

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case No: HC-MD-CIV-ACT-CON-2016/03394

In the matter between:

**LEE'S INVESTMENTS (PTY) LTD**

**PLAINTIFF**

and

**JOHANNA HALLELUYA SHIKONGO**

**FIRST DEFENDANT**

**BONGOLA INVESTMENTS PROJECT CC**

**SECOND DEFENDANT**

**Neutral Citation:** *Lee's Investment (Pty) Ltd v Shikongo* (HC-MD-CIV-ACT-CON-2016/03394) [2018] NAHCMD 321 (12 October 2018)

**Coram:** OOSTHUIZEN, J

**Heard:** 20 September 2018

**Delivered:** 12 October 2018

**Flynote:** Civil Procedure – Case Management – Pre-Trial Report – Rule 26 – variation of a Pre-Trial Order – application for variation brought on day of trial.

**Summary:** The defendants' brought an oral application for the variation of the Pre-Trial Order (made an order of court on 27 November 2017) on the day the trial was supposed to start. The plaintiff opposed the application. The court ordered a proper application. Whether such an amendment could be granted in the circumstances.

*Held that* – Late amendments violate the overriding objective of judicial case management to bring expeditious closure to litigation.

Held that - Parties are bound to their pre-trial reports.

Held that - Late amendments call for reasonable explanations.

Held that - Instructing legal practitioner admitted that, and explained why he erred in signing the pre-trial report.

Held that - In the circumstances of the case and taking account of pleadings in the matter, the explanation is reasonable.

Held that - The amendment will partially be allowed.

Held that - Instructing legal practitioner, being agent of the defendants, bound the defendants. Defendants responsible for wasted trial costs.

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## ORDER

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In the result, the following orders are made -

[1] The contents of sub-sub-paragraph 3.3.4 and sub-paragraphs 3.4 in the pre-trial report is moved to "Issues of Law to be Resolved" and renumbered as sub-paragraphs 2.39 and 2.40.

[2] The defendants shall pay the cost of plaintiff for 3 trial days, which shall include the costs of the application, not being capped by Rule 32(11), inclusive of the costs of one instructing and one instructed counsel on a party and party scale

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## JUDGMENT

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OOSTHUIZEN J:

### Introduction

[1] The application before this court was brought by the defendants in this matter for the variation and/or modifications to the existing Pre-Trial Order, which was made an order of Court on 27 November 2017. This application was sought the morning of when trial was to commence on 18 September 2018.

### Parties

[2] The first applicant/first defendant is Johanna Halleluya Shikongo, an adult female technical consultant employed in the Property Procurement Department of the Social Security Commission.

[3] The respondent/plaintiff is Lee's Investment (Pty) Ltd, a private company, duly registered and incorporated in accordance with the applicable Company Laws of the Republic of Namibia.

[4] The second applicant/second defendant was joined after the service of the Summons.

#### Brief Background

[5] The main action between the plaintiff and defendants is based on a written consultancy agreement entered into between the parties. The application before this court is interlocutory in nature, but brought very late and initially from the bar in oral form on the date trial was set to start.

[6] The court order that a proper application be brought and ordered very short periods for filing of papers in order for the application to amend the pre-trial order to be argued at 11H00 on 20 September 2018, two days after it was brought.

[7] Defendants complied and filed their application late afternoon on 18 September 2018.

[8] In the affidavit supporting the application, instructed counsel, with reference to the pleadings filed, explained his error in signing the pre-trial order.

[9] Plaintiff opposed the application and filed an answering affidavit before 19h00 on 19 September 2018.

[10] Both parties filed notes on arguments during the morning of 20 September 2018.

[11] The court found instructive guidance in the case of IA Bell Equipment Company Namibia (Pty) LTD v Roadstone Quarries CC<sup>1</sup>.

[12] Instead of directly referring to the actual pleadings in the matter (to which the court had regard), it will suffice to refer to the Pre-Trial Order of 27

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<sup>1</sup> (I 601-2013 P 1 4084-2010) [2014] NAHCMD 306(17 October 2014), paragraphs [40] to [62].

November 2017, which adopted and ordered paragraphs 1 to 3 of the Joint Pre-Trial Report of 22 November 2018.

[13] Defendants applied for sub-sub-paragraph 3.3.4 and sub-paragraph 3.4 under the heading "FACTS NOT IN DISPUTE" to be moved to "ISSUES OF LAW TO BE RESOLVED" (paragraph 2 of the pre-trial report).

[14] The said referred to two paragraphs read as follows:

*"The sale and transfer of the property would comply with the statutory requirement detailed in the Local Authorities Act 23 of 1992 (as amended) including the obtaining of the approval by the Minister of Regional, Local Government and Housing.*

*The conclusion of a written sales agreement and registration of Transfer of property by Local Authorities are subject to approval by the Minister of Regional and Local Government, and Housing in terms of Section 63(1) of the Local Authorities Act, 1992 (Act No.23 of 1992)".*

[15] Although interlocutory in nature, the application by defendants have effectively paid put to 3 of the 4 trial days and the court vacated the 4 trial days as a result thereof.

[16] Despite defendants protestations that the case could still commence, the court was not willing to create a part heard case and the plaintiff understandably need time to consider whether it need to file supplementary witness statements.

[17] Late amendments of pleadings or a pre-trial order violate the overriding objective of judicial case management to bring expeditious closure to litigation.

[18] Parties are usually bound by their pre-trial reports, which constitute their binding compromise. Vide Rule 26(10) of the Rules of the High Court.

[19] Late amendments call for reasonable explanations.

[20] In the circumstances of this case and taking into account the pleadings in the matter, instructing counsel's explanation was reasonable and satisfactory, and is accepted.

[21] The amendment is allowed in part.

[22] The contents of sub-sub-paragraph 3.3.4 and sub-paragraphs 3.4 is moved to Issues of Law to be resolved and renumbered as sub-paragraphs 2.39 and 2.40.

[23] Three trial dates were wasted. Defendants applied for an indulgence. The court, in the circumstances, are not bound by the capping in Rule 32(11). In any event, the plaintiff was unsuccessful in its opposition. Not being the successful party, its costs will not be capped.

[24] In the result, the following orders are made -

[24.1] The contents of sub-sub-paragraph 3.3.4 and sub-paragraphs 3.4 in the pre-trial report is moved to "Issues of Law to be Resolved" and renumbered as sub-paragraphs 2.39 and 2.40.

[24.2] The defendants shall pay the cost of plaintiff for 3 trial days, which shall include the costs of the application, not being capped by Rule 32(11), inclusive of the costs of one instructing and one instructed counsel on a party and party scale.

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GH Oosthuizen  
Judge

APPEARANCE:

APPLICANTS/DEFENDANTS T Phatela  
Instructed by Kadhila Amoomo Legal  
Practitioners, Windhoek

RESPONDENT/PLAINTIFF A Van Vuuren  
Instructed by Behrens & Pfeiffer, Windhoek