

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CIV-ACT-CON-2017/03587

In the matter between:

MARK ADCOCK
DEFENDANT

APPLICANT/

and

HOLLARD INSURANCE COMPANY OF NAMIBIA
LIMITED

RESPONDENT/ PLAINTIFF

Neutral Citation: *Hollard Insurance Company of Namibia Limited v Adcock* (HC-MD-CIV-ACT-CON-2017/03587) [2020] NAHCMD 317 (27 July 2020)

Coram: **PRINSLOO J**

Heard: 08 July 2020

Delivered: **27 July 2020**

Reasons: **28 July 2020**

Flynote: Civil Practice – Amendments of Pleadings – Should be allowed in order to obtain a proper ventilation of the dispute between the parties – Subject to the principle that the opposing party should not be prejudiced by the amendment.

Civil Practice – Litigant seeking amendment is craving an indulgence – Explanation must be offered why the amendment is sought – Explanation strongest when brought late in proceedings and/or where it involves a change of front or withdrawal of a material admission.

Civil Practice – Applicant to establish that the application to amend is bona fide – Amendments allowed unless the application to amend is mala fide

Summary: The defendant seeks to amend its plea to the plaintiff's particulars of claim. The basis for the defendant seeking an amendment in this matter is that (a) the defendant never consulted his erstwhile legal practitioner when the plea was drafted, delivered and/or formulated. The defendant therefore had no insight into the plea which was formulated on his behalf; (b) the plea which was drafted and delivered on behalf of the defendant does not contain a counterclaim however the defendant at all material times wanted to have a counterclaim introduced but was not assisted by his erstwhile legal practitioner to do so; (c) that the insurance policy agreement upon which the plaintiff relies for its claim against the defendant is meant to bear the number WK CMM 405518 but the document attached to the particulars of claim as annexure A as the policy agreement allegedly concluded between the parties does not reflect the said number; (d) that it appears from para 4.1 of the particulars of claim that the 'policy wording, policy schedule and the risk assessment form so allegedly completed by the Applicant/Defendant', constitutes the alleged agreement between the parties but does not form part of annexure A and has not been attached to the particulars of claim; (e) the document filed as annexure 'A' to the particulars of claim is the incorrect document and the admission originally made in the existing plea was a mistake; and (f) the admission which is sought to be withdrawn came about not as a result of the defendant's own doing but by circumstances beyond the defendant's control.

Held that the application for amendment in this matter is at a very late stage of the proceedings. The defendant at no stage intimated that his defence plea was not a true reflection of his case. The matter went through the JCM process and mediation and the issue of an inaccurate plea and the resultant proposed amendments was only raised in November 2019 when this application was launched.

Held that the contradictory versions in the statements deposed to by defendant calls into question the defendant's bona fides in launching this application at this late stage of the proceedings. Having considered the contradictory versions and the explanation advanced Court is not convinced that the application launched by the defendant to amend is bona fide.

Held that the objection raised in respect of the belatedness of the application and the bona fides of the defendant should be sustained and that the amendment should not be granted.

ORDER

1. Application to amend the plea of the defendant is dismissed with costs. Such costs to be limited to rule 32(11) and which costs include the costs occasioned by one instructed and one instructing counsel.

JUDGMENT

PRINSLOO, J

Background

[1] The matter before me has a long and rather multifaceted history, a history that I do not wish to repeat for purposes of the current proceeding but which I will refer to occasionally when discussing the current application. What is important to note is that apart from the current matter before me this court also dealt with the defendant's

application for rescission of judgment, which application was granted on 2 August 2019.¹

Case management history

[2] In order to consider the application before me it is important to have regard to the procedural history of this matter, which is as follows:

- a) Summons was issued during September 2017;
- b) The defendant defended the matter in October 2017.
- c) The defendant was ordered to deliver his plea on 24 November 2017 and to make discovery. The defendant delivered his plea on 27 December 2017 but made no discovery.
- d) *Litis contestatio* was reached in February 2018 after the plaintiff delivered its replication on 6 February 2018.
- e) The plaintiff delivered its discovery on 9 February 2018.
- f) Mediation was concluded in June 2018 and the pre-trial process commenced in July 2018.
- g) The defendant's lack of participation led to a number of delays and only during November 2018 the parties reached consensus regarding the proposed pre-trial order.
- h) The plaintiff delivered its witness statements on 3 December 2018.
- i) Sanctions were imposed on the defendant on 7 February 2019 and his defence was struck in terms of the Rules of Court as a result of the delays referred to above.
- j) On 22 February 2019 default judgment was granted against the defendant.
- k) On 8 May 2019 the defendant applied for rescission of judgement which was granted on 9 August 2019.
- l) The defendant subsequently filed his notice to amend on 16 September 2019.

