

“ANNEXURE 11”
IN THE HIGH COURT OF NAMIBIA

Case Title: NORBERT HERCULES vs SUBTECH (PTY) LTD, T/A SUBTECH GROUP	Case No: HC-MD-CIV-ACT-CON- 2016/02829
	Division of Court: High Court, Main Division
Heard before: Honourable Justice Herman Oosthuizen	Date of hearing: 15 May 2020
	Delivered on: 12 June 2020
Neutral citation: <i>Hercules v Subtech (Pty) Ltd T/A Subtech Group</i> (HC-MD-CIV-ACT-CON-2016/02829) [2020] NAHCMD 223 (12 June 2020)	
Result on merits: Leave to appeal. Declined.	
The order: Having heard counsel for the plaintiff and counsel for defendant – IT IS ORDERED THAT: [1] Leave to appeal is declined. [2] Applicant/Defendant shall pay the litigious out of pocket taxed expenses incurred by the plaintiff in pursuing his opposition to the leave to appeal. [3] The matter is postponed to 20 July 2020 at 14h30 for a Status Hearing.	
Reasons for orders:	
[1] This is an application for leave to appeal against the Ruling and Orders of this Court on 24 January 2020 refusing leave to amend the applicants/defendants plea and to file an additional special plea, and ordering that the citation and description of applicant/defendant in the summons and in the amended particulars of claim be altered	

to read "Namibia Subtech Diving and Marine (Pty) Ltd".

[2] At the outset it must be noted that when the Court ordered the alteration of the description of the defendant it had no formal application before it to do so. It had a request by the amicus curiae counsel before it, recorded in the plaintiff's heads of argument. The request however was not divorced from reality in that the essence of the interlocutory dispute was the description of the defendant and who the defendant actually is.¹

[3] It is common cause between the parties that the applicant/defendant raised an exception on 10 February 2017 when the plaintiff was no longer legally represented. This first exception was abandoned when plaintiff was again represented and filed an amended particulars of claim on 10 July 2017. A second exception was thereafter launched by the applicant defendant on 17 July 2017, only to be withdrawn again on 24 November 2017, whereafter the applicant/defendant pleaded.

[4] In its pleading on 15 February 2018 the applicant/defendant pleaded specially that Act 30 of 1941 applies and that plaintiff is non-suited in terms of section 7(a) thereof. Applicant/defendant further admitted the receipt of the summons, knowledge of plaintiff, its registered place of business, that the cause of action arose in this Court's jurisdiction, that it entered into the written agreement with plaintiff on 27 August 2013 at Walvis Bay, that it employed plaintiff as diver and that plaintiff was injured in an accident while working for it.

[5] Annexure "A" and "B" to the plaintiff's amended particulars of claim are not disputed. Annexure "A" bears the logo "Subtech Group" on every of its 12 pages. Annexure "B" bears the same logo and is signed on behalf of "Subtech (Pty) Ltd". No wonder that plaintiff cited the defendant as "Subtech (Pty) Ltd t/a Subtech Group". Defendant clearly represented itself as such to the plaintiff.

[6] The Court's Ruling and Orders on 24 January 2020 is quoted verbatim hereunder:

'1. Although this is merely a Ruling on an interlocutory application for the amendment of a plea

¹ Du Toit v High Carriers and Another 1999(4) SA 564 (W) and 569 J to 570 D.

and adding a special plea, it is important to provide a brief summary of the background of the main action and the events which lead up to the current application.

2. For ease of reference, I shall refer to the parties as the Plaintiff/Respondent and Defendant/Applicant during the initial part of this background summary when referring to the main action and thereafter I shall refer to the parties simply as the Defendant and Plaintiff when dealing with the merits of this application.

3. The Plaintiff/Respondent instituted an action against Subtech (Pty) Ltd T/A Subtech Group for a claim of damages.

4. Plaintiff/Respondent in the main action relies on a contract of employment and it is alleged that the damages claimed arose from an accident which occurred during his scope and tenure of employment with the Defendant/Applicant allegedly due to the latter's gross negligence.

