REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/00939

In the matter between:

ELISABETH NEIS **PLAINTIFF**

and

KENNETH THIONGO KASUMA **FIRST DEFENDANT**
JOSEPHINA KWALIMUSHE AMUTSE **SECOND DEFENDANT**
REGISTRAR OF DEEDS **THIRD DEFENDANT**

Neutral citation: *Neis v Kasuma* (HC-MD-CIV-ACT-CON-2017/00939) [2020] NAHCMD 502 (4 November 2020)

Coram: PARKER AJ
Heard: **October 2020**
Delivered: **4 November 2020**

Flynote: Practice – Amendment of pleadings sought late in proceedings – Judicial case management introduced judge-controlled litigation – Legal practitioners obliged to thoroughly identify real issues in dispute for the just and expeditious conclusion of matter – Where application brought late in the proceedings statement on oath or otherwise is required to explain satisfactorily the delay in amending the pleadings – Court held that if a party failed to provide explanation on oath or

otherwise in circumstances where one is called for, the proposed amendment must be refused.

Summary: Practice – Amendment of pleading sought late in proceedings – Court finding that with advent of judicial case management litigation is judge-controlled – Consequently legal practitioners required to thoroughly identify the real issues in dispute for the just and expeditious conclusion of matter – Application for amendment sought to be made at close of plaintiff's case – Court finding that amendment sought to introduce a new case – Court finding further that to allow the amendment would entail rerunning the whole length of the judicial case management process and more important no explanation was forthcoming on oath or otherwise for the delay in bringing the amendment application – Consequently, court refused the application for amendment

Flynote: Contract – Oral – In terms of rule 47 (5) of the rules of court – Court held that plaintiff must allege a definite location where oral agreement entered into and definite date or dates on which agreement entered into – Plaintiff's failure to allege where and when oral agreement was concluded is fatal – Consequently, court held no agreement existed between the parties.

Summary: Contract – Oral – In terms of rule 47 (5) of the rules of court – Plaintiff must allege where, when and by whom oral agreement concluded – Court finding that plaintiff failed to allege where and when oral agreement entered into – Consequently, court rejected plaintiff's claim that plaintiff and first defendant agreed that on top of paying the purchase price of plaintiff's house, first defendant shall buy a house for her or give her N$ 2 000 000 in lieu thereof.

ORDER

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1. Plaintiff's claim that defendant should be ordered to purchase a house for her or give her N$2 000 000 in lieu thereof is dismissed.

2. First defendant must on or before 30 November 2020 pay to plaintiff's legal practitioners of record N$15 000 for the benefit of plaintiff, together with interest thereon at the rate of 20 per cent per annum, calculated from 15 March 2017 to date of full and final payment

3. There is no order as to costs.

4. The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] The background of the instant matter is set out in the judgment delivered on 30 July 2020 with regard to the absolution from the instance application brought by first defendant at the close of plaintiff's case ('the absolution judgment'). It serves no purpose to rehash it here.

[2] Right at the close of plaintiff's case, Mr Amoomo counsel for first defendant, gave notice from the Bar that he was going to bring an application for absolution from the instance. There and then, Ms Mondo, counsel for plaintiff, rose in turn to apply from the Bar to amend plaintiff's particulars of claim, nay plaintiff's amended particulars claim, as plaintiff had earlier amended her original particulars of claim on 7 May 2018. Ms Mondo read the proposed amendment into the record. Mr Amoomo objected to the proposed amendment. The basis of Mr Amoomo's objection was principally that the amendment sought introduced a new cause of action.

[3] Having considered the application and the objection, I rejected there and then the application to amend. These are my reasons.

[4] Plaintiff has known all along since 16 March 2017 when plaintiff instituted the instant action what her case is; and she has at all material times been legally

represented. Plaintiff has not given a modicum of explanation on oath or otherwise why the amendment to the amended particulars of claim she then sought was not sought timeously and earlier than 1 July 2020, that is, more than two years when the particulars of claim were amended, and more than three years when summons issued from the court.

