

IN THE HIGH COURT OF NAMIBIA

Case Title: BANK WNDHOEK LIMITED V CONGRESS OF DEMOCRATS	Case No: HC-MD-CIV-ACT-CON-2017/00123
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 12 MAY 2019
	Date of order: 19 JUNE 2019
	Reasons delivered on: 19 JUNE 2019
Neutral citation: <i>Bank Windhoek Limited v Congress of Democrats</i> (HC-MD-CIV-ACT-CON-2017/00123) [2019] NAHCMD 206 (19 June 2019)	
Results on merits: Application for leave to amend amended particulars of claim. No decision on the merits	
The order: Having heard ADV R TÖTEMEYER for the Applicant and MR A VAATZ , for the Respondent, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The plaintiff's application for leave to amend its amended particulars of claim is hereby granted. 2. The plaintiff to pay the costs occasioned by the amendment, as tendered. 3. The first defendant to pay the costs of the application for leave to amend, consequent upon the employment of one instructing and one instructed counsel on the ordinary scale. 4. The amended particulars of claim must be filed on or before <u>26 June 2019</u>. 5. The defendant must plead to the amended particulars of claim on or before <u>17 July 2019</u>. 6. The matter is postponed to 25 July 2019 at 15:00 for Status Hearing. 	
Reasons for orders:	
<u>Introduction and brief background</u> [1] In this application brought before me the plaintiff ¹ is seeking an order in terms of which it be granted leave to amend its amended particulars of claim in terms of Rule 52 of the High Court Rules. The defendant	

¹ Parties are referred to as they are in the main action.

however objects to the proposed amendments and prays for the application for amendment to be dismissed with costs.

[2] On 19 January 2017 the plaintiff instituted summons against the first to fourth defendants, but it's only the first defendant that defended the action. On 12 October 2017 the plaintiff filed its amended particulars of claim. This amendment was initially objected to by the first defendant, however the objection was later withdrawn. Plaintiff, in a nutshell, seeks payment for the outstanding balance (together with interest and costs as agreed between the parties) of a loan, a mortgage bond and suretyships for the loan. The plaintiff, with its amendment, seeks to clarify and amplify their claim and introduce alternative claims for enrichment and damages against the defendants. The latter reliefs were occasioned by the nature of the defence raised by the first defendant.

Parties' submissions

First defendant

[3] The first defendant raised nine objections to the proposed amendments, which in summary, are as follows: (a) plaintiff failed to attach the standard conditions relied upon by the plaintiff as the written agreement of the overdraft facilities; (b) plaintiff failed to plead the name of the person who represented the first defendant in the overdraft agreements; (c) it is not alleged in terms of what authority (resolution) third defendant was authorised to represent first defendant in concluding the mortgage loan agreement; (d) it is not alleged in terms of what authority the second and fourth defendants were authorised by first defendant to represent the latter in entering into the first and second commercial loan agreement as well as the second written mortgage loan agreement ; (e) the amounts claimed to be owed as alleged in the proposed amended particulars of claim and the prayers as well as the amount of the second mortgage loan agreement differs; (f) plaintiff failed to allege precisely what amounts have actually been paid to first defendant and precisely to whom, authorised by first defendant, the money was paid to and received; and (g) plaintiff failed to allege who, on behalf of the first defendant, authorised the plaintiff to register the respective bonds against the property of the first defendant.

[4] In amplification of the above objections Mr Vaatz, counsel for the first defendant, argued that the word '*by whom*' contained in Rule 45(7) require the plaintiff to state the exact name of the person or his or her status in first defendant's organisation and not merely stating '*a duly authorised representative*' in its particulars of claim. In this regard the proposed amended particulars of claim are vague and embarrassing for non-compliance with Rule 45 (7) and also Rule 45 (6) as the above averments is evasive and vague.

[5] Mr Vaatz submitted that the standard conditions which are referred to in the overdraft facility letters² have not been annexed to the particulars of claim and doubt whether the first defendant received the said conditions at the time the alleged overdraft facilities were granted to the first defendant. He further submitted that the tacit portion of the agreement referred to in the particulars of claim cannot be seen nor analysed from the letter granting the overdraft facilities. This makes it impossible for the first defendant to plead and therefore prejudicial in that regard.

