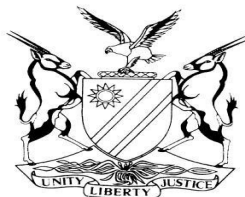


REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> Power-Oyeno Construction (Pty) Ltd v National Housing Enterprises and Minister of Urban and Rural Development	<b>Case No.:</b> HC-MD-CIV-ACT-CON-2019/00303
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/trie d before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 10 September 2020
	<b>Delivered on:</b> 10 September 2020
<b>Neutral citation:</b> <i>Power-Oyeno Construction (Pty) Ltd v National Housing Enterprises</i> (HC-MD-CIV-ACT-CON-2019/01830) [2020] NAHCMD 404 (10 September 2020)	
<b>The Order:</b> Having heard <b>Adv. R Heathcote (SC)</b> with him <b>SI Jacobs</b> , on behalf of the Plaintiff and <b>Adv G Coleman</b> with him <b>M Kashindi</b> , on behalf of the Defendant and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The plaintiff is granted leave to amend its particulars of claim in the manner indicated in its notice of intention to amend dated 5 May 2020.  2. The plaintiff directed to deliver the amended particulars of claim on or before 18 September 2020.	

3. The plaintiff is ordered to pay the costs of the second defendant occasioned by the application for leave to amend. Such costs include costs of one instructing and one instructed legal practitioner. The provisions of rule 32(11) apply.
4. With agreement of both parties the following exchange of pleadings and papers is hereby ordered:
  - 4.1 The defendants shall file plea and counterclaim, if any, on or before 02 October 2020,
  - 4.2 The plaintiff shall file replication and plea to counterclaim, if any, on or before 16 October 2020,
  - 4.3 The defendant shall file replication to plea to counterclaim, if any, on or before 23 October 2020,
  - 4.4 The parties shall file respective discovery affidavits and exchange bundles of discovered documents on or before 6 November 2020.
5. The matter is postponed to 18 November 2020 at 15:15 for case management conference.
6. The parties are directed to file a joint case management report on or before 11 November 2020.

**Reasons: Practice Direction 61(9)**

Introduction

[1] This is an application by the plaintiff for leave to amend its particulars of claim filed of record on 26 June 2020 consequent upon an exception raised by the second defendant which was upheld by the court on 20 August 2019.

## Background

[2] On 20 August 2019 this court upheld an exception raised by the second defendant to the particulars of claim, in respect of claim 1 and 2 of the particulars of claim. The order granted by the court on 20 August 2019 afforded the plaintiff opportunity to amend the particulars of claim within 15 days from the date of the order. The case was then postponed to 16 October 2019 for a case planning conference.

[3] The plaintiff was supposed to have delivered its amended particulars of claim on or before the 10 September 2019. The plaintiff did not do so. Instead the plaintiff filed its notice of intention to amend on 12 September 2019.

[4] On 16 October 2019 the court condoned plaintiff's late filing of the notice of intention to amend and directed the plaintiff to file its amended particulars of claim on or before 23 October 2019 and postponed the case to 04 December 2019.

[5] Again, the plaintiff did not file its amended particulars of claim by 23 October 2019. Instead, the plaintiff filed its particulars of claim on 06 November 2019. The plaintiff did not give explanation for the delay but submitted that the defendants were not prejudiced by the delay.

[6] On the 04 December 2019 the court postponed the matter to 18 March 2020 for a sanctions hearing and directed the plaintiff to file a sanctions affidavit by a certain date. The defendants were also directed to file an answering affidavit, if so advised.

[7] On the 18 March 2020 the court held that the explanation furnished by the plaintiff for its failure to file the amended particulars of claim within the time prescribed in the court order dated 16 October 2019 was neither reasonable nor acceptable. As penalty for the default, the court struck-out, in terms of rule 53(2)(b), the particulars of claim filed by the plaintiff on 06 November 2019 and directed the plaintiff to pay the costs of the defendants caused by the plaintiff's non-compliance with the court order dated 16 October 2019. The

case was then postponed to 22 April 2020 for status hearing.

[8] Thereafter the plaintiff indicated its intention to amend the particulars of claim and sought and obtained directions in relation thereto. On 5 May 2020 the plaintiff delivered a notice of intention to amend its particulars of claim. On 20 May 2020 the second defendant delivered a notice of objection thereto. Later, directions were sought and obtained in regard to the exchange of further papers and documents.

[9] The plaintiff then filed its application for leave to amend on 26 June 2020.

#### The application for leave to amend

[10] In its application for leave to amend, the plaintiff states, among other things, that it is entitled to amend its particulars of claim at any stage before judgment is delivered. The plaintiff further submits that its intended amendments are bona fide and do not cause any prejudice to the second defendant.

[11] The plaintiff argues that the objection raised by the second defendant to the proposed amendment, is baseless and is not supported by authority. The plaintiff submits that the application for leave to amend be granted and that the second defendant be ordered to pay the costs of application, which costs should not be limited by *rule* 32(11) and should include one instructing and two instructed legal practitioners, where employed.