[5] For a good reason which will become apparent shortly, I append, hereunder, the material part of the particulars of claim filed on 16 March 2017:

> '4. During June 2014, the plaintiff and the first defendant entered into an oral agreement.
>
> 5. The terms of the oral agreement were as follows:
>
> 5.1 The plaintiff would transfer the ownership of her house (Erf 6902, Maroela, Katutura, Windhoek) to the second defendant (as a proxy of the first defendant) who would then transfer the property to the first defendant.
>
> 5.2 In return the first defendant would pay the plaintiff the amount of N$200 000.00 and purchase for the plaintiff a house with approximately the same value as the plaintiff's house.
>
> 6. On 24 July 2014, the plaintiff transferred the property to the second defendant.
>
> 7. On 6 July 2015, the second defendant transferred the property to the first defendant.
>
> 8. The first defendant paid to the plaintiff a total amount of N$185 000.00 during the months June 2014 to December 2014.
>
> 9. The first defendant breached the agreement by failing, despite demand, to pay the remaining N$15 000.00 and to purchase for the plaintiff a house.
>
> 10. As a result of the first defendant's breach, the plaintiff has suffered damages in the amount of N$1 415 000.00, which represents the amount paid to the plaintiff, less the value of the house.

11. As such the first defendant is liable to the plaintiff in the amount of N$1 415 000.00.'

[6] By a parity of reasoning, I append hereunder, in material part, the amended particulars of claim filed on 7 May 2018, but only the part of plaintiff's claim that remained in dispute after the granting of the absolution from the instance application. What was left to be adjudicated upon was, therefore, only para 1*(b)* of the order of the court in the absolution judgment. The following is the material part:

'5. During June or July 2014, the plaintiff and the first defendant, alternatively the plaintiff and the defendants entered into an oral agreement.

6. The terms of the oral agreement were as follows:

6.1 The plaintiff would transfer the ownership of her home, a 3 bedroom house situated at Erf 6902, Maroela, Katutura, Windhoek valued at approximately N$800 000.00 to the second defendant.

6.2 The second defendant would then transfer the plaintiff's home to the first defendant.

6.3 The first defendant would pay the plaintiff the amount of N$200 000.00 and in addition purchase for the plaintiff a house similar in size to plaintiff's home and/or with approximately the same value as the plaintiff's home.

7. On 23 July 2014 plaintiff signed a deed of sale which stipulated that the plaintiff would sell her house to the second defendant for the amount of N$200 000.00.

8. The defendants represented to plaintiff that the agreement of 23 July 2014 was only signed for purposes of transferring the property to the second defendant (who would then transfer the property to first defendant). Furthermore, the first defendant assured plaintiff that despite the contents of the deed of sale, the first defendant would, in addition to paying plaintiff N$200 000.00, purchase for the plaintiff a house.

9. On 24 July 2014, the plaintiff transferred the property to the second defendant.

10. The first defendant paid to the plaintiff a total amount of N$185 000.00 during the months June 2014 to December 2014.

11. On 6 July 2015, the second defendant transferred the property to the first defendant.

12. To date the first defendant has not purchased for the plaintiff a house similar in size to plaintiff's home and/or with approximately the same value as the plaintiff's home.

WHEREFORE THE PLAINTIFF PRAYS FOR THE FOLLOWING ORDERS AGAINST THE FIRST DEFENDANT AND SECOND DEFENDANT:

1. Declaring that the plaintiff was unduly influenced by the first defendant and/or second defendant to enter the oral agreement of June 2014.

2. Declaring that the plaintiff was unduly influenced by the first defendant and/or the second defendant to enter into the written agreement of 23 July 2014.

3. Declaring the agreements in 1 and 2 above null and void.

4. Ordering the third defendant to cancel the transfer of the deed of the plaintiff's home to the second defendant.

5. Ordering the third defendant to cancel the transfer of the deed of the plaintiff's home from the second defendant to the first defendant.

