

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON AMENDMENT TO COUNTERCLAIM

Case no: HC-MD-CIV-ACT-MAT-2017/00615

In the matter between:

JULIANA NAAPOPYE ANDJAMBA APPLICANT/DEFENDANT

and

MOSES TALENI-YATALE ANDJAMBA

RESPONDENT/PLAINTIFF

Neutral Citation: *Andjamba vs Andjamba* (HC-MD-CIV-ACT-MAT-2017/00615) [2018]
NAHCMD 90 (26 February 2018)

CORAM: PRINSLOO J

Heard: 06 FEBRUARY 2018

Delivered: 22 FEBRUARY 2018

Reasons: 26 FEBRUARY 2018

ORDER

1. The defendant's leave to amend its counterclaim is granted.
 2. The defendant is to pay the plaintiff's costs occasioned by the amendment application.
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RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

PRINSLOO J:

[1] This ruling is based on the issue involving an application made by the defendant to amend its counterclaim. This is necessitated to deal with disputes involving immovable property acquired in the duration of the marriage between the parties in this matter. For purposes of this ruling, I shall refer to the parties as in the main action.

Factual Background

[2] The parties were married in the Omusati Region at Anamulenge Roman Catholic Church on 6 May 2016. Three children are born of marriage between the two parties. On 21 February 2017, the plaintiff instituted divorce proceedings against the defendant on grounds of malicious desertion amongst others. The defendant filed a notice of intention to defend the proceedings on 6 March 2017 and after pleadings were exchanged, the parties went on to mediation which failed and concluded that a welfare report would be required to determine custody and control.

[3] On 24 August 2017, the defendant filed a notice of intention to amend its counterclaim to the plaintiff's claim seeking to join three additional parties to the

counterclaim. On 29 August 2017, the plaintiff opposed the intention to amend by raising the following grounds:

3.1. Whether a party may utilise rule 52 as opposed to rule 40 to join additional parties.

3.2. Whether a party whose “joinder” is sought ought to be notified of the “joinder” proceedings.

3.3. Locus standi specifically whether in the founding affidavit the deponent has alleged that she is authorised to institute and prosecute the application for an amendment.

[4] What is seemingly forming the key issue in dispute is with regards to donations of immovable property. The facts surrounding the immovable properties are as follows:

4.1. The plaintiff acquired two immovable properties prior to the marriage and during the subsistence of the marriage, Erf 9687 and Erf 9805 (portions of Erf 8445) Extension 15, Katutura, Windhoek, Republic of Namibia was purchased. Two mortgage bonds are registered on the property and both parties contributed to the maintenance and payment of the mortgage bonds.

4.2. The parties also acquired immovable property to wit, a traditional homestead in Okamboola Village, Ruacana constituency, Republic of Namibia as well as a plot in Rehoboth. Both parties contributed to the acquisition and maintenance of the aforesaid immovable properties. In addition, the parties acquired another immovable property to wit, No. 543 Extension 1, Outapi, Republic of Namibia, to which the parties contributed to its acquisition and maintenance.

4.3. On 23 March 2016, the plaintiff donated Erf 9805 to Taleni Shirley Andjamba and Naindji Hileni Andjamba as children of the plaintiff. Further some time later, Erf No. 543

Extension 1, Outapi, Republic of Namibia was donated to Taleni Shirley Andjamba. In this regard, the defendant makes the submission that the title deed reflected the plaintiff as an unmarried person.

Issues in dispute

[5] Essentially the parties to this dispute are not *ad idem* in terms of the governing regime of the marriage solemnized between them. The divorce action instituted by the plaintiff is based on notion that the marriage took place out of community of property by virtue of the Native Administration Proclamation 15 of 1928 as a marriage solemnized above the “Red Line”.

[6] The defendant counterclaimed the plaintiff’s claim, seeking an order declaring the marriage in community of property and to set aside the donations of the aforesaid properties allegedly done without her consent or knowledge.

Plaintiff’s submissions

[7] The plaintiff takes issue on the fact that the intended amendment application seeks to join third parties that are not parties to the application. The plaintiff makes reference to the defendant’s replying affidavit wherein the defendant indicated that prior to an order of court joining the third parties, there is no requirement to serve those parties. The plaintiff further submits that the approach of the defendant in this regard is premised on the notion that once the three defendants are joined, they shall have an opportunity to defend the counterclaim. The plaintiff in this respect further cites *United Africa Group (Pty) Ltd v Uramin Incorporated*¹ where Masuku J made the following observation:

“I am accordingly of the considered view that the application for joinder cannot and should not be granted in the present circumstances, where the parties affected by it are not

¹ [2017] NAHCMD 315 (3 November 2017) at para 34.

cited and have not been served with the application to enable them to place their position before court and try as they may, to influence the direction that a proper order, which caters for all the interested parties' rights and interests is made.”

[8] The plaintiff is further of the view that the failure to serve and notify the three defendants is fatal to the application and should be dismissed with costs.

[9] With regard to the applicable rule to join the three defendants, the plaintiff submits that it is common cause that the defendant chose to join the three identified parties by way of an amendment to the pleadings in terms of rule 52. The plaintiff is of the view that joinder of parties may only occur in terms of rule 40 for the following reasons:

9.1. Rule 40 was crafted with the sole purpose of being an instrument to be utilized by court and parties in determining whether a party should be joined to any proceedings pending in the high court.