¹ *Adcock v Hollard Insurance Company of Namibia (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/03587) [2019] NAHCMD 284 (02 August 2019).

m) The plaintiff filed its objection to the proposed amendments on 30 September 2019 and the defendant launched his application for amendment on 19 November 2019.

[3] From the papers before me it appears that the defendant's intention initially was to seek an amendment to his plea and to also introduce a counterclaim. However, the issue of the counterclaim is no longer relevant as the defendant issued summons in this regard under case number HC-MD-CIV-ACT-CON-2019/04961.

The claim

[4] On 1 December 2013 the parties entered into a written insurance agreement. On 21 March 2014 the defendant gave the plaintiff written notice of a defined and insured event having occurred and loss and damages suffered by the defendant on 6 March 2014 at the defendant's place of business due to a lightning strike.

[5] Subsequently during March 2014 the defendant represented to the plaintiff that he, as a result of this aforementioned lightning strike, suffered loss due to irreparable damage to the defendant's solar electricity system, including 144 batteries and 138 of the said batteries needed to be replaced.

[6] It is the case of the plaintiff that the defendant made a misrepresentation in that only 6 of the batteries needed to be replaced and as a result of the misrepresentation induced the plaintiff to act on thereon and pay the defendant a settlement figure of N\$ 736 197.35.

[7] The plaintiff seeks repayment of the said amount, plus interest and costs.

The basis for the proposed amendment

[8] The proposed amendment seeks to amend paras 2, 3 and 7 of the defendant's plea.²

² The plea to paras 3, 4 and 8 of the plaintiff's particulars of claim.

[9] The basis for the defendant seeking an amendment in this matter is that:

- a) The defendant never consulted his erstwhile legal practitioner when the plea was drafted, delivered and/or formulated. The defendant therefore had no insight into the plea which was formulated on his behalf;
- b) The plea which was drafted and delivered on behalf of the defendant does not contain a counterclaim however the defendant at all material times wanted to have a counterclaim introduced but was not assisted by his erstwhile legal practitioner to do so. However as aforementioned the defendant issued summons with regard to his counterclaim.
- c) That the insurance policy agreement upon which the plaintiff relies for its claim against the defendant is meant to bear the number WK CMM 405518 but the document attached to the particulars of claim as annexure A as the policy agreement allegedly concluded between the parties does not reflect the said number.
- d) That it appears from para 4.1 of the particulars of claim that the 'policy wording, policy schedule and the risk assessment form so allegedly completed by the Applicant/Defendant', constitutes the alleged agreement between the parties but does not form part of annexure A and has not been attached to the particulars of claim.
- e) The document filed as annexure 'A' to the particulars of claim is the incorrect document and the admission originally made in the existing plea was a mistake;
- f) The admission which is sought to be withdrawn came about not as a result of the defendant's own doing but by circumstances beyond the defendant's control.

General principles relating to amendments

[10] The amendment of pleadings is regulated by rule 52 of the Rules of Court and with specific reference to rule 52(9), which provides as follows:

'52(9): The court may during the hearing at any stage before judgment, grant leave to amend a pleading or document on such terms as to costs or otherwise as the court considers suitable or proper.'

[11] 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'

[12] In *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*⁴ 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 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.'⁵

[13] A reasonably satisfactory explanation for a proposed amendment is strongest where it is brought late in proceedings and/or where it involves a change of front or

³ (SA 33-2010) [2013] NASC 11 (19 August 2013).