6. Ordering the third defendant to transfer and register the property into the plaintiff's name.

7. Alternatively, an order compelling the first defendant to retransfer the property to the plaintiff.

8. Delivery of the property to the plaintiff.

9. Costs of suit.'

[7] This is clear from a reading of the original particulars of claim and the amended particulars of claim: The original claim, which was for specific performance of a valid and an enforceable contract in the original particulars of claim, morphosised in the 7 May 2018 amended particulars of claim into this claim, namely, that that valid and enforceable contract was after all not valid and enforceable for reasons which the court has rejected in the absolution judgment.

[8] Then comes the amendment sought on 1 July 2020 during the trial, as aforesaid, by Ms Mondo which the court rejected. Plaintiff sought to amend the 7 May 2018 amended particulars of claim by -

(1) the addition of the following before the full stop in para 20:

and to plaintiff's detriment; and

(2) the addition of the following after para 25:

26. On or about 4 February 2015 plaintiff entered into a further agreement with second defendant acting as proxy for first defendant. The terms of the agreement were that plaintiff will receive money from second defendant acting as proxy for first defendant, more specially (especially) second defendant will pay plaintiff an amount in three equal instalments of N$76 666.70 on 28 February 2015, 31 March 2015 and 30 April 2015.

27. Plaintiff signed the agreement on 4 February 2015 with the belief that first defendant will still purchase plaintiff another house.

28. When plaintiff signed the agreement she was not in her correct state of mind to properly give consent to the terms of the agreement on 4 February 2015. Plaintiff's state of mind was such that she had been experiencing intellectual exhaustion.

29. As a result of the mental state of mind of plaintiff at the time the agreement of 4 February 2015 was entered into, the agreement should be set aside.

30. In the event that the court finds that plaintiff properly gave her consent to the terms of the agreement of 4 February 2015, first defendant has not paid the three instalments of N$76 666.70; as such first defendant is in breach of the agreement and plaintiff cancels the agreement.

[9] I have set out, in material part, the 7 May 2018 amended particulars of claim and the proposed 1 July 2020 amendment to that amended particulars of claim to make these crucial points. The amendment sought in para 20 is pleonastic and adds nothing of substance – as a matter of law – to the present para 20 of the 7 May 2018 amended particulars of claim. And the amendments sought in paras 26 to 30 represent a textbook example of the introduction of a new cause of action brought through the backdoor and dressed unabashedly in the garb of amendments. Furthermore, having carefully considered the original 16 March 2017 particulars of claim, the 7 May 2018 amended particulars of claim, and the 1 July 2020 proposed amendments, the only reasonable and irrefragable conclusion to make is that which the full Bench of the court in *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601/2013 & I 4084/2010) [2014] NAHCMD 306 (17 October 2014) para 31 (per Damaseb JP) warned the court to be on the lookout for and to avoid:

'The practices adopted by the courts (when considering applications for the amendment of pleadings) should avoid creating the impression that litigation is some sort of a game and that parties can, without good reason, change their positions as they go along and as circumstances suit them.'

[10] The conduct and attitude of plaintiff in the instant matter is, with respect, indubitably a mirror of the conduct and attitude *I A Bell Equipment Company (Namibia) (Pty) Ltd* frowns at and which the court should not encourage. In his work *Court-Managed Civil Procedure of the High Court of Namibia* at 145, Petrus T Damaseb, relying on *I A Bell Equipment Company (Namibia) (Pty) Ltd* writes:

'…the court has the following avenues open to it when an amendment is sought:

- if a party has failed to provide an explanation on oath or otherwise in circumstances where one is called for, the proposed amendment must be refused ;….'

[11] In the circumstances of the instant matter, an explanation on oath or otherwise is called for; but none was forthcoming. The reason for saying that an explanation on oath or otherwise is called for is that, apart from the fact that the proposed amendment introduces a new cause of action, if the amendment was allowed, all that have been done since March 2017 would have to be repeated: defendants will plea; plaintiff will replicate, if minded to do so; and more disturbing, the whole length of all the processes of case management procedures would have to be repeated and rerun. And we should not forget, the case has been on the roll for more than 40 months. On the facts and in the circumstances, the court was entitled to refuse the amendment. (See Petrus T Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia*, loc cit.)