5. The summons was served on the Defendant/Applicant at its principal place of business and/or registered address in Walvis Bay, Namibia. The Defendant/Applicant defended the action and before pleading, filed a notice to except to the Plaintiff/Respondent's particulars of claim based on grounds that it failed to disclose a cause of action against the Defendant/Applicant and/or does not contain all the necessary averments to sustain a cause of action against the Defendant/Applicant. The Plaintiff/Respondent then filed a notice to amend his particulars of claim and since there was no opposition noted, continued to file his amended particulars of claim.

6. Defendant/Applicant withdrew its notice to except and a Case Plan was issued by this Court ordering the parties to exchange further pleadings and make discovery.

7. The Defendant/Applicant filed a Plea and Special Plea. The special plea was based on Section 7(a) of the Employee's Compensation Act 30 of 1941 which states that no action at law shall lie against an employer for damages. The plea admitted (my emphasis) that it was the Defendant/Applicant in the relevant paragraphs where the Defendant/Applicant was referred to however denied most of the remaining allegations made by the Plaintiff/Respondent relating to the reason for the accident and the alleged damages suffered.

8. On 5 November 2018, the Defendant/Applicant filed its notice of intention to amend which was subsequently opposed to by the Plaintiff/Respondent in person and gave rise to this current application. It must be noted that the Plaintiff/Respondent was without legal representation at the time and filed the notice to oppose personally wherein he listed numerous grounds for opposition.

This Court appointed Mr Marcus Nixon as amicus curiae on the 18th of February 2019.

The Application to amend:

9. The Defendant seeks leave to amend its plea and add a special plea of non-joinder and/or mis-joinder.

10. The Defendant avers that the “defendant” referred to in the pleadings is in fact a separate legal entity called “Namibia Subtech Diving and Marine (Pty) Ltd i.e Subtech Namibia”, a private company and not the “defendant” company as cited i.e Subtech (Pty) Ltd T/A Subtech Group and that the correct entity has therefore not been joined/cited.

11. Furthermore, that the Plaintiff was never employed by Subtech Group Holdings, which is a separate legal entity, and that the Defendant bear no knowledge of an entity named “Subtech (Pty) Ltd T/A Subtech Group” as cited, and therefore this amounted to a mis-joinder.

12. Defendant seeks to (a) substitute, in its plea and special plea, the word “defendant” wherever it occurs for the word “Namibia Subtech Diving and Marine (Pty) Ltd”; (b) plead over that the correct defendant to have been sued is Namibia Subtech Diving and Marine (Pty) Ltd; and (c) withdraw its admission that it is the defendant.

13. It is the Defendant’s case that the Subtech Group Structure consists of (i) Subtech Namibia (Namibia Subtech Diving and Marine (Pty) Ltd); (ii) Subtech South Africa (Subtech (Pty) Ltd); and (iii) Subtech Holdings (Subtech Group Holdings (Pty) Ltd) and therefore the wrong entity was sued.

14. In argument of why the amendment should be allowed, Defendant argued that Plaintiff’s notice of objection filed to this application is crucial as it is not the same version as in his answering affidavit.

15. Defendant argued that the intention of the Plaintiff was not to cite the Namibian entity, and that this is not a case of a wrong description but a case of a wrong party cited.

16. On the issue of costs, Defendant contended that due to the fact that the Plaintiff is represented by amicus curiae, costs may be costs in the cause.

The Respondent’s/Plaintiff’s Case:

17. The Plaintiff attended to the drafting and filing of the notice to object to this application in

person while unrepresented. I shall first deal with the grounds as set out therein and thereafter the answering affidavit filed by Plaintiff under legal representation of Mr Marcus as amicus curiae.

18. The notice to object raised the following objections:

18.1 That the notice to amend constituted an irregular step in terms of Rule 61 as pleadings had already closed and therefore the Applicant was not entitled to file any further pleadings. In Plaintiff's answering affidavit, and upon advice from legal counsel, Plaintiff abandoned this objection.

18.2 The objection refers to the history of how litigation unfolded and the argument that the correct entity had been cited by implication as a result of the Applicant/Defendant not only accepting service of the summons, but defending the matter and admitting in the initial plea filed that it was the defendant.

