

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> PIETER ANDRIES DELPORT vs ROSALIA ALWEENDO	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2019/03810
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> Determined on the papers
	<b>Date of order:</b> 30 November 2020
	<b>Reasons delivered on:</b> 30 November 2020
<b>Neutral citation:</b> <i>Delport v Alweendo</i> (HC-MD-CIV-ACT-OTH-2019/03810) [2020] NAHCMD 550 (30 November 2020)	
<b>Results on merits:</b> Merits not considered.	
<b>The order:</b> Having heard <b>PIETER ANDRIES DELPORT, IN PERSON</b> and having read the documentation filed of record:  <b>IT IS HEREBY ORDERED THAT:</b>	

1. The plaintiff be and is hereby granted leave to amend the particulars of claim in accordance with the notice given by him on 1 June 2020.
2. The plaintiff to pay the cost of this application, including the heads of arguments.
3. The matter is postponed to **11 February 2021 at 15h00** for Pre-trial Conference.
4. The plaintiff must file his amended particulars of claim on or before 11 December 2020.
5. The defendant must plead to the amended particulars of claim on or before 22 January 2021.
6. The plaintiff must file his replication, if any, to the Defendant's plea on or before 29 January 2021.
7. Joint proposed pre-trial order must be filed on or before 8 February 2021.

**Reasons for orders:**

PRINSLOO, J

[1] Serving before me is an application by the plaintiff to amend his particulars of claim. The parties filed their respective heads of argument and filed an agreement in terms of para 2.7.2.6 of the Revised Roadmap for the High Court of Namibia to abide by their papers without the need of oral arguments.

Brief background of the judicial management process

[2] The plaintiff instituted action on 23 August 2019 and the matter was defended on 10 September 2019. The matter reached *litis contestation* on 6 December 2019. The matter moved swiftly forward to the case management conference that was held on 24 March 2020.

[3] Hereafter the matter unfortunately grounded to a halt because of the lockdown period due to the COVID 19 Pandemic. In addition thereto the matter was transferred from the judicial case management roll of Ndauendapo J on 18 May 2020 to the roll of

the current JCM roll, due to the fact that Ndauendapo J became conflicted in this matter.

[4] The plaintiff's counsel withdrew as legal practitioner of record on 27 May 2020 and in spite of continuous attempts to secure assistance from the Legal Aid Directorate the plaintiff was unsuccessful and proceeded to launch the current application himself, and did so quite competently.

#### The current particulars of claim

[5] In terms of the current amended particulars of claim<sup>1</sup> the plaintiff's claim is based on a written partnership agreement entered into by the parties during December 2015 and particulars of claim proceeded to set out the salient terms of the agreement between the parties<sup>2</sup>. The plaintiff pleaded that during 2017 the defendant prevented the plaintiff from meaningfully taking part in the business operations of the partnership and as a result the relationship between the parties has irretrievably broken down. The relief sought by the plaintiff is a) a dissolution of the partnership and b) the appointment of a liquidator to realise the partnership assets and c) to liquidate the partnership liabilities and to prepare a final account pursuant to that for division of the profits.

[6] In terms of the proposed amendment the plaintiff is still basing his claim on the written partnership agreement but the plaintiff wishes to plead that preceding the written partnership agreement a universal partnership between the plaintiff and the defendant

<sup>1</sup> As amended on 26 February 2020.

<sup>2</sup> '4.1 The parties would enter into a business partnership trading under the name and style of Stop and Shop Group Supermarkets;

4.2 The parties will have equal shareholding in the partnership business and any further business entered into by the partnership;

4.3 No partner will engage or enter into another business without the explicit permission of the other partner;

4.4 Both partners will give their full attention to the business and assist each other where needed;

4.5 When one partner passes away, his or her shares will automatically become the property of the remaining partners without any compensation to be paid whatsoever;

4.6 The parties would put their assets, income and labour for their joint benefit and for the furtherance of the objects of the abovementioned business enterprise including the acquisition of immovable property, furniture, fixtures, stock, motor vehicles and equipment thereof;

4.7. The parties would share a common bank account(s) from which all household and business expenses were paid, and both parties would have signing powers to those accounts.'

existed. In summary the plaintiff intends to amend his particulars along the following lines: that the parties having lived as husband and wife from 1999 to 2018 and that during period 1999 until 2010 the plaintiff had no direct interest in the defendant's business. In 2010 the parties entered in to an oral agreement and shared a common interest in various business enterprises acquired by the defendant. The parties pooled their assets, income and labour for their joint benefit and furtherance of the different business enterprises. Then on 7 December 2015 the plaintiff and the defendant entered into a written partnership agreement in equal shares. No express agreement was arrived at between the parties as to the division of the profits or the partnership but since there was an equal shareholding there was a tacit term of the partnership agreement that the profits would be divided in equal share. The parties also received monies from time to time as part of their profits but the plaintiff is not sure as to the exact amount of these monies. During the latter part of 2017 the defendant prevented the plaintiff from meaningfully taking part in the business operations of the partnership and as a result the relationship between the parties has irretrievably broken down. The defendant persistently refused to allow the plaintiff to participate in the business operations of the partnership and has effectively divested the plaintiff of any control over its assets and income. The plaintiff claims the same relief as in the amended particulars of claim.