[6] On the question of authority, Mr Vaatz argued that the proposed amended particulars of claim and the documents attached to the pleadings ie the mortgage loan agreement, first and second commercial loan agreement and second mortgage loan agreement, do not allege in terms of what authority the third defendant (in respect of the mortgage loan agreement) and second and fourth defendants (in respect of the first and second commercial loan agreement and the second mortgage loan agreement) was authorised to represent the first defendant in concluding these agreements. Mr Vaatz further argued that the plaintiff failed to allege and prove precisely what amounts have actually been paid to first defendant, precisely to whom and when and whether the person to whom payment was made was authorised by first defendant to receive the money on behalf of first defendant. Counsel further argued that the plaintiff makes no allegations as to the existence of a power of attorney authorised by first defendant authorising plaintiff to register the respective bonds and no properly signed power of attorney is annexed to the proposed amended particulars of claim in respect of the four bonds registered in favour of the plaintiff.

[7] Mr Vaatz further submitted that the different amounts claimed by the plaintiff leads to a confusion and prejudices the first defendant as it is vague and embarrassing to have to deal with different figures for the amounts of the loan as well as the claims by plaintiff against first defendant.

[8] As to costs, Mr Vaatz argued that first defendant is entitled to maintain that its objections to the proposed amendments were justified and that costs should thus not be awarded against it. He further argued that plaintiff is entitled to amend its particulars of claim in order to present the real issues, but that such amendments must not be vague and embarrassing and prejudicial to first defendant. First defendant must be informed of all material facts relating to plaintiff's claim so as to enable first defendant to plead.

Plaintiff

[9] Counsel for the plaintiff, Adv Töttemeyer, submitted that the standard conditions referred to in the overdraft facility letters are more than 10 years old in some instances and plaintiff cannot locate copies of the

² Annexure OD1-OD8 to the proposed amended particulars of claim.

said terms and conditions despite a diligent search. It is his argument that the plaintiff may still prove such terms with evidence. It is his submission that the overdraft facilities have been settled however they form part of the background leading to the conclusion of the agreements alleged in the main claim and serve as important material background because the overdraft facilities constituted the *causae* for the bonds and sureties still in existence. The said terms and conditions, he argues, are not part of the claims of the plaintiff against the defendants and that the terms and conditions relied upon are fully pleaded and the first defendant has an option to admit, deny or confess and avoid such terms and conditions,

[10] Counsel further submitted that the question of '*authority*' and whether the first defendant '*cannot find out*' whether a person, who represented the first defendant in concluding the various agreements, was a representative of the first defendant to an agreement are questions of evidence to be determined by the Court during the trial. He submitted that pleadings should contain facts and not evidence required to establish the facts. He further argued that it is not necessary to plead unnecessary allegations as well as unnecessary *facta probantia*. No prejudice will be suffered as the first defendant can plead any dispute it believes to exist with regard to the authority and address the matter further in evidence during trial and in any event the nature of the alleged prejudice is not explained by first defendant. He further submitted that the plaintiff complied with Rule 45 (7) in that the rule merely requires the plaintiff to plead who concluded the agreement ie who the parties to the agreement were and not the specific name of the relevant representative of the party. If the plaintiff does not specify the exact name of the person does not render the claim vague and embarrassing and does not go to the root of the cause of action.

[11] Counsel further submits that a bond may be registered for an amount in excess of the amount borrowed by a client of the plaintiff and that payment made in respect of the mortgage bond amount would reduce the outstanding balance over time. He therefore submits that the different amounts claimed are in respect of the different claims as well as the amounts claimed in the alternative and that the difference in the amounts is sufficiently pleaded with particularity to which the first defendant can plead.

[12] Adv Töttemeyer further argued that if the first defendant disputes the validity of the relevant mortgage bonds in regard to authority, it is free to plead such defences and which will then ultimately be dealt with in evidence.

[13] In conclusion, counsel submits that as to costs, the matter is complex and justified the engaging of counsel. He submitted that the costs should not be capped in terms of Rule 32 (11) and that the plaintiff should recover its full costs.

Applicable law

[14] The principles of amendments have been considered by our courts on numerous occasions. These principles are very clear and were summarized in a Supreme Court judgment of *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*³ wherein Maritz JA, Strydom AJA and O'Regan AJA stated the following:

[38] 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'

[15] And

[39] A further principle governing amendments is that a pleading may not be amended if the result would be excipiable on the basis, for example, that the amended pleading would not disclose a cause of action. Again a court may permit an amendment, even if it would render the pleading excipiable, if exceptional circumstances exist. In order for a pleading to disclose a cause of action, it must set out every material fact, which it would be necessary for the plaintiff to provide to support his or her right to the order sought.'

[16] In *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*⁴ Damaseb, JP, Hoff, J and Ueitele J, referred to the case of *Moolman v Estate Moolman* wherein it was held that:

[28] The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

[17] In the *I A Bell Equipment Company (Namibia) (Pty) Ltd* matter⁵ Damaseb, JP, Hoff, J and Ueitele J, held that

[55] Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judiciallyThe overriding consideration is that the parties, in an adversarial system of justice, decide

³ (SA 33-2010) [2013] NASC 11 (19 August 2013). See also *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084 [2014] NAHCMD 306 (17 October 2014).