⁴ (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

⁵ *Supra* para 55.

withdrawal of a material admission. In the latter instance, tendering wasted costs or the possibility of a postponement to cure prejudice is not enough.⁶

[14] The court also pointed out that the difficulty arises if the change of front is opposed by the other side. In that situation the change of front becomes the real issue between the parties and the court stated that although the court has no power to hold a party to a version it seeks to disown, it is entitled to hold it, as being an afterthought, the fact that it has withdrawn late in the day a concession consciously and deliberately made or to change a front persisted with for considerable time in the life of the case. The explanation offered for the proposed change, or lack of it, may well go to credibility and the overall probabilities of the case.⁷

The amendments sought

[15] The proposed amended sought are to change the defendant's plea to paras 3, 4 and 7 of the particulars of claim.

[16] It is important to refer to the particulars of claim and the corresponding plea of the defendant.

[17] In para 3 of the particulars of claim plaintiff pleaded as follows:

'3. On or about 1 December 2013 an at Windhoek alternatively Ngepi Camp, further alternatively Johannesburg, the plaintiff and the defendant, then and there acting personally, entered into a written insurance policy agreement with WK CMM 4058818 (the insurance policy). A copy of the insurance policy is annexed hereto "A".

- A. To which the defendant pleaded in para 2 of his plea: 'The defendant admits entering into an insurance with the defendant acting personally thereat.'
- B. Proposed amendment: Deletion of the existing paragraph 2 in its entirety and by the substitution thereof with the following paragraph which paragraph is to be numbered 3 and to read as follows:

⁶ *Ibid.*

⁷ *Ibid.*

'3. The Defendant admits entering into an insurance policy with the Plaintiff.

3.1 The Defendant however denies that such insurance policy so entered into with the Plaintiff is annexure "A" as attached to the Particulars of Claim as alleged or at all and the Plaintiff is put to the proof thereof.

3.2 The Defendant furthermore denies that the Plaintiff acted personally or that the Plaintiff was capable of acting personally as alleged and the Plaintiff is herewith given notice that the Particulars of Claim does not comply with the provisions of rule 45(7) of the uniform rules of court.'

[18] In para 4 of the plaintiff's particulars of claim plaintiff pleaded as follows:

'The following are salient and express, alternatively implied, in the further alternative tacit terms of the insurance policy:

4.1 The policy wording, the policy schedule and the risk assessment from completed by the defendant constitutes the agreement between the parties.

4.2 Subject to the terms, exceptions, conditions and provisions (precedent or otherwise) and in consideration of, and conditional upon the prior payment of the premium by the defendant, the plaintiff agrees to indemnify or compensate the defendant in respect of defined events occurring during the period of insurance and as otherwise provided under the sections up to the sums insured, limits or indemnity, compensation and other amounts specified.

4.3 The period of insurance shall take effect on 1 December 2013 and continue on a month-to-month basis until such time as the agreement is cancelled.

4.4 If any claim under insurance policy is in any respect fraudulent or if any fraudulent means or devices are used by the defendant, or anyone acting on the defendant's behalf, with the defendant's knowledge or with the defendant's consent to obtain any benefit under the insurance policy the benefit afforded under the insurance policy in respect of any such claim shall be forfeited.'

- A. To which the defendant pleaded in para 3 of his plea: 'The defendant admits the contents of these paragraphs.'

- B. Proposed amendment: By deleting the existing paragraph 3 in its entirety and by substituting it with the following paragraph which paragraph is to be numbered 4 and to read as follows:

'4. The Defendant pleads that the policy schedule, the policy wording and the risk assessment form so allegedly completed by the Defendant is not attached.

4.1 The Defendant consequently pleads that, as a result of what is pleaded above, the Defendant cannot, at this stage and until such documents had been provided and/or attached, admit and/or deny that such policy wording, policy schedule and risk assessment form completed by the Defendant and as referred to, constitutes the agreement between the parties.

4.2 Subject to the contents of sub-paragraph 4.1 above, and subject to the Plaintiff providing the Defendant with the correct copies of the referred to policy wording, the correct policy schedule and the correct risk assessment form allegedly completed by the Defendant and in compliance with the provisions of rule 45 of the rules of court, the Defendant admits that he entered into an insurance policy with the Plaintiff.

4.3 In the absence of the Plaintiff complying with rule 45 and providing the Defendant with the correct copies of the referred to policy wording, the policy schedule and the correct risk assessment form so allegedly completed by Defendant, the Defendant denies the contents of paragraph 4 of the Particulars of Claim.'