[12] The second defendant, in its answering affidavit, contends that the amendments proposed by the plaintiff are not permitted in terms of the court order dated 20 August 2020. The second defendant argues that the court order of 20 August 2019 only authorises amendments to the particulars of claim in respect of claim 1 and 2 of the particulars of claim. If the plaintiff wishes to amend claims other than claim 1 and 2, the plaintiff is required to explain why such amendment is necessary. The second defendant, therefore, submits that the plaintiff's notice to amend offends the 20 August 2020 court order, insofar as the notice seeks to amend claim 3, 4 and 5 of the particulars of claim.

[13] The second defendant further submits that the proposed amendments are mala fide in that the plaintiff intends to bring a new cause of action which is prejudicial to the second defendant. The second defendant, therefore, prays that the application for leave to amend be dismissed with costs not be limited by rule 32(11) and include costs of one instructing and one instructed legal practitioner.

#### Analysis

[14] It appears to be common cause that the reasons for plaintiff's intended amendments stem from the court order dated 20 August 2020. The court order dated 20 August 2020 reads as follows:

#### **'IT IS HEREBY ORDERED THAT:**

1 The second defendant's exception in respect of claim 1 of the plaintiff's particulars of claim is upheld on the ground that plaintiff's particulars of claim do not disclose a cause of action against the second defendant. The plaintiff is ordered to pay the costs of the second defendant in respect to this exception, such costs to include costs of one instructing and one instructed legal practitioner.

2 The second defendant's exception in respect of claim 2 of the plaintiff's particulars of claim is upheld on the ground that the plaintiff's particulars of claim do not disclose a cause of action. The plaintiff is ordered to pay the costs of the second defendant in respect to this exception, such costs to include costs of one instructing and one instructed legal practitioner.

3 The second defendant's exception in respect of claim 3 of the plaintiff's particulars of claim is dismissed with costs, such costs to include costs of one instructing and two instructed legal practitioners.

4 The second defendant's exception in respect of claim 4 of the plaintiff's particulars of claim is dismissed with costs, such costs to include costs of one instructing and two instructed legal practitioners.

5 The second defendant is ordered to pay the plaintiff's wasted costs in regard to the abandoned exception in relation to claim 5 of the particulars of claim, such costs to include costs of one instructing and two instructed legal practitioners.

6 As regard paragraph 1 and 2 of this order, the plaintiff is afforded opportunity to amend its

particulars of claim within 15 days from the date of this order.

7 The case is postponed to 16/10/2019 at 15:15 for Case Planning Conference hearing.

8 The Parties must file joint case plan on or before 09 October 2019.'

[15] I do not decipher, from the above order the restrictions contended for by the second defendant. In my opinion, the above quoted court order does not limit the nature or extent of the intended amendment in the manner contended for by the second defendant.

[16] Insofar as amendments to pleadings are concerned, the general rule is that a court would allow an amendment unless the application for leave to amend is:

- (a) made late in the proceedings,
- (b) *mala fide*, or
- (c) unless the proposed amendment would cause an injustice to the opposing party which cannot be compensated by a costs order.

[17] In the present matter, the amendment is sought at a fairly early stage of the proceedings. The defendants have not yet pleaded to the plaintiff's particulars of claim. I therefore disagree with the second defendant that the plaintiff is required to explain why the amendments are necessary. Furthermore, I am not persuaded that the proposed amendments are being made *mala fide* nor that some injustice would be caused to the second defendant in the conduct of its defence. I am therefore of the opinion that the application for leave to amend stands to be granted.

[18] As regards the *bona fides* of the second defendant's objection to the proposed amendments, I am not persuaded that the objection is made *mala fide*. Given the plaintiff's history of non-compliance with court orders, as referred to in paragraphs [3] to [7] hereof, I do not regard the objections of second defendant to the plaintiff's proposed amendments as entirely unreasonable in the circumstances.

[19] Insofar as costs are concerned, *rule 52(8)* provides that, a party giving notice of amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned,

to the other party. In the circumstances of the present case, I see no reason for deviating from the aforesaid general principle. I shall therefore order that the plaintiff pays the costs of the second defendant occasioned by the application for leave to amend. However, I am not persuaded that in this matter the costs should exceed the limit prescribed by *rule 32(11)*. The provisions of rule 32(11) are therefore applicable to the costs granted in this matter.

[20] In the result, I make the following order:

1. The plaintiff is granted leave to amend its particulars of claim in the manner indicated in its notice of intention to amend dated 5 May 2020.
2. The plaintiff directed to deliver the amended particulars of claim on or before 18 September 2020.
3. The plaintiff is ordered to pay the costs of the second defendant occasioned by the application for leave to amend. Such costs include costs of one instructing and one instructed legal practitioner. The provisions of rule 32(11) apply.
4. With agreement of both parties the following exchange of pleadings and papers is hereby ordered:
  - 4.1 The defendants shall file plea and counterclaim, if any, on or before 02 October 2020,
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5. The matter is postponed to 18 November 2020 at 15:15 for case management conference.

6. The parties are directed to file a joint case management report on or before 11 November 2020.	
<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Second Defendant</b>
Advocate R Heathcote (SC) with him SI Jacobs Instructed by Ellis Attorneys Windhoek	Advocate G Coleman with him M Kashindi Instructed by the Office of the Government Attorney Windhoek