[12] Now, to the matter at hand. The order I made in the absolution judgment is as follows; and it is clear:

> '1. The application for absolution from the instance regarding-
>
> (a) the claim of undue influence is granted; and
>
> (b) the claim that by an agreement between plaintiff and first defendant, first defendant was to pay the purchase price of the house and also give N$2 000 000 to plaintiff for her to buy a house in Windhoek is refused.
>
> 2. On this day of the judgment, the court shall determine a set down date for continuation of trial.
>
> 3. Costs are to stand over for argument in due course during the continuation of trial.'

[13] It is clear that when the plaintiff was put on his defence, the burden of the court was to adjudicate on para 1*(b)* of the court order, referred to in para 12 above,

only. That much, Ms Mondo appreciated. Therefore, any evidence outwit para 1*(b)* is irrelevant and has no probative value, and nothing can flow out of it; expressed in the principle *ex nihilo nihil fit*; and so, with respect, I shall not waste my time to consider any such evidence.

[14] In considering the aforementioned para 1*(b)* of the order made in the absolution judgment, the first thing to do is to go to the material and relevant part of the pleadings concerning the claim. The only allegation in the 7 May 2018 amended particulars of claim that has a scintilla of relationship with para 1*(b)* of the order in the absolution judgment is contained in para 8 thereof, and it reads:

> '8. The defendants represented to plaintiff that the agreement of 23 July 2014 was only signed for purposes of transferring the property to the second defendant (who would then transfer the property to first defendant). Furthermore, the first defendant assured plaintiff that despite the contents of the deed of sale, the first defendant would, in addition to paying plaintiff N$200 000.00, purchase for the plaintiff a house.'

[15] It seems to me clear that plaintiff relies on an oral agreement whereby plaintiff and first defendant agreed that first defendant shall, apart from paying for the price of plaintiff's house being N$200 000, on top of that, 'purchase for the plaintiff a house'. In that regard, it is worth noting that it is required by rule 45 of the rules of court that a party -

> '(7) … 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 of the part relied on in the pleading must be annexed to the pleading.'

[16] In the instant proceeding, plaintiff deals only with 'by whom' the agreement she wishes to rely on was concluded. As I held in *Ehoro Investment CC v Randall's Meat Close Corporation* (HC-MD-CIV-ACT-CON-2017/02862) [2020] NAHCMD 379 (27 August 2020) para 5 –

> 'The word "where" in r 45(7) (of the rules of court) requires a definite location and not alternative, unsure locations …; and "when" requires a definite date or dates.'

[17] Plaintiff does not allege in the pleadings 'where' and 'when' the oral agreement she relies on was concluded between her and first defendant. On this ground alone plaintiff's claim in para 8 of the amended particulars of claim stands to be dismissed; and is dismissed.

[18] Apart from that, the claim ought to be dismissed on this following ground. In the pleadings, plaintiff alleges that the agreement was that 'in addition to paying plaintiff N$200 000' (which is the purchase price of plaintiff's house), first defendant would 'purchase for the plaintiff a house' (see para 14 above). It is only in plaintiff's examination-in-chief-evidence that she testified that 'Kenneth (first defendant) told me that he would give me N$2 000 000 to buy a house'. This is not alleged in the pleadings; and, *a fortiori*, plaintiff seeks no such order to that effect in the relief she prays for in the original particulars of claim or in the 18 May 2018 amended particulars of claim. In the circumstances, it seems clear to me that, unless the claim for N$2 000 000 was an afterthought planted in plaintiff's head by a third party, it beggars belief that, although plaintiff instituted the action on 16 March 2017 and amended the particulars of claim was filed on 18 May 2018 when first defendant had neither bought her a house nor given her N$2 000 000 to buy a house which she now claims, plaintiff did not make such allegations in the original 16 March 2017 particulars of claim or the 18 May 2018 amended particulars of claim. If Ms Mondo were to have her way, she would urge the court to accept the statement in plaintiff's examination-in-chief-evidence as sufficient to prove the allegation, even if no such allegation is pleaded. That is wishful thinking.

