3 of the particulars of claim of this first case it is alleged that on 1 January 2009, and at Gobabis, plaintiff (hereafter 'plaintiff in the *first case*') and

[1]Plea dated 13 November 2009.

[2] Trial dates of 20-24 February 2012 were vacated. Trial dates of 26-29 November 2012 were vacated and new trial dates set for 22-25 July 2013. Trail dates of 22-25 July 2013 were vacated.

[3] 14 July 2011; 20 September 2011; 8 November 2011; 31 January 2012; 13 March 2012; 20 March 2012; 12 June 2012; 3 July 2012; 9 July 2012; 24 July 2012; 31 January 2013; 26 March 2013; 16 July 2013.

defendant (hereafter 'defendant in the *first case'*) entered into a written agreement in terms of which the plaintiff in the first case allegedly gave permission that the defendant in the first case may remove 37 heard of cattle (hereafter the 'subject cattle') from the farm of plaintiff in the first case to the farm of the defendant in the first case at the latter's 'own risk'. That written instrument (hereafter the 'written instrument') annexed to the combined summons aforesaid is dated 1 January 2009 and records as follows:

> 'I Kaitira E Kandjii give permission for the removal of 37 cattle from my farm Okatjiuabua No. 242, Gobabis district. The cattle will be taken to farm Andes to Eben Tjingaete for custody, on own risk'.

[3] Plaintiff in the first case alleges that the subject cattle were placed in the custody of the defendant in the first case 'as security' for the return to Namibia of the brother of plaintiff in the first case (hereafter 'Tjinjeke') from Botswana. It is common cause that Tjinjeke was accused by the defendant in the first case of stealing cattle from a farm on which defendant in the first case either farmed or worked. I will hereafter refer to these cattle which it is alleged were 37 in number as the 'allegedly stolen cattle'.

[4] According to plaintiff in the first case, an express terms of the agreement was that upon Tjinjeke's return from Botswana (where he had allegedly gone to attend a funeral) the subject cattle were to be returned to plaintiff in the first case. He further alleges that the defendant in the first case removed the subject cattle on 1 January 2009 as agreed but that Tjinjeke never left Namibia as was contemplated and that upon the plaintiff in the first case demanding back the subject cattle, the defendant in the first case neglected or refused to return the subject cattle.

[5] Plaintiff in the first case therefore claims the return of the subject cattle or their value in the amount of N$ 217 400. Additionally, plaintiff in the first case claims as against defendant in the first case, the offspring of the subject cattle totaling the sum of N$ 27 900. He also claims interest on the claim amounts, including costs of suit.

<u>The plea in the first case</u>

[6] The defendant in the first case filed a plea of record on 13 November 2009 (hereafter 'the plea in the first case') after being placed under bar.[4] The plea in the first

[4] By notice of bar dated 16 November 2009 in the first case. There was also a notice of bar by Tjingas' in the second case dated 15 February 2010.

case was signed by the instructing practitioners of record (Messrs. Stern and Barnard[5]) and instructed counsel, Mr PCI Barnard. In the plea in the first case it was alleged that the subject cattle were placed in the possession of defendant in the first case at the risk of plaintiff in the first case and that in entering into the written instrument and receiving the subject cattle from the plaintiff in the first case, defendant in the first case was acting on behalf of a partnership, being *Tjinga's Gold Farming (*hereafter 'Tjinga's'). It is further pleaded in the plea in the first case that the true agreement between the parties (being the plaintiff in the first case and Tjinga's) was that the subject cattle and their offspring were pledged by plaintiff in the first case to Tjinga's as security for the return of Tjinga's allegedly stolen cattle. It is further pleaded that Tjinjeke had not returned the cattle and their offspring to Tjinga's and that the latter is entitled to retain the subject cattle.

<u>The second case</u>

[7] In case no I 4579/2009 (hereafter the 'second case'), Tjinga's issued summons against Tjinjeke (as first defendant) and plaintiff in the first case (as second defendant) in which it is alleged that on or about November 2008, Tjinjeke unlawfully removed the allegedly stolen cattle belonging to Tjinga's with the intention to steal the same. It is further alleged in the second case that Tjinjeke and plaintiff in the first case had, despite demand, refused to return the allegedly stolen cattle or to pay compensation. The value of the allegedly stolen cattle is given as N$261 312. It is further alleged in the particulars of claim of the second case that on 1 January 2009 plaintiff in the first case pledged the subject cattle and their offspring as security for Tjinjeke's return to Tjinga's of the allegedly stolen cattle. It is then alleged that given the non-return by Tjinjeke of the allegedly stolen cattle, Tjinga's is entitled to 'levy execution against the pledged cattle of the plaintiff in satisfaction of the claim against the first defendant'.

