

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Pretorius v van Eck</i>	Case No: I 45/2016 HC-MD-CIV-ACT-CON-2016/02538
	Division of Court: High Court
Heard before: Honourable Justice Herman Oosthuizen	Date of hearing: 10 July 2018
	Delivered on: 12 July 2018
Neutral citation: <i>Pretorius v van Eck</i> (I 45/2016) [2018] NAMCMD 209 (12 July 2018)	
Result on application for amendment of pleadings: Unsuccessful.	
The order: Having heard Mr Strydom assisted by Ms Yssel , counsel for the 1 st and 2 nd defendants, Mr Heathcote assisted by Ms Campbell , counsel for 4 th and 5 th defendants and having read the documents filed of record: IT IS ORDERED THAT: 1. First and second defendants' application for amendment is refused. 2. Costs is awarded to the fourth and the fifth defendants on a party and party scale, which costs shall not be limited by Rule 32 (11) and to include the costs of one instructing and one instructed counsel. 3. The trial shall proceed on the fixed action roll from 16-26 July 2018 on the issues contained in the Substitute Pre-Trial Order of 19 October 2017.	

Reasons:

1. First and second defendants seek an amendment to their pleadings to introduce a special plea of prescription at a very late stage and a mere 3 weeks before a complex consolidated case is set to start on trial on the fixed roll, set down for two weeks.

2. The Managing Judge directed truncated periods very different from the periods prescribed in Rule 52 for filing process in order to secure that the very late amendment sought does not result in the postponement of a fixed trial period already ordered on 19 October 2017 under a regime of case management designed for the orderly management of cases until they are trial ready.

3. The Substituted Pre-trial order of 19 October 2017 reads as follows:

“3.1 The allocated trial dates on the action floating roll of 5 – 9 March 2018, are hereby vacated.

3.2 The new trial dates on the fixed action roll will be 16 – 26 July 2018 at 10h00.

3.3 The pre-trial order of 18 September 2017 is hereby rescinded.

3.4 The matter is referred to trial on the issues contained in paragraphs 1 and 2 in the proposed pre-trial order filed on 15 September 2017.

3.5 Paragraph 3 (facts not in dispute) of the proposed pre-trial order is made an order of court.

3.6 Parties shall file their notices in terms of Rule 36(1) on or before 2 February 2018.

3.7 Parties shall supply each other with a list containing the names of their witnesses before 28 February 2018 and file their witness statements **and** expert witness statements on or before 30 March 2018.

3.8 Any further or augmented witness statements or expert reports (and statements) are to be filed on or before 20 April 2018

3.9 Any rule 94 and 95 notices and requests for trial particulars are to be filed and served on the

counterparty on or before 11 May 2018.

3.10 Replies/answers to the above notices and requests are to be provided on or before 1 June 2018.

3.11 On Friday 15 June 2018 any party intending to call witnesses by subpoena shall notify the other party of the identity of such witnesses and simultaneously provide the other party with a copy of the duly issued subpoena duces tecum in respect of such witnesses

3.12 Dr Weder, Kauta & Hoveka and Fisher, Quarmby & Pfeifer shall index and paginate the court files on or before 15 June 2018

3.13 The pre-trial status hearing is scheduled for Monday, 18 June 2018 at 14h00.

3.14 In the event of any of the Legal Practitioners withdrawing as representatives of their respective clients, the Notice of Withdrawal shall be served together with this order and the proposed pre-trial order filed on 15 September 2017 on their clients not less than six (6) weeks prior to the trial dates.”

4. The aforesaid order was premised on the agreement of the parties as embodied in their joint pre-trial report filed on 15 September 2017.

5. Deviating from the aforesaid order the first and second defendants filed their witness statements and augmented witness statement late.

6 It seems that the other parties to the proposed pre-trial order and substituted pre-trial order did not formally object to the late filings in order to ensure that the matter remains on track to be heard on the fixed action roll for 16-26 July 2018.

7. Returning to the late attempt to amend by first and second defendants, the 4th and 5th defendants filed a notice to oppose, setting out their grounds of objection on 29 June 2018. That is within 3 days instead of within 10 days. Instead of within 10 days, first and second defendants were directed to file their application to amend within one court day on 2 July 2018, giving them the advantage of the interceding weekend.

8. Only 4th and 5th defendants objected and they were directed to file their opposing affidavits on or before 5 July 2018, which they did.

9. First and second defendants had to file their replying affidavit by 9 July 2018.

10. The objection was argued on 10 July 2018 and set to be ruled upon on 12 July 2018 at 09H00, within 3 days before the trial is due to start on issues agreed upon on 15 September 2017 which were not inclusive of prescription.

11. The amendments sought to be introduced are vexed and not simple and ought to have been traversed before the compromise of the parties on 15 September 2017.

12. Rule 26(10) of the Rules of the High Court prescribe that issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with leave of the managing judge or court granted on good cause shown.

13. Applicants for the amendments, first and second defendants, have failed to show good cause. In the chronology of what was required during the case management preceding the late application for amendment, the applicants for the indulgence they seek, have failed to satisfy the court that they acted promptly; did not advance a sufficient explanation for their failure; did not address the liability for the failure sufficiently and did not convince the court that the fixed trial dates are not in jeopardy despite all parties' acquiescence that the trial must continue next week.

14. The Court is mindful thereof that the amendments, if allowed, may or may not be expiable, should be replicated to and would necessitate a consensual amendment/addition to the pre-trial order. It would necessitate changes which cannot be conveniently adjudicated upon without the likelihood of putting the imminent trial in jeopardy to the prejudice of all the other litigants. It would likely put the trial judge and the due administration of justice in a position where issues, not properly dealt with during case management and the consequential joint pre-trial proposal with its resultant consensual pre-trial order, create controversy and discord during the trial.

15.1. Having considered the application on the basis I did, does not reduce the effort of the fourth and fifth defendants in opposing the application and the content of their opposition which was necessary and expedient.

15.2 Applicants for the amendment used one instructing and one instructed counsel.

15.3 Fourth and fifth defendants used one instructing and two instructed counsel.

15.4 All counsel will appear in the trial which will commence within 3 court days (today and Monday included).

15.5 The application for the amendment and the resultant opposition were done in a very short period of time. It was seriously pursued and warranted substantial effort and research from both sides.

15.6 Due to the lateness the Court shortened the time periods provided for in Rule 52 and directed the parties not to follow the formal Rule 32 (9) and (10) procedure as it would have wasted available limited time where the parties were at loggerheads and apparently not prone to reach an amicable resolution.

16. The following orders are made:

16.1 First and second defendants' application for amendment is refused.

16.2 Costs is awarded to the fourth and the fifth defendants on a party and party scale, which costs shall not be limited by Rule 32 (11) and to include the costs of one instructing and one instructed counsel.

16.3 The trial shall proceed on the fixed action roll from 16-26 July 2018 on the issues contained in the substituted Pre-Trial Order of 19 October 2017.

Judge's signature:

Counsel:

1st and 2nd defendants (Applicants)

4th and 5th Defendants (Respondents)

<p>Yssel of Engling Stritter & Partners, Windhoek</p>	<p>McCulloch of Fisher, Quarmbly & Pfeifer, Windhoek</p>
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