9.2. It would be improper to allow interpretations that allow an applicant to utilize two separate court rules to the same request. Furthermore, to allow parties joinders by way of rule 52 would render rule 40 redundant.

[10] Further on the point of *locus standi*, the plaintiff is of the view that it is common cause that the defendant admitted to the allegation that the institution and prosecution of the application was not addressed in the founding papers. In this regard, the plaintiff submits that the founding affidavit ought to have contained the allegations required for *locus*. The plaintiff cites *Stipp and Another v Shade Centre and Others*² where the court held the following:

“In a long line of cases the Courts have stated as a general rule that an applicant in motion proceedings must set out his cause of action and supporting evidence in his founding

² (SA 29/2006) [2007] NASC 2 (18 October 2007) at para 29.

affidavit. It is only in exceptional circumstances that the Court will allow an applicant to supplement its allegations in a replying affidavit in order to establish its case.”

The plaintiff further submits that the defendant had to plead exceptional circumstances in order for the court to exercise its discretion and allow the essential averments for *locus standi* to be made in the replying affidavit. The plaintiff cites *Coin Security Namibia (Pty) Ltd v Jacobs and Another*³ where the court made the following observation:

“I do not find any special or exceptional circumstances in this case such as to move the Court to exercise its discretion to allow the new matters to remain in the replying affidavit filed by applicant in this matter.”

The plaintiff concludes that failure to aver *locus standi* to institute and prosecute the application by way of the founding affidavit is fatal and the application should be dismissed with costs.

Defendant's submissions

[11] With regards to the joinder issue, the defendant submits that amendment sought by it does not join the parties until the amendment is allowed, i.e. the defendant only seeks to introduce three parties to the pleadings in her counterclaim. If the amendment is granted, the defendant further submits that only then will she be obliged to serve the counterclaim on the three parties to afford them the opportunity to defend the action/relief sought against them. To that effect, the defendant is of the view that it is not necessary to bring a joinder application as the defendant is entitled to serve her counterclaim as initiating a new cause of action on the parties so introduced by the amendment.

³ 1996 NR 279 (HC) at pg. 288F.

[12] The defendant, in light of the above, submits that the amendment can therefore not be dismissed even if the amendment seeks to join new parties to the proceedings, which is according to the defendant is not the case and is denied.

[13] With regards to the *locus* issue, the defendant submits that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit and that it is the institution of the proceedings and prosecution thereof, which must be authorised. The defendant submits that in the present matter, it is the legal representative of record acting on behalf of the defendant and on instructions of the defendant who is instituting and prosecuting the matter. Further to this, the defendant submits that even if no proper resolution in respect of authority is in existence, it can be taken and provided at a later stage and this would operate retrospectively⁴ and this can be done in the defendant's replying affidavit as well as by the defendant's confirmatory affidavit confirming such authority. In this regard, the defendant submits that it had ratified the apparent lack of authority to institute the application by deposing to an affidavit in reply.

[14] The defendant further submits that in essence, amendments should be allowed to properly ventilate the dispute between parties, subject to being able to cure any prejudice by a cost order or a postponement. The defendant submits that a refusal of this application shall fall foul of this principle.

[15] The defendant further submits that the plaintiff did not show or plead prejudice at all. Further, the amendment sought to be introduced by the defendant should be allowed in that if it is established that the marriage between the parties is one of community of property, and the amendment is not allowed, this will result in severe loss to the defendant.

⁴ *JB Cooling and Refrigeration CC v Dean Jacques Willemse t/a Windhoek Armature Winding and Others* (A 76/2015) [2016] NAHCMD 8 (20 January 2016).

[16] The defendant is further of the view that the amendment does not alter the cause of action relied on. The proposed amendments seek only to introduce essential parties in light of the alienation of the marital properties.

Conclusion

[17] The essential issue in dispute in this matter surrounds what would be in my view, the status regarding the matrimonial regime and the immovable property acquired in the marriage. Essentially, these are two very important issues that would finalise many other disputes or potential disputes if the court is to properly adjudicate in trial.

[18] The fact that the plaintiff raised technical grounds to objecting the amendment and not clearly indicating the prejudice it would suffer if the amendment is to be allowed gives this court the indication that no circumstances exist to persuade this court not to grant the amendment, with the order as to costs for the amendment and this hearing.

[19] What would ultimately result in the amendment application is that, once the amendment is granted, the defendant would then again have to make an application for joinder in terms of rule 40 (5) to have the three parties joined to the main action, which would then again delay the proceedings.

[20] However, I am alive to the fact that the defendant has made allegations in respect of immovable properties that were seemingly donated without her knowledge and consent, which at trial, the defendant may provide evidence to contradict or label the donations as illegal. The defendant's interests in respect of the immovable property is well laid out and requires the court to make a determination on this issue.

[21] In the result, I then make the following order:

1. The defendant's leave to amend its counterclaim is granted.

2. The defendant is to pay the plaintiff's costs occasioned by the amendment application.

J S Prinsloo
Judge

APPEARANCES:

FOR THE PLAINTIFF:

A N Hans-Kaumbi

of Ueitele & Hans Inc., Windhoek

FOR THE DEFENDANT:

E Angula

of AngulaCo Inc., Windhoek