18.3 The Defendant had admitted that it was the Defendant in the pleadings and therefore it cannot be permitted to withdraw such admission.

18.4 The Plaintiff raised the issue of fairness and equality stating that the Defendant should not be allowed to attempt to dispose of this matter on mere technicalities but rather on the merits of the case.

18.5 The Plaintiff contended that because "Subtech Group" is the name displayed on all the documents, including his Employment contract annexed as "A" to the particulars of claim as well as the termination letter received by the Plaintiff from his employer, annexed as "B", he instituted action against the cited Subtech (Pty) Ltd t/a Subtech Group. From the Court's inspection of these documents, it is clear why Plaintiff/Respondent would have been under the impression that his employer was "Subtech Group". Annexure "B" clearly states in the subject line that the letter is with reference to: "Subtech Group" and the signatory for Defendant/Applicant signed under the title "Subtech (Pty) Ltd".

18.6 Lastly, the Plaintiff contended that due to his previous legal representative's failures to efficiently deal with this case, summons was served on the Namibian subsidiary of the Subtech Group (at the time, the Plaintiff was still under the impression that Subtech Namibia, as it is now clarified, was the wrong defendant and that the right defendant should have been Subtech Group).

19. The Plaintiff's Answering Affidavit:

19.1 Paragraph 7 of the affidavit the Plaintiff states as follows: "In paragraph 24 of my notice to oppose defendant's notice to amend its plea ("notice to oppose") I state among others that I was not employed by Namibia Subtech Diving and Marine (Pty) Ltd ... and that Subtech Namibia did not negotiate my employment contract. I am advised that this statement is, on the facts of this case, incorrect. I am advised by my legal practitioner that, as a matter of fact, I was employed by Subtech Namibia." (my emphasis)

19.2 The Respondent further therein submits that based on the facts he sued his former employer, Subtech Namibia. The summons was served on Subtech Namibia at its registered address at Walvis Bay. Subtech Namibia accepted that it is the correct defendant and on that basis defended the claim and filed its plea. As indicated herein above, on the documents in his possession (annexures "A" and "B") it was not unreasonable to deduct that Subtech Group was the employer, hence I do not find the citation of the Applicant in the main action as an incorrect party, but rather an incorrect description (induced by Defendant) of the correct party.

19.3 The Plaintiff contends that substance should be considered over form and I am inclined to agree with him on this point. No proper ventilation of the real issues can take place in this matter, should I hold otherwise.

19.4 The Plaintiff in paragraph 9 states that the Defendant presented itself as Subtech Group to the outside world and to the defendant, and based on the documentary evidence I am inclined to agree.

19.5 The Plaintiff in paragraph 12 contended that the resolution attached to the founding affidavit of this application is a resolution by Subtech (Pty) Ltd and not the correct defendant i.e Subtech Namibia. Plaintiff contended that the founding affidavit cannot be considered in any shape or form, as the correct defendant has not authorised the deponent to initiate the application for amendment.

Applicable Case Law and Reasoning:

20. *In DB Thermal (Proprietary) Limited and Another v Council of Municipality of Windhoek* (SA 33/2010) [2013] NASC11 (19 August 2013), paragraph 38 the Supreme Court has held that "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 ...” (Court’s underlining)

21. By allowing the amendments and additional special plea, the likely prejudice to the Plaintiff will be substantial and no conceivable costs order can cure the prejudice. The real issues for determination between the parties are likely never to be resolved.

22. The interest of justice and the overall objectives of judicial case management in this case require that the application for amendment should not be granted.

23. The Court is cognisant of the fact that should the amendment be granted, a special plea is raised which may be dispositive of the entire action.

24. It was always the intention of the Plaintiff to sue his former employer and substance must be taken over form. To reason otherwise, would allow an induced misdescription (by Defendant) to derail the main case and the ends of justice would never be met, which is, a proper ventilation of the real issues in dispute. The Defendant was described and cited exactly as it represented itself in the employment contract and its dismissal letter (“B”). It shall be a grave injustice if the Court allow the Defendant to capitalise on its own misrepresentation.