⁴ Ibid footnote 3.

⁵ Ibid footnote 3.

what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings . . . A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought . . . A court cannot compel a party to stick to a version either of fact or law that it says no longer represent its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.

[18] On the issue of what should be contained in pleadings, Rule 45 (7) of the High Court Rules provides that:

‘A party who in his or her pleading relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or the part relied on in the pleading must be annexed to the pleading.’

[19] Geier, J in *China Henan International Cooperation (Pty) Ltd v De Klerk and Another*⁶ had the occasion to deal with the issue raised in terms of Rule 45(7). This case makes reference to rule 18(6) of the old rules of the High Court, which corresponds with rule 45(7) of the new Rules of the High Court. The Court held that the non-compliance with rule 18(6) by a plaintiff is not necessarily fatal to a summons and accordingly held that:

‘[17] Surely the averments relating to - where the contract was concluded – and - who acted on behalf of the parties at the time – must be ancillary to- and do not constitute material facts which a pleader, pleading a cause of action in contract, must necessarily set out in order to generate claim particulars which sustain a valid action based in contract. The material fact, which most certainly has to be pleaded, must, at the very least, be the allegation that a contract was concluded between the parties.’

[20] And

‘[18] It surely is the requirements of the substantive law which determine whether or not valid cause of action has been made out and not the particular compliance or non-compliance with the rules of court.’

Application of the law to the facts

[21] Parties are allowed to amend their pleadings at any stage of the proceedings in order for the real issues between them to be ventilated, however such amendments can only be allowed if: (a) no prejudice is

⁶ 2014 (2) NR 517 (HC).

caused to the other party and (b) such prejudice can be cured by an appropriate cost order. Parties should however note that the courts will not allow a party to amend pleadings without good reasons advanced and for parties to change their positions as they go along and as circumstances suit them. Concrete arguments must be advanced for wanting to amend once pleadings and also the objectives of judicial case management must be borne in mind ie the speedy and inexpensive disposal of cases before the Court.

[22] In *China Henan International Cooperation (Pty) Ltd* case⁷ the particulars of claim was silent as to: (a) where and (b) by whom the agreement was concluded. The particulars of claim however disclosed that: (a) the contract relied on was an oral lease agreement, and (b) disclosed when the agreement was concluded. The court in the *China Henan's* case held correctly that despite the non-disclosed facts, the remainder of the pleaded facts, in the circumstances of that particular case, covered all the material allegations required to make out a cause of action. In that case there was substantial compliance with the provisions of Rule 45(7), which is the same as in the present instant. It is therefore my considered view that substantial non-compliance with rule 45(7) does not render the particulars of claim vague and embarrassing as long as long as the material facts relied upon has been alleged.

[23] The process and considerations for an application for leave to amend is provided by Rule 52 (9), which provides that:

'The court may during the hearing at any stage before judgment, grant leave to amend a pleading or a document on such terms as to costs or otherwise as the court considers suitable or proper.'

[24] The principles on amendments, as elucidated above, are very clear and I see no reason why I should deviate from the said principles. The court, ultimately, has the judicial discretion to uphold or not an application for leave to amend depending on the circumstances of each particular case and that such amendments should be granted in order for the disputes between the parties to be properly ventilated in order to determine the real issues between them. This court cannot find that the plaintiff's application for an amendment was brought mala fide and that such amendments will cause prejudice to the defendant which cannot be cured by an appropriate cost order. I say so because the objections raised by the defendant are objections that can be cured by leading evidence during trial. To require the plaintiff to plead more than what is necessary will ultimately result in pleading evidence, which is not allowed by our courts. What is required is for the plaintiff to plead *facta probanda*, which I am satisfied the plaintiff has done. Should the court refuse the application for amendment it will effectively close the doors of court to the plaintiff to put proper facts

⁷ Supra footnote 6.

before court and for real issues between the parties to be established and resolved.

[25] This court must make an order that meets the justice of the case and having regard to the submissions made by Adv Totemeyer, the court is of the view that this is a case where the court will allow the plaintiff to amend its amended particulars of claim as the application is made bona fide and that no injustice will be occasioned by the first defendant as the latter can either admit, deny or confess and avoid any allegations advanced in the amended particulars of claim.

[26] As to the issue of costs I see no reason why the court should deviate from awarding costs capped in terms of Rule 32 (11) as no special circumstances were raised for me to rule otherwise.

[27] My order is therefor as set out above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Adv Totemeyer Instructed by Dr Weder, Kauta & Hoveka Inc.	Mr A Vaatz Of Andreas Vaatz & Partners