[19] In para 8 of the plaintiff's particulars of claim plaintiff pleaded as follows:

'Subsequently, and during or about March 2017, the defendant represented to the plaintiff that the defendant, as a result of the aforesaid defined and insured event, suffered loss as a result of irreparable damage to the defendant's solar electricity system, including 144 batteries and that, inter alia, 138 of the aforesaid batteries need to be replaced.

A. To which the defendant pleaded in para 7 of his plea: 'The defendant enlisted the services of an expert to determine the damage to the defendant's solar battery and electrical damage system, and which expert's assessment of the damages was forwarded to the plaintiff, who then, after plaintiff's assessor's own assessment, determined that the damage to the solar batteries and electrical system requires the replacement of all batteries..''

B. Proposed amendment: By adding additional paragraphs to the existing paragraph 7 thereof to be numbered and to read as follows:

'7.1 The Defendant denies that it ever represented to the Plaintiff and/or any representative and/or employee of the Plaintiff that all 144 batteries were damaged

and/or, that he ever informed the Plaintiff, and/or any representative and/or employee of the Plaintiff that 138 batteries needed to be replaced as alleged or at all and the Plaintiff is put to the proof thereof.

7.2 The Defendant pleads that he through (*sic*) maintained that only six batteries were blown but the experts and more particularly the expert employed by the Plaintiff i.e. a certain Johan Liebenberg, whom advised and/or recommended that all 144 batteries be replaced and not only six because and according to Johan Liebenberg, a system of batteries consists of battery banks which in turn consists of 24x2 v battery cells in a series.

7.3 The said Johan Liebenberg further advised and/or recommended that, should a single cell or various individual cells be damaged within a battery bank (as was the situation in this instance where 6 batteries (3 in one bank) were damaged), then the entire battery bank/banks be replaced.'

The objection to the proposed amendment

[20] The plaintiff objected to the intended amendments in terms of rule 53(4) read with rule 52(2) of the Rules of Court.

[21] The plaintiff opposed the intended amendments on five grounds and in summary its opposition thereto is as follows:

First objection

[22] The plaintiff's first ground of objection is that the proposed amendment to the plea of the defendant is raised at a very advanced stage in the proceedings where the case management procedure has been concluded and a pre-trial report has been filed. The plaintiff indicated that the proposed amendment will re-open the pleadings from plea stage and lead to further significant delays. The plaintiff submits that if the amendment is allowed then the plaintiff will be required to revisit and change its entire case as from replication stage and the plaintiff objects to such an approach, from a cost perspective and also due to the delays which will cause the plaintiff prejudice and infringe its Article 12 rights. The plaintiff further submitted that the proposed amendment lacks bona fides.

Discussion

[23] The application for amendment in this matter is at a very late stage of the proceedings. The joint proposed pre-trial order was adopted and made an order of court as far back November 2018 and technically this matter is ready to be allocated a trial date, and has been so for a considerable period of time already, at least on the part of the plaintiff. I agree with the plaintiff that this application is indeed belated even though no trial date has been set as yet.

[24] It was argued on behalf of the defendant that the delays cannot be ascribed to the defendant and he could only apply for the amendment he is now seeking after his rescission application was granted. It might be so that the amendment could only be sought once the rescission application succeeded but it cannot be disputed that the delays should be ascribed to the defendant and/or his erstwhile legal practitioner.

[25] What is of importance is that the defendant at no stage intimated that his defence plea was not a true reflection of his case. The matter went through the JCM process and mediation and the issue of an inaccurate plea and the resultant proposed amendments was only raised in November 2019 when this application was launched.

[26] In fact the defendant relied on his plea in support of his application for rescission as having a bona fide defence to the claim of the plaintiff. In his founding affidavit in his application for rescission of judgment the defendant stated the following:

'BONA FIDE DEFENCE

I furthermore submit that I have a bona fide defence against the Respondent's claim so instituted against me. I say so for the following reasons:

8.1 The plea setting out my defence against the Respondent's claim was filed on 23 December 2017 and served on 27 December 2017 by my erstwhile legal practitioner of record, ie. Mr Tjombe.

A copy of my plea so delivered is attached hereto marked as annexure "MA14"

[27] The defendant hereafter proceeded to restate the entire plea as it currently stands, in support of his averments that he has a bona fide defence to the claim of the plaintiff. This plea was filed more than a year before the defence of the defendant was struck.

