



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 4097/2014

In the matter between:

SCHNEEBERGER AND ASSOCIATES (PTY) LTD

PLAINTIFF

and

HANGANENI EMONA (PTY) LTD

DEFENDANT

Neutral citation: *Schneeberger and Associates (Pty) Ltd vs Hanganeni Emona (Pty) Ltd (I 4097/2014) [2017] NAHCMD 51 (01 March 2017)*

Coram: Miller AJ

Heard: 23 November 2016

Delivered: 01 March 2017

ORDER

1. The application to amend the particulars of claim is granted.
2. The application for security for costs is dismissed.
3. The plaintiff is ordered to pay the costs relating to the application to amend its particulars of claim on the basis of one instructing and one instructed counsel.
4. The defendant is ordered to pay the costs relating to the application for security for costs on the basis of one instructing and one instructed counsel.
5. Matter is postponed to 28 March 2017 for a status hearing.

JUDGMENT

Miller AJ:

[1] On the 23rd of November 2016 I heard two applications in this matter, namely;

- 1.1. An application in terms of Rule 52. The Plaintiff gave notice of its intention to amend its particulars of claim on 14 August 2015, which were not opposed.

- 1.2. An application for security for costs in which the defendant requires the plaintiff to furnish security for costs in these proceedings in the amount of N\$500 000.00.

The Amendments

[2] The background of this matter is that the plaintiff allegedly sought to amend its particulars of claim four times in the past, namely on 18 May 2015, 13 August 2015, 10 September 2015 and 14 April 2016 (notice of intention to amend its further amended particulars of claim). On one of these occasions, the notice of amendment was filed after the defendant raised an exception to the plaintiff's particulars of claim. The plaintiff also withdrew its notice of intention to amend delivered on 14 August 2015 after the defendant filed its objection thereto on 28 August 2015, however it is submitted by the plaintiff that the 14 August amendments were not opposed. Subsequently, the amended particulars of claim were filed on 25 September 2015.

[3] On the 13th of May 2016, the plaintiff applied by Notice of Motion to amend its further amended particulars of claim. The defendant, conceded that he no longer pursues the objections contained in paragraph 1 and 2 of the notice of objection, thus the only objections that remained were those contained in paragraphs 3, 4, 5, and 6 of the notice of objection, as they have been fully set out in the Notice of objection in terms of Rule 52(4).

[4] It is submitted by Mr. Van Zyl that the sole purpose of the amendments to the plaintiff's particulars of claim are intended to ensure a proper ventilation of all the issues before the Court.

[5] The plaintiff submits that the previous intended amendment was brought about after in depth consultation in preparation of the plaintiff's witness statements and was lodged as soon as possible after it came to the attention of the plaintiff that an amendment was required. They further submit that with regard to the case management process of this Court, the intended amendment was filed prior to a pre-trial order being compiled by the parties in order to ensure that the speedy resolution of the matter was not in any way influenced by the amendment. The intended amendment is bona fide, as the matter was in no way delayed.

[6] It is further submitted by the plaintiff that in the defendant's answering affidavit in the previous application to amend the Plaintiff's particulars of claim, the defendant took the point (in paragraph 17 thereof), that the plaintiff had to comply with Rule 32(9) and (10), pertaining to interlocutory proceedings, and failed to do so. Thereafter, the plaintiff, without complying with the veracity of the issue raised by the defendant, adopted a prudent approach by withdrawing the previous application for amendment in order not to get bogged down with the issue raised by the defendant, but to file a new Notice of Intention to and thereafter an application to amend after complying with Rule 32(9) and (10).

[7] The plaintiff submits that the September 2015 Particulars of Claim if compared to the intended amendment makes it apparent that the intended amendment to a large extent mirrors the September 2015 amendment. Furthermore, the plaintiff's purported amendment merely clears up certain typographical errors and aligns the wording of the Particulars of Claim with the wording of the agreement annexed to the Particulars of Claim as Annexure A.

[8] The defendant opposed the intended amendment on the grounds that this piecemeal approach to proceedings has caused the defendant unnecessary inconvenience and it has also caused considerable delay which cannot be attributed to the defendant. The defendant submits that he would want this matter to be concluded as expeditiously as possible. However due to the failure of the plaintiff to adequately plead its case, the defendant has been prejudiced by such delay.