[19] As Mr Amoomo submitted, evidence cannot cure lack of pleading. I hold that no amount of evidence can prove that which has not been alleged. Logic and common sense dictate that no evidence can prove that which does not exist. First defendant could not have been dragged to court to meet that which is not pleaded. Therefore, the evidence of Bruce Willis Josop, a plaintiff witness and plaintiff's son, that he and the mother went house-hunting in Windhoek is irrelevant: It has no probative value. The evidence of Ms Uina Stephanus that she and her husband on the one hand and plaintiff on the other entered into a sale agreement whereby plaintiff was to purchase their house stands in the same boat. That evidence is also irrelevant and has no probative value. They are roundly rejected.

[20] Worse of all, no explanation is given for the absence of such allegation and the absence of a prayer for such relief in the 18 May 2018 amended particulars of claim. And there is no excuse for such monumental failure because, as I have said previously, plaintiff has at all relevant times been represented by legal practitioners. And what is more, it is mysteriously astonishing that even the amendments which Ms Mondo proposed so late in the day on 1 July 2020 does not contain a wraith of such allegation or such relief about N$2 000 000. Indeed, this is a case where, if costs were to be awarded against plaintiff, the court should have considered granting such costs *de bonis propriis* against the legal practitioners. As Mr Amoomo reminded the court more than once, plaintiff came to court to set aside the agreement of sale of her house to first defendant – directly or indirectly – through second defendant, it matters tuppence. That is the case which defendants were dragged to court to meet in the first place. Be that as it may, based on the reasons I have discussed above, it is unsafe, unsatisfactory, unjust and wrong to grant the claim for the purchase of a house or the claim that she be given N$2 000 000 in lieu thereof.

[21] By a parity of reasoning, the claim concerning plaintiff claim for the three equal instalment payment (see para 8 above) has not been pleaded. Consequently, no amount of evidence can stand as a pleading of the allegation and be put forth at the same time as proof of such allegation which does not exist, in the first place. That being the case, evidence about payment of N$50 000 by first defendant to plaintiff's brother Eiseb in favour of plaintiff as part performance of plaintiff's obligation under some agreement which is not pleaded is irrelevant. On the evidence I do not consider the N$50 000 as part of the payment by first defendant towards defraying the purchase price of plaintiff's house. In any case, first defendant testified that he made several payments to plaintiff as plaintiff kept on badgering him into giving her money. Therefore, as I see it, any payment of N50 000 cannot be towards defraying the purchase price of plaintiff's house. This conclusion leads me to the next level of the enquiry.

[22] It has been alleged and proved that an amount of N$15 000 is outstanding on the sale of plaintiff's house, to be paid by first defendant to plaintiff. I did not hear first

defendant to testify, without reservation and unambiguously, that that amount has, indeed, been paid to plaintiff.

[23] As to costs; it has now been brought to the attention of the court that plaintiff is represented by counsel appointed by the Ministry of Justice: Directorate: Legal Aid. It stands to reason, therefore, that I make no order as to costs. Otherwise, the first defendant who has been successful substantially in challenging plaintiff's claim should have had his costs. Second defendant did not participate in these proceedings. I dare say, plaintiff, as I have intimated previously, as I see it, was misled into believing that she has a strong case, hence the series of volte-face in her pleadings as the case progressed. At all events, at least, plaintiff, too, has gained N$15 000 which she would not have got if she did not approach the court.

[24] In the result, I order as follows:

1. Plaintiff's claim that defendant should be ordered to purchase a house for her or give her N$2 000 000 in lieu thereof is dismissed.

2. First defendant must on or before 30 November 2020 pay to plaintiff's legal practitioners of record N$15 000 for the benefit of plaintiff, together with interest thereon at the rate of 20 per cent per annum, calculated from 15 March 2017 to date of full and final payment

3. There is no order as to costs.

4. The matter is considered finalized and is removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFF:	R Mondo Of Nixon Marcus Public Law Office, Windhoek
FIRST DEFENDANT:	K Amoomo Of Kadhila Amoomo Legal Practitioners, Windhoek
SECOND AND THIRD DEFENDANTS:	No appearance