[8] In the plea in the second case (hereafter 'the plea in the second case') the accusation of theft against Tjinjeke is admitted but it is stated that no criminal charges were laid and the further assertion made that it was because of that accusation, and the imminent intended departure of Tjinjeke to Botswana to attend a funeral and to guarantee Tjinjeke's return, that plaintiff in the first case agreed (with the intercedence of a named police officer) to pledge his cattle to the defendant in the first case until the return of Tjinjeke.

---

[5] Who withdrew on 11 May 2010 and who were replaced by Francois Erasmus & Partners on 17 May 2010).

Who are the partners of Tjinga's?

[9] On 14 January 2010, the legal practitioner of record of plaintiff in the first case issued a rule 14 notice in connection with the first case, seeking particulars of the alleged partners of Tjinga's. That information was provided on 25 January 2010. In the reply to the rule 14 notice, the partners of Tjinga's were listed as: Eben Tjingaete; Boas Tjingaete and McLenn Tjingaete and their residential addresses were also provided. It was further stated that each partner held 33.33% shares in Tjinga's and that the partnership was created on 14 May 2008.

[10] Plaintiff in the first case chose not to join the partnership or the other alleged partners. Therefore, if it is proved that the subject cattle were received by defendant in the first case on behalf of Tjinga's, the claim of plaintiff in the first case is dead in the water. But he has since stated that Tjinga's is estopped from now raising the point that the partners or the partnership ought to have been sued because, already in his plea dated 18 November 2009 which he now wants to amend, defendant in the first case admitted that he received the subject cattle in a personal capacity and that such an admission cannot be withdrawn without a satisfactory explanation on affidavit, considering that it is being made four years after the original plea was filed. It has, as I later point out, become unnecessary for me to divide the merits of this objection to the amendments.

First case and second case consolidated

[11] On 10 September 2010, the first case and the second case were consolidated by van Niekerk, J at the parties' request.[6] When actions are consolidated they proceed as one action and the court may give judgment disposing of all matters in dispute in the consolidated action.[7]

The issue between the parties is essentially factual and simple

[12] What emerges, therefore, is that there are two mutually destructive versions: the one of the plaintiff in the first case which says that he gave the subject cattle to defendant in the first case as a pledge for the return to Namibia of Tjinjeke (which, if

[6] The application in terms of rule 11 was made on 23 August 2010 by Tjinga's practitioners of record but citing the case No 1024/2009 of the first case.
[7] H Daniels, *Becks' Theory and Principles of Pleadings in Civil Actions,* 2002. Durban: LexisNexis, p 41-42.

true, is *contra bonos mores* and thus unenforceable[8]) in which case the plaintiff in the first case is entitled to the return of the subject cattle; and the version of Tjinga's to the effect that the subject cattle were surrendered to defendant in the first case on Tjinga's behalf because of Tjinjeke's alleged theft of the allegedly stolen property. In the latter respect, it is for Tjinga's to prove that Tjinjeke stole their cattle. They need not await the outcome of the criminal trial to prove the theft. The inquiry in the criminal trial is irrelevant to the question whether in a civil case Tjinga's is able to prove that Tjinjeke stole the allegedly stolen cattle. The rule in *Hollington*[9] establishes that an earlier criminal conviction of a party is inadmissible for purposes of subsequent civil proceedings.

Further pleadings after consolidation

[13] On 12 September 2011, and in the first case, second defendant's legal practitioner of record filed an amended plea raising a point in *limine* stating that since the alleged pledge is based on the principal obligation that Tjinjeke was to return the allegedly stolen cattle to Tjinga's, that principal obligation was not valid on 1 January 2009[10] because, it is said, Tjinga's did not provide proof that the first defendant stole the allegedly stolen cattle and that, in the alternative, the first defendant denied that he stole the allegedly stolen cattle and that, therefore, there was no obligation to return to Tjinga's the allegedly stolen cattle. This is irrelevant as I already pointed out at para 12.

The present interlocutory proceedings

[14] The defendant in the first case then raised an amendment to its plea of 2009 and the matter was heard on 26 September 2013. This judgment is concerned with that application which, when brought, necessitated the vacation of trial dates.