25. In the result and to prevent any further unnecessary interlocutories the Court orders that -

25.1 Applicant’s/Defendant’s application for leave to amend its plea and file an additional special plea is dismissed.

25.2 The citation and description of Applicant/Defendant in the summons and in the amended particulars of claim are altered to read “Namibia Subtech Diving and Marine (Pty) Ltd”.

25.3 Respondent/Plaintiff shall file his discovery affidavit and exchange the discovered documents on or before **14 February 2020**.

25.4 The matter is postponed to **24 February 2020** at **14h15** for a further **case management conference** and the parties must file a joint case management report on or before **20 February 2020**.

25.5 Defendant shall pay the litigious out of pocket taxed expenses incurred by the Plaintiff in pursuing his opposition to the proposed amendments.’

[7] When making its Ruling and Orders the Court was mindful of the overriding objectives of case management.

[8] A mis-description of a defendant cannot be the real issue to be determined in the circumstances at hand, although the defendant belatedly apply that the court should find that it was not a mis-description but the citing of a wrong party (out of this court's jurisdiction) and on the back of such finding want to specially plead a mis/non joinder in order to non-suit a plaintiff who was unrepresented during crucial periods of this action

[9] When defendant filed its notice to amend on 5 November 2018 the plaintiff was unrepresented. When plaintiff filed his notice to oppose on 16 November 2018, he was unrepresented. The parties were definitively not on an equal footing. It was for that reason that the court decided to appoint an *amicus curiae* for plaintiff, which it did on 18 February 2019. Only thereafter and under oath with legal counsel did the plaintiff file another objection which differs and attempt to rectify his earlier unguided objection.

[10] The fact that *amicus curiae* assist the court, without charge to the plaintiff, contributed thereto that the court, without another interlocutory, ordered the name change of the defendant, while the issue of the correct description was before court. The order is a logical consequence of the findings the court made. It was a limitation of interlocutory proceedings to what was strictly necessary (and expedient) in order to achieve a timely and fair disposal of the matter. Fairness is indeed part and parcel of the overriding objective. The benefit of legal advice and representation is mirrored in plaintiff's objection under oath and was given more weight than the earlier objection without legal counsel.

[11] Defendant is represented by the same legal counsel since it first defended the matter on 19 September 2016. Clearly the defendant made considered use of this benefit. Refer to paragraph [3].

[12] The application to amend its plea was clearly brought by a peregrine corporate entity in "Subtech Group" and not by the Namibian corporate entity of the same group. Plaintiff has invited this court during the amendment proceedings to find it impermissible,

which the court did not. The court allowed the ventilation of the issue (the amendment) at hand. Fairness to the defendant/applicant was exercised in the circumstances.

[13] Applicant for leave to appeal contends that the court's order concerning the rectification of defendants' description is final and appealable. It is an attractive argument. It however lose sight of the admissions of defendant and the reality of the real issue to be decided, which is whether the employer of the plaintiff is liable to compensate the plaintiff as claimed.

[14] The Ruling and Orders of this court is not definitive of the rights of the parties, nor disposes of a substantial portion of the relief claimed.

[15] The court is not convinced that there is a reasonable prospect that another court may come to different findings and a different conclusion. The court remain convinced that it made the correct findings and came to the correct conclusion in the circumstances. The order altering the description of the plaintiff was not incompetent in the circumstances set out above.²

[16] In the result, the following orders are made:

[16.1] Leave to appeal is declined.

[16.2] Applicant/Defendant shall pay the litigious out of pocket taxed expenses incurred by the plaintiff in pursuing his opposition to the leave to appeal.

[16.3] The matter is postponed to **20 July 2020** at **14h30** for a Status Hearing.

Judge's signature:	Note to the parties:
Counsel:	

² See *inter alia* paragraphs [2], [4], [5] and [7] to [10] above together with the Ruling quoted in [6].

Plaintiff(s)	Defendant (s)
Mr Marcus (amicus curiae) Nixon Marcus Public Law Office, Windhoek	Mr Obbes Mr Vlieghe Instructed by Koep & Partners, Windhoek