[28] The version of the defendant is that he never consulted his erstwhile legal practitioner regarding the drafting and/or the formulation of his plea when such plea was delivered. According to the defendant this can be gauged from the fact that the plea delivered does not include a counterclaim. In support of this contention the defendant refers to an e-mail correspondence attached to the defendant's founding affidavit filed with his rescission application.⁸

[29] However, in the same application and in response to the plaintiff's answering affidavit, the defendant states that:

'18.5 It must therefore be clear from the above that I have already had consultations with Mr Tjombe in the past and at the time when the status report was delivered.

18.6 Mr Tjombe, at the time when the status report was delivered, had enough consultations with me and information (expert report) available from which to have drafted witness statements.'

[30] Although these this statements relates to the non-filing of witness statements and the fact that the deponent to the answering affidavit stated that the erstwhile legal practitioner stated in court that it was the defendant that failed to provide instructions for compliance with the court orders, it is of important as it is clear that the defendant had ample consultations with his erstwhile legal practitioner and the main basis of the application for amendment is that mistakes in the plea should be

⁸ MA 5 to the founding affidavit which reads as follows:

'I called your offices the other day and Pamela said there was a pre-trial conference on this matter on the same afternoon which I did not have to attend, but I also know nothing about? I thought we were still going to mediation? In any event, I would think that we need to put a counterclaim for this claim loss that they refused?'

attributed to the fact that he never consulted his erstwhile legal practitioner regarding the drafting and formulation of his plea. If one reads the founding affidavit and replying affidavit in the rescission application and the subsequent founding affidavit in the current application in proper context, it is clear that the earlier affidavits deposed to stands in clear contradictions with his founding affidavit filed in the current application before this Court. There is however no explanation presented to this court to explain this obvious discrepancies.

[31] With regard to the explanation advanced by the defendant, the court also stated in *IA Bell* that a reasonably satisfactory explanation for proposed amendment is the strongest where it is brought at a late stage of the proceedings⁹. The defendant advanced an explanation for the belated filing of the application stating that he could not bring the application earlier due to the rescission application that had to be adjudicated. That is factually correct however his reasons for bringing the application for the proposed amendment does not hold water.

[32] Every application for leave to amend requires as an obligation on the applicant to establish that the application is bona fide. In *Moolman v Estate Moolman & another*¹⁰ Watermeyer J held that ‘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’.

[33] The contradictory versions in the statements deposed to by defendant calls into question the defendant’s bona fides in launching this application at this late stage of the proceedings. Having considered the contradictory versions and the explanation advanced by the defendant for the amendment I am not convinced that the application launched by the defendant to amend is bona fide.

⁹ *Supra* footnote 3 para 55.

¹⁰ 1927 CPD 27 at 29.

[34] It follows that the objection in respect of the belatedness of the application and the bona fides of the defendant should be sustained and that the amendment should not be granted.

[35] I deem it fit at this point to remark that the statement of the defendant that his erstwhile legal practitioner filed a plea on his behalf without consulting him is disturbing to say the very least.

[36] In the *IA Bell*¹¹ matter the court stated as follows:

[58] A legal practitioner is an agent of the client. The source of his or her authority and mandate is the client. It is for that reason assumed that when a legal practitioner files a pleading or makes undertakings to the court, he or she has the necessary authority and mandate to do so. If that were not so, our litigation process will be afflicted by uncertainty. The legal practitioner therefore has a special duty to make sure that his or her conduct of the client's case accords with instructions. It is a breach of an ethical duty not to do so and the surest way of making sure that does not happen is to take a detailed statement from the client at the first consultation; meet the client again to take instructions in relation to pleadings of substance received from the opponent; confirm with the client admissions and denials made in either pleadings or case management reports, especially the pre-trial report which binds the parties to admissions and denials made for the purpose of trial.'

[37] The statements that the defendant makes in his founding affidavit that the plea was filed without consultation is a grave statement to make as it goes to the heart of the ethical duty of a legal practitioner. This is an allegation that the erstwhile legal practitioner did not have the opportunity to answer to. One must ask the question why a legal practitioner would have consultations with his client which would be sufficient enough to draft a witness statement but would not consult on the drafting of a plea, which is the corner stone of the defendant's defence. This just flies in the face of logic. Further to that one must wonder that if the defendant's version is true and correct, that the plea was formulated and filed without consultation with the defendant, why is it that certain portions of the plea would be unacceptable and not the whole plea?