[9] The defendant further submits that the plaintiff fails to deal with the crux of the defendant's argument, namely that the amendments sought to be introduced are based upon the premise that such amendment would, firstly render the pleadings exceptible, and secondly, that they would introduce a new cause of action and/or a new claim. Furthermore it is submitted that the amendment is sought after the defendant has filed its plea and after both parties have filed their witness statements in preparation for trial.

[10] It is submitted by the defendant in its Notice of Objection that the amount the plaintiff intends on introducing in the Notice of amendment, contradicts the amount referred to in Annexure "C" to the Notice and on that basis, should the amendment be allowed, the plaintiff's further amendments to the particulars of claim would be exceptible. Additionally, the plaintiff in its Notice in paragraph 9 intends to introduce a new basis for its claim, namely an alternative claim premised on the entitlement of plaintiff to fair and reasonable fees and costs. The Plaintiff's cause of action was based on the express provisions of the agreement between the parties, and in now seeking to introduce 'presumably' tacit, alternative, implied terms of the agreement, the plaintiff is basing its claim on a new cause of action, not previously pleaded. This is what the defendant pleaded in its Notice of objection in para 3:

'In paragraph 9 of the further amended particulars of claim, the plaintiff pleads that it prepared a statement for discussion purposes in the amount of N\$4 445 082.12, a copy whereof was attached marked "C" to such amended particulars of claim. In paragraph 5 in the notice of

amendment the plaintiff seeks to replace that paragraph with a paragraph where it is pleaded that on 25 October 2011 the plaintiff prepared an account for discussion purposes in the amount of N\$5 635 379.20, a copy of which is attached marked "C". The copy attached as Annexure "C" to the notice refers to an amount of N\$4 445 081.12. The primary documentary evidence upon which the plaintiff purports to base its claim directly contradicts paragraph 9. As such, the particulars if amended, would be exceptible.'

[11] The plaintiff replies by submitting that the intended amended claim is grounded in contract and the way it is now pleaded, merely introduces fresh and alternative facts supporting the original right of contract.

[12] The amount reflected in the original combined summons is 5 635 379.20, which is also the amount reflected initially in Annexure C (the Invoice/Statement). In the further amended particulars of claim, the plaintiff claims for N\$4 445 082.12, which is also the amount reflected in annexure C attached to the further amended particulars of claim

[13] The Namibian Supreme court pointed out in *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*¹ at para 38, which was further stated in the *I A Bell Equipment Company Pty Ltd v Roadstone Quarries CC* case at para 28:

*'The established principle that relates to amendments of pleadings is that they should be "allowed in order to obtain a proper ventilation of the dispute between the parties ... so that justice may be done", subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement.'*²

¹ (SA 33-2010)[2013]NASC 11(19 August 2013).

² See further *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A.

[14] As it was put in *Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co Ltd*³:

'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.'

And:

'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.'

[15] In the case of *South Bakels (Pty) Ltd and Another v Quality products and another*⁴ Manyarara AJ said:

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

³ 1923 TPD 309.

⁴ 2008 (2) NR 419 (HC) at page 421: D-H.

sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment.'

[16] In addition, it is important to distinguish between an amendment introducing a new cause of action (i.e. right of action), and one which merely introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time.

[17] In the original particulars of claim, the amount claimed was N\$5 635 379.20, whereas Annexure C attached to the present notice of amendment or rather further amendments, reflects an amount of N\$4 445 082.12. There can accordingly be no prejudice to the defendant. This amount is substantially less than the amount in the original particulars of claim.

[18] In any event, the opposed amendment seeks to reduce the prayers to reflect a lesser amount of N\$4 445 082.12, will not render the amendment exceptible. Therefore the application for amendment is granted.

Security for Costs

[19] The defendant requires the plaintiff to furnish security for costs in these proceedings in the amount of N\$500 000.000 and that the proceedings be stayed pending such security being furnished, together with an order for costs. The basis of this is that the plaintiff is a *peregrinus* of this Court (a private company registered in South Africa) and the defendant has a reasonable belief that the plaintiff would not be able to

pay the defendant's costs in the event of the defendant successfully defending the claim brought against him by the plaintiff.