[15] The defendant filed two notices of amendment dated 13 June 2013 and 28 June 2013. The effect of the first notice is that the defendant in the first case disputes that he acted in a personal capacity when he received the subject cattle from the plaintiff in the first case, maintaining that he at all times acted on behalf of Tjinga's partnership (which is the plaintiff in case no I 4579/2009). Secondly, he denies that the subject cattle

[8] Article 21(1)(g) of the Namibian constitution guarantees every person the freedom of movement and it is contrary to public policy to, by contractual arrangement, restrict the right of any person to move freely in and out of this country.
[9] *Hollington v Hewthorn* 1943 (2) ALL ER 35.
[10] The date on which the alleged pledge took place.

belong to the plaintiff in the first case since they were pledged to Tjinga's as security for the return of the allegedly stolen cattle and their offspring by Tjinjeke. The same notice raises a special plea that failure to cite and hold the partnership liable in terms of the pledge agreement is a fatal misjoinder. Anticipating the court granting the application to amend, the proposed amendment postulates that given that the claim for the return of the subject cattle was made in March 2009, joining any partner after the expiry of a three year period would be incompetent since any claim against the partners or Tjinga's had prescribed in terms of the Prescription Act, 1969.

[16] The second notice of amendment relates to the expenses incurred during the period of 1 January 2009 to July 2013 when the subject cattle were in the custody of Tjinga's. Such expenses allegedly included grazing, supervision, cattle fodder, vaccination and Dip amounting to N$ 216 266.02. It is alleged that Tjinga's has acquired a lien over the subject cattle until payment of the expenses allegedly incurred by Tjinga's in respect of the subject cattle.

[17] Plaintiff in the first case has raised objection to the proposed amendments both on the merits and in *limine*. Given the view that I take on the point in *limine* and the threshold requirement for seeking an amendment late in a civil proceeding, I do not find it necessary to consider the respondent's objection to the application on the merits.

<u>Objection in *limine*</u>

[18] The founding affidavit in support of the application to amend was deposed to by Mr Prinsloo, a candidate legal practitioner, apparently attached to Messrs. Francois Erasmus & Partners, Tjinga's practitioners of record.

[19] At the hearing of this opposed application for amendment, Mr van Vuuren for the plaintiff in the first case has raised a point in *limine* to the effect that the founding affidavit in support of the application to amend was deposed to by an articled clerk who does not have the necessary authority to act and to bring the application to amend on behalf of the defendant in the first case. Mr Prinsloo has not filed any supplementary affidavit proving any authority. Counsel on behalf of the plaintiff in the first case has pertinently raised the issue of the authority of Mr Prinsloo to bring the opposed application for amendment.

[20] The only allegations made by Mr Prinsloo which come close to establishing his authority to bring the present application are contained in paragraph 1 of the founding affidavit as follows:

> 'I am a male article clerk attached to the law firm Francois Erasmus and Partners…legal practitioners of record of [the defendant under the first case and for Tjinga's under the second case]. The facts contained in this affidavit fall within my personal knowledge unless the context clearly indicates otherwise and are true and correct'.

[21] Mr Prinsloo makes no specific allegations about being authorised to bring the proceedings. In *De Waal*[11] a rescission application was brought in the name of the applicant while the supporting affidavit is deposed to by a legal practitioner as the defendant's legal practitioners of record. The respondent opposed the rescission application and in *limine* stated that the legal practitioner was not authorized to bring the rescission application. The issue arose because the practitioner curiously chose not to depose the client personally to the affidavit in support of the rescission application, or at the very least to confirm on oath that he was authorized to bring the rescission application. That application was brought in the name of the applicant while the supporting affidavit was deposed to by the legal practitioner who was not named on the power of attorney as one of the authorised attorneys.

[22] It was submitted on behalf of the applicant that the allegation that the practitioner was authorized to depose to the founding affidavit was sufficient authority for him to have brought the application and that, in any event, the power of attorney passed in favour of the firm of legal practitioners to which the deponent belonged was, together with such allegation in the founding affidavit, sufficient basis for bringing the rescission application. It was common cause that the client had not deposed to any confirmatory affidavit and that the practitioner only averred that he was authorized to depose to the affidavit but nowhere stated that he was authorized to bring the application. The court stated as follows:

> 'It is trite that it is not the deposing of the affidavit, but the institution of the legal proceedings, that must be authorized. A legal practitioner is an agent of a client and as agent cannot institute legal proceedings on behalf of the agent without authorization.[12] There being no

---

[11] De Waal v De Waal, (I 1775/2009) [2012] NAHC 103 (12 April 2012) para [10]. Also available online: http://www.saflii.org/na/cases/NAHC/2012.