¹¹ *Supra* footnote 4.

[38] In spite of the grave allegations against the erstwhile legal practitioner it would not appear that a complaint was filed with the Law Society of Namibia nor was there any mention made of the alleged breach of ethical standards when the rescission application was launched. It was however convenient for the defendant to rely on the plea drafted by his erstwhile legal practitioner in order to succeed with this application for rescission.

[39] In *Maestro Design t/a Maestro Operations CC v The Microlending Association of Namibia*¹² Masuku J held that legal practitioners are entitled to bring it to the notice of their colleagues if there are allegations made against them by erstwhile clients in view of the damage this may herald on the said legal practitioners so that they can respond to the said allegations.

[40] In paras 60 and 61 of the judgment the learned Judge remarked as follows:

[60] It accordingly appears to me that where a legal practitioner acts for a person like the applicant in this matter, and a client makes prejudicial remarks about a previous legal practitioner, it would be ethical for the new legal practitioner, to bring the allegations and criticism levelled against the erstwhile legal practitioner, to the latter's attention, say under cover of a letter.

[61] This would enable the affected legal practitioner to decide whether or not to respond to the allegations, as Ms. Samuel did. That in my view, is the least that a legal practitioner owes to a colleague, who is learned brother or sister, especially where these allegations will be in the public domain, on a platform like eJustice, where they will be readily available for the whole world to ingest.'

[41] It would therefore have been prudent and the right thing to do to afford the erstwhile legal practitioner an opportunity to state his side of the story.

Second and third objections

[42] The second and third grounds of opposition raised by the plaintiff is that the proposed amendment amounts to an attempt to impermissibly withdraw admissions

¹² (HC-MD-CIV-MOT-GEN-2018/00414) [2020] NAHCMD 140 (7 May 2020).

made in respect of paras 3, 4 and 8 of the particulars of claim and the proposed amendment introduces a change of stance by the defendant. The plaintiff pointed out that these admissions are recorded in the pre-trial report as constituting common cause facts.

[43] Plaintiff further submitted in this regard that the admissions are binding on the party making them and prohibits any further dispute of the admitted facts by the party making them and admissions in a plea, once made, can only be withdrawn with leave of court.

Discussion

[44] The defendant maintains that the admission(s) sought to be withdrawn came about not as a result of the defendant's own doing but due to circumstances beyond the defendant's control and not of his own doing, such that his erstwhile legal practitioner of record drafted the plea on his behalf without his knowledge, input and consent. The defendant actually goes further by stating that he was unaware of the fact that a plea was drafted on his behalf and was unaware of the contents of the plea and that it contained the admission(s) wished to be withdrawn.

[45] In this regard I must reiterate and stand by my views expressed earlier in this judgment regarding the allegations made against the erstwhile legal practitioner, without him having been afforded the opportunity to respond thereto.

[46] The position regarding the withdrawal of admissions is set out in Herbstein & Van Winsen: *The Civil Practice of the High Court of South Africa*¹³ where the learned authors state that:

'An amendment to a pleading involving the withdrawal of an admissions stands in a somewhat different position from other amendments and is more difficult to achieve because it involves a change of front, which requires a full explanation to convince the court of the *bona fides* of the parties seeking the amendment. Also it is more likely to prejudice the other

¹³ 5th ed by Cilliers, Loots & Nel Vol 1 (2009) at 683.

party who has been led by the admission to believe that the fact in question need not be proven and who may, for that reason have omitted to gather the necessary evidence¹⁴.’

[47] And further:

‘Where a proposed amendment involves the withdrawal of an admission, the court would generally require a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it. In addition the court must consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn is to cause prejudice or injustice to the other party to the extent that a special order as to cost will not compensate him, then the application to amend will be refused¹⁵.’

[48] The position was summed up thus by Ogilvie Thompson AJ in *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd*¹⁶:

‘Before granting an amendment to a pleading which has the effect of withdrawing an admission therein I consider that the Court should require a satisfactory explanation of both the circumstances whereunder the admission was made and of the reasons why it is now sought to withdraw it: and, as in the case of all amendments to pleadings, the question of possible prejudice to the opposing party must of course also be considered.’