[20] In motivating the application, the defendant refers to the complexity of the matter, the 1600 pages of discovery and the estimation that the trial will take 10 days to finalise. Reference is also made to the costs already incurred and the anticipated work still to be done in preparation for trial, estimating sufficient security to be in the amount of N\$500 000.00

[21] The plaintiff contends that this application is *mala fide*, it was brought late, on 03 August 2016 (18 months after the present action had been instituted) and with extreme delay and it was brought in circumstances where the applicant waived its right to seek security for costs. It is further submitted by the plaintiff, that the application bears no merit, given the fact that the defendant conceded that at the very least it owes the plaintiff N\$800 006.00 as it appears from Annexure D to the plaintiff's amended particulars of claim.

[22] The defendant further submits that nothing in Rule 59 suggest that either in demanding or in applying for security, delay is to be regarded as necessarily fatal.

[23] In terms of the Rules of this court, Rule 59 provides:

'59. (1) A party entitled to demand security for costs from another must, if he or she so desires, as soon as practicable after the commencement of proceedings, deliver a notice setting out the grounds on which the security is claimed and the amount demanded.

(2) If a party contests the amount of security only that party so objecting must, within three days after the notice contemplated in subrule (1) is received, give notice to the requesting party to

meet the objecting party at the office of the registrar on a date pre-arranged with the registrar and that notice must state the date of the meeting and the date must not be more than three days after the notice of objection to the amount of security is delivered to the party requesting the security.

(3) The registrar must determine the amount of security to be given.

(4) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to the managing judge on notice for an order that such security be given and that the proceedings be stayed until the order is complied with.

(5) The managing judge may, if security is not given within the time referred to in sub-rule

(4), dismiss the proceedings instituted or strike out any pleadings filed by the party in default or make any order that he or she considers suitable or proper.

(6) Security for costs is, unless the managing judge otherwise directs or the parties otherwise agree, given in the form, amount and manner directed by the registrar.

(7) The registrar may, on the application by the party in whose favour security is to be given and on notice to interested parties, increase the amount originally furnished if he or she is satisfied that that amount is no longer sufficient and his or her decision is final.

(8) A person to whom legal aid is rendered by or under a law or who is represented by the Government Attorney is not compelled to give security for the costs of the opposing party, unless the managing judge directs otherwise.

[24] In the case of *Hapute and others v Minister of Mines and Energy and Another*,⁵ it was stated that:

'It is trite that in an application for security for costs,

⁵ 2007 (1) NR 124 (HC) at para [10]

- (a) *the court has a discretion to grant or refuse such security;*
- (b) *the question of security for costs is not one of substantive law, but one of practice;*
- (c) *the Court does not enquire into the merits of the dispute, but may have regard to the nature of the case.'*

[25] It was further stated in the *Hapute* matter that:

'The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order of security, against that, it must weigh the injustice the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.'

[26] It is apparent that the application for security for costs was brought at a later stage of the proceedings. This is directly in conflict with the provisions of Rule 59(1). There is furthermore no explanation why the application was not brought sooner. The fact upon which the plaintiff now relies must have been within the knowledge of the plaintiff's right from the onset.

[27] For these reasons, the application for security for costs, must be dismissed.

[28] In the result, I make the following orders:

1. The application to amend the particulars of claim is granted.
2. The application for security for costs is dismissed.

3. The plaintiff is ordered to pay the costs relating to the application to amend its particulars of claim on the basis of one instructing and one instructed counsel.
4. The defendant is ordered to pay the costs relating to the application for security for costs on the basis of one instructing and one instructed counsel.
5. Matter is postponed to 28 March 2017 for a status hearing.

K. MILLER

APPEARANCES:

For the Plaintiff:

CJ Van Zyl

Instructed by:
Windhoek

Francois Erasmus & Partners,

For the Defendant:

AW Corbett, SC

Instructed by:

Ellis Shilengudwa Inc. (ESI), Windhoek