[12] Compare, Konga *Clearing Agencies CC v Minister of Finance* 2011 (2) NR 616; Vaatz *v Registrar of Deeds: In re Grootfontein Municipality: In re Nöckel's Estate* 1993 NR 170 (HC).

allegation that the legal practitioner… is authorized to bring the application, the point *in limine* is on the face of it a good one; unless I am satisfied that the power of attorney relied upon is sufficient authority for the bringing of the rescission application.'

[23] After quoting the power of attorney which did not name the practitioner in question as one of the authorised persons, the court went on to state:

'[12] The question that arises is if this power of attorney constitutes sufficient authority for [the practitioner] to bring the rescission application. Powers of attorney are interpreted restrictively.

[13] One has to accept that the defendant is alive and *compos mentis* and able to give instructions and to depose to an affidavit. Why he did not remains a mystery. Even after the plaintiff raised the legal objection that [the applicant's practitioner] was not competent or duly authorized to bring the rescission application, no confirmatory affidavit was filed by the defendant personally to confirm that he had indeed authorized the rescission application. On what basis can a Court then make an adverse costs order against the respondent if the application were to fail? That question provides the answer to the rule already referred to that civil proceedings must be brought by the party who enjoys the legal right (locus) to bring it. There is no rule that prevents a legal practitioner to depose to an affidavit in support of a rescission application, as long as he is authorized to do so. In the present case, the client not only does not in the power of attorney authorize [applicant's practitioner] to act on his behalf; he also does not confirm that fact or the bringing of the rescission application, in the founding papers or in reply.

[14] The present power of attorney authorizes named practitioners of the firm …to oppose the relief sought in the combined summons. [The practitioner] who deposes to the supporting affidavit for the relief is not named in the power of attorney. There is no explanation either by the deponent or his principal, the applicant why he is excluded. There could very well be a good reason but none has been proffered. There is therefore no factual or legal basis for [the practitioner's] assertion that he is duly authorized to bring the application for rescission in the name of the applicant. The rescission application is therefore not competent.'

[24] I am faced with a similar situation here: Mr Prinsloo has not made as much as a bare allegation of authority let alone established any authority to bring the present application to amend. Mr Prinsloo is a candidate legal practitioner who is not named in the power of attorney passed by the applicant in favour of Francois Erasmus and Partners, nor has he alleged to be authorised to bring the application. The applicant has not deposed to an affidavit in support of an application for amendment. There is no

explanation as to why the applicant did not depose to the affidavit himself. A legal practitioner is an agent of a client and an agent cannot institute legal proceedings on behalf of the client without authorization.[13] The defendant is alive and able to depose to an affidavit. Why he did not do that is not explained. The absence of a confirmatory affidavit to confirm that he had indeed authorized makes it difficult to confirm that Mr Prinsloo acts with full instructions.

[25] The application to amend is therefore liable to be struck for want of authority, with costs.

Absence of an explanation for the late amendment

[26] I have shown the number of time this matter was subject to case management. I have also shown the number of trial dates vacated in the matter. The timing for the application to amend therefore called for a satisfactory explanation, coming as it does so late in the evolution of the case. As this court stated in *Andreas v La Cock and Another* [14] :

> 'I am inclined to the modern approach adopted in *Swartz v Van der Walt*[15] that although Rule 28(4) does not require a notice of motion supported by affidavit there may be cases where, to enable the Court properly to exercise its discretion and to determine where justice between the parties lies, an explanation for the amendment and the timing thereof needs to be given on affidavit. A party seeking an amendment therefore runs the risk of being denied an amendment if no explanation is given on affidavit and the Court is unable properly to exercise its discretion.'

[27] I need to state at once that neither the partners of Tjinga's nor the defendant in the first case have deposed to affidavits in support of the application to amend. They do not even confirm the allegations attributed to them by Mr Prinsloo. Mr Prinsloo deposes that defendant in the first case and the other alleged partners of Tjinga's only revealed at the consultation of 13 June 2013 that a lien over the cattle exists and that the expenses must first be paid before the return of the cattle to the plaintiff in the first case, alternatively that there was a set-off. This deponent alleges that the plaintiff knew that the defendant acted in a representative capacity for a long time as it appears from para

[13] De Waal v De Waal, I 1775/2009, para [10] of the judgment. Compare Konga Clearing Agency CC v Minister of Finance 2011 (2) NR 616; Vaatz v Registrar of Deeds: In re Grootfontein Municipality: In re Nöckel's Estate 1993 NR 170 (HC).