[49] A rider must be added: the enquiry into whether or not the application to amend is bona fide – in other words, whether a satisfactory explanation has been given – is the first enquiry and, if it is found that the applicant for the amendment does not clear this hurdle, there is no need to consider the second leg of prejudice.¹⁷

[50] The withdrawal of the relevant admissions would result in a complete change of front by the defendant should the proposed amendment be granted, for example:

¹⁴ *Supra* at 685.

¹⁵ *Supra* at 685 (footnotes excluded).

¹⁶ *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd* 1946 CPD 735 at 749

¹⁷ *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 111 A-B; *Standard Bank of South Africa Limited v Davenport NO and Others* (847/10) [2014] ZAECHGHC 27 (25 April 2014) para 9.

- a) the Annexure A to the particulars of claim previously admitted as constituting the agreement between the parties would now become disputed in that the defendant seeks to plead that the policy schedule, policy wording and risk assessment form are not attached, so by implication the defendant seeks to undo the admission of Annexure A being the agreement between the parties.
- b) The defendant seeks to withdraw its entire admission of the terms of the agreement between the parties and seeks to reserve his plea until unidentified documents are provided or attached to the particulars of claim, failing which, the defendant withdraws his admission in full and places the entire agreement and its terms, which are presently admitted, in dispute.
- c) The defendant also seeks to deny that he ever made a representation that all 144 or 138 batteries had to be replaced, whereas, if regard is had to the contents of para 7 of the defendant's plea as it currently stand, the defendant does not deny the representation, but merely explains where it originates from.

[51] What is noticeable is that the defendant seeks to amend his plea but the admissions as set out in the plea at present are indicated in the pre-trial order dated 2 November 2018 as issues not in dispute.

[52] The defendant does not show any intention of withdrawing the admission made in the pre-trial order. In *IA Bell* the court stated that an admission in a pre-trial order is binding on the parties but can be withdrawn on the same basis as admissions in a pleading. However facts in case management orders are not that easily resiled. That is so because a legal practitioner is presumed, because of the new system which requires them to consult early and properly, to have done so and committed a client to a particular version only after proper consultation and instructions. That presumption entitles the opponent to rely on undertakings made by the opponent and to plan its case accordingly.¹⁸

[53] The defendant is relying heavily on the lack of consultation with his erstwhile counsel as the reason for the withdrawal of the admissions. Admittedly if one have

¹⁸ *Supra* footnote 4 para 55.

regard to the e-file then it is clear that there were issues and possible lack of communication between attorney and client but the relevant time span in that regard was between November 2018 and February 2019, the time when the court struck the defence of the defendant. This court in the ruling on the rescission of judgment application makes the finding that there was a certain degree of remissness on the part of the erstwhile legal practitioner that led to the striking of the defendant's defence¹⁹ but having regard to the argument before me it cannot be drawn back as far as the filing of the plea.

[54] It is easy to blame everything on the erstwhile legal practitioner in order to get a sympathetic ear from the court, but I can truly not find merit in what the defendant states in this regard and I therefore re-inforce my findings of lack of bona fides.

[55] If this court cannot find that the application for amendment is bona fide, I can as a result not find that a satisfactory explanation was advanced as to why the defendant now seek to withdraw those admissions.

[56] The defendant has failed to establish that his application for leave to amend has been brought bona fide. That being so, there is no need to consider the question of prejudice to the plaintiff.

[57] The application for leave to amend, insofar as the withdrawal of admissions is concerned, must therefore fail.

Fourth and fifth objection

[58] The fourth objection raised is that the defendant impermissibly introduces a Rule 61 procedure, alternatively, an exception by means of a plea. The fifth and last objection is that the defendant does not tender any wasted costs occasioned by such proposed amendment. However, in light of my findings made in respect of the first to third objections I do not deem it necessary to discuss the fourth and fifth objections raised by the defendant.

¹⁹ *Supra* footnote 1 para 14.

Order

[59] My order is therefor as follows:

1. Application to amend the plea of the defendant is dismissed with costs. Such costs to be limited to rule 32(11) and which costs include the costs occasioned by one instructed and one instructing counsel.

JS Prinsloo
Judge

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