[14] 2006 (2) NR 472 (HC) at 481H-I, 482A-B.

[15] 1998 (1) SA 53 (W).

3.2 of the plea in the first case[16] and that the failure to join all the partners, alternatively the partnership, is a non-joinder. It is stated that a plea of non-joinder at this stage has become a plea in abatement.

[28] The applicant who wishes to bring a late application, being required to make out the case in the affidavit justifying the bringing of an amendment so late in the day, Mr Prinsloo's affidavit fails to provide a reasonable explanation for why the amendment was not brought earlier. I say it was not reasonable for the following reasons: Mr Barnard, instructed counsel, was already on record in this matter as early as October 2010. He participated in most of the case management conferences in connection with this matter. He was also instructed counsel of record at the time that the parties prepared and filed the proposed pre-trial order of 22 November 2011. The explanation that the client could only discuss with Mr Barnard when the time came to prepare witness statements borders on being specious and reckless. On what basis were all the pleadings prepared and did counsel attend at case management conferences in order to assist the court, as is expected, in identifying the real issues in the matter. Is it seriously suggested that when the instructions were taken to prepare the plea in which the alleged expenses incurred were mentioned that the client was not asked to specify them? The answer is obvious! Counsel has a duty to act diligently, without delay and conscientiously in the conduct of the cases that come before the court.

[29] Rule 37(1)A stipulates the objectives of case management, as being amongst others, to ensure the speedy disposal of an action, to promote the prompt and economic disposal of an action, to identify issues in dispute at an early stage, to curtail proceedings and to reduce the delay and expense of interlocutory processes. In terms of rule 37(1)B, parties to litigation are obliged to assist the managing judge in curtailing proceedings. On both scores, the conduct of this case has been wanting. In the adjudication of the question whether the applicant who wishes to amend pleadings late in the evolution of the case has provided a satisfactory answer for bringing the application late, the applicant has not only the prejudice of the opponent to content with but also the interests of the administration of justice.

[30] The lack of bona fides of the application, including, as it does, the legal objection that the plaintiff failed to join the partnership and or the partners, is evidenced by the

[16] Dated 13 November 2009.

conspicuous absence of any mention why it is being made so late in the day. The partners of Tjinga's and defendant in the first case have not deposed to any affidavits explaining why timely instructions were not given to their practitioners of record. That is fatal.

Failure to join and failure to intervene

[31] There are two sides to this issue. The first is the failure by plaintiff in the first case to join the partnership or the partners after he was told that the defendant in the first case acted on behalf of Tjinga's. He carries the risk for failing to join Tjinga's if evidence establishes that the allegedly stolen cattle belonged to Tjinga's and that defendant in the first case acted as a partner on behalf of Tjinga's. That said, Tjinga's knew that defendant in the first case was sued in his personal capacity when, according to Tjinga's, he acted on its behalf. Having realised that plaintiff in the first case opted or failed, for whatever reason, not to join Tjinga's, nothing prevented Tjinga's or the rest of the partners from intervening in the proceedings. In fact, common sense suggests they should have: They stood to lose if, for any reason, defendant in the first case chose not to defend the matter, or if he agreed to return the subject cattle to the plaintiff in the first case.

[32] It is no longer permissible for one party to sit idly by when the interests of speedy justice demands that it should act. After all, whether the allegedly stolen cattle belonged to the partnership and not solely to defendant in the first case, and whether the latter on 1 January 2009 acted personally in his dealings with the plaintiff in the first case, were matters peculiarly within the knowledge of the defendant in the first case and Tjinga's[17] and nothing prevented the rest of the partners intervening in the proceedings. The obligation on all litigants to take the necessary steps to move the case forward is now firmly embedded in our practice with the advent of judicial case management. I find succor in the following dictum by the Supreme Court in the case of *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*[18]*:*

'[90] With the advent of the JCM rules where all parties to the proceedings have the obligation to prosecute the proceedings and assist the court in furthering the underlying

[17] The written instrument, on the face of it, gives the impression defendant in the first case was acting personally.
[18] Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd 2012 (2) NR 671 (SC) at 699G-H.

objectives, it would be highly relevant to consider any inaction on the part of the parties. And there is no place for defendants to adopt the attitude of 'letting sleeping dogs lie' and for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be I asserted.'

[33] It was therefore just as much the duty of the partners and or Tjinga's to intervene in the proceedings in the first case as it was that of the plaintiff in the first case to join the partners or Tjinga's. As it happens, he chose not to join because he takes the view that he is able to prove that defendant in the first case acted personally or that estoppel operates to shield him from the argument that the partnership was the actual party. That is a legal strategy which he may yet rue but which was his choice to make. It certainly does not provide any basis for the present application.

[34] Mr Prinsloo tells the court that his firm and instructed counsel for the first time consulted with the key actors when they were preparing witness statements for the purpose of trial. This statement by Mr Prinsloo is an admission of the most blatant dereliction of duty made on oath. It is an attitude that is so symptomatic of everything that is bad in our local legal culture. It speaks to a form of legal practice which, for so long, has happily thrived on the notion that it is acceptable to initially plead anything in order to get the show going as, after all, our courts have a liberal and permissive attitude towards amendment of pleadings. It is lamentably a form of practice that has become a serious blot on our system of civil justice. As every trial judge knows, late amendment of pleadings and the invariable opposition thereto is a factor most responsible for the postponement of the majority of matters set down for trial at the High Court of Namibia. This seriously affects the proper administration of civil justice at the High Court and makes planning so unpredictable. It is a form of practice that is subversive to the underlying objective of the civil litigation process: that of early identification of the real issues in the case and the speedy and economical disposal of cases.

[35] Legal Practitioners, both instructing and instructed, have a duty, upon assuming a mandate or a brief, to meet with the client and to take full instructions. That includes gathering all relevant documents, identifying all potential witnesses and interviewing them. It is a duty without which the imperatives (which represent a promise to the public for whose benefit the civil litigation system exists) of early identification of the real

issues in the case and the speedy and economical disposal of cases becomes hollow. Practitioners are expected to take full instructions from clients before committing their cases to paper in the form of pleadings. It is a dereliction of duty to fail to do so. That is an obligation which pre-dates case management but assumes an even greater significance under judicial case management because the practitioner must now assist the court and actively participate in, from very early in the life of the case, identifying the real issues in dispute- an enterprise which is meaningless unless counsel have fully consulted with the client.

[36] As I have shown, this case has enjoyed so much disproportionate share of the court's time yet turns on so simple a factual matrix. A rule 30 application brought on behalf of the plaintiff in the first case was opposed and then withdrawn on 02 July 2010. On 24 August 2011, notice was given to amend the particulars of claim of plaintiff in the first case. The parties filed a proposed pre-trial order dated 22 November 2011 and none of what is the bone of contention in the present application is raised. The proposed pre-trial order makes clear that the parties were prepared to go to trial on the pleadings as they stood on 22 November 2011 in both matters. Summary of witness statements were filed on behalf of the plaintiff in the first case on 25 January 2011. On behalf of the defendant in the first case, a discovery affidavit was filed on 09 August 2011 and on behalf of plaintiff in the first case, discovery was done 22 August 2011. The practitioners involved in this case have created a sideshow that is staggering and utterly disproportionate to the value of the claim and the legal dispute involved which is predominantly factual.

[37] For all of the above reasons, the two applications to amend must fail. Having dismissed the applications to amend, I see no reason why costs should not follow the event.

[38] In the result:

a) The two applications for leave to amend are hereby dismissed with costs, including the costs of one instructing and one instructed counsel.

b) The matter is postponed to **11 February 2014 at 8h30** for status hearing in order to fix trial dates in the second term.

c) For the convenience of the court the party which is *dominus litis* in respect of either case, is directed to prepare the record in the following manner:

i) FILE A: First case

ii) Part 1: pleadings in chronological order;

iii) Part 2:Interlocutory motions in chronological order;

iv) Part 3: Case management orders in chronological order up to consolidation;

v) FILE B: Second case;

vi) Part 1: pleadings in chronological order;

vii) Part 2:Interlocutory motions in chronological order;

viii) Part 3: Case management orders in chronological order up to consolidation;

ix) FILE C: Part 1: First case: returns and notices in chronological order;

x) Part 2: Second case: returns and notices in chronological order;

d) Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 37(16) (e) (i)-(iv);

e) A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation thereof within a reasonable time before the next scheduled hearing, by notice to the opposing party.

P T Damaseb

Judge-President

APPEARANCE:

PLAINTIFF	A van Vuuren
Instructed by:	Grobler & co, Windhoek

DEFENDANT	PCI Barnard
Instructed by:	Francois Erasmus & Partners, Windhoek