#### The opposition to the proposed amendment

[7] The five principal grounds on which the defendants object to the amendments are as follows:

- a) The plaintiff seeks to introduce an entirely new cause of action, namely the existence of a tacit universal partnership;
- b) The intended amendment is *mala fides* as it is intended to defeat the preliminary legal point raised as a special plea in that whether the plaintiff had the legal capacity during 1999 to 2008 enter into a partnership agreement;
- c) That the plaintiff seeks to withdraw certain admissions by way of the intended amendment;

- d) That the intended amendment of the particulars of claim, if amended, will be excipiable;
- e) The prejudice that will be suffered by the defendant due to the late stage of the proceedings and that the prejudice cannot be cured by an appropriate cost order.

#### The reasons advanced for the intended amendment

[8] In his founding affidavit the plaintiff avers that it is common cause between the parties that an oral agreement existed between the parties regarding their business relations and that the said oral agreement existed before the written agreement was entered into.

[9] According to the plaintiff there was an oversight on the part of his erstwhile legal practitioner to include this fact in the particulars of claim and by not pleading the existence of the oral agreement would distort the true facts of the matter.

[10] The plaintiff further avers that the amendment, if so granted, would not cause the subject matter to change nor is it based on a tacit universal partnership.

#### The legal principles applicable to amendments and application to the facts

[11] In deciding whether or not to grant an application for an amendment the question is essentially what the interests of justice demand, and a practical rule is that an amendment will always be granted unless it is sought in bad faith or will cause an injustice to the other side which cannot be cured by an appropriate costs order.<sup>3</sup>

[12] It is common cause that the plaintiff cannot obtain an amendment to his particulars of claim just for the mere asking thereof. The plaintiff is seeking leave to amend and is therefore asking for an indulgence from this court. The plaintiff must therefore show that

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<sup>3</sup> PT Damaseb Court-Managed Civil Procedure of the High Court of Namibia 1<sup>st</sup> Ed on p. 141 at para 5-062.

there is a factual foundation for the amendment.

[13] It is further trite that an amendment will not be allowed where it would render the pleading excipiable.<sup>4</sup>

*The plaintiff seeks to introduce an entirely new cause of action*

[14] One of the first submissions made on behalf of the defendant is that the plaintiff cannot change his cause of action by the proposed amendment. Although courts on occasion refuse to allow amendments which add or substitute a new cause of action, there appears to be no rigid rule governing the matter. From reading Herbstein & Van Winsen's *The Civil Practice of the Superior Courts in South Africa*<sup>5</sup> I understand the learned authors to say that while there has not been an unanimity on this point, it seems that the mere fact that an amendment sought will result in the introduction of an additional new cause of action or add a new claim is not *per se* a ground for refusing such an amendment. There is some authority for the view that the amendment under these circumstances should not be allowed but no general rule to that effect has been laid down and ultimately the questions would be if the proposed amendment would cause such prejudice to the opposing party which cannot be remedied by an order of cost, postponement or otherwise.

[15] Having considered the proposed amendment it appears to still be based on the written partnership agreement reached between the parties, and I am of the view that the intended amendment would not introduce a fresh cause of action but would clarify pleadings that was insufficiently or imperfectly set out in the particulars of claim. I am of the view that the particulars of claim, as it stands, would not give a true reflection of the relationship between the parties preceding the written partnership agreement, nor is there any reference to the oral agreement reached between the parties regarding the common interest in various business enterprises, which was subsequently culminated into the

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<sup>4</sup> *Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A.

<sup>5</sup> 5<sup>th</sup> Ed at p 685.

written partnership agreement, that forms the basis of the plaintiff's action.

[16] It is a well- established principle that when the court considers an application for leave to amend that the primary object of allowing amendment is "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done".<sup>6</sup>

#### *Excipiability*

[17] The defendant's legal practitioner raised the issue of the excipiability of the proposed amendment in the notice of opposition however the defendant did not continue with the objection coached in that form and advanced no argument in this regard.

#### *No costs tendered*

[18] The defendant's legal practitioner places a lot of emphasises on the fact that the plaintiff did not tender costs as he is seeking an indulgence from this court. On behalf of the defendant it was argued that the proposed amendment would cause the defendant to be further out of pocket as the plaintiff effectively sought to abandon the already amended particulars of claim. As indicated earlier in this ruling I am of the view that the base of the claim remains unchanged and the prejudice caused by the proposed amendment can be mitigated by an appropriate cost order. Even if the plaintiff did not tender cost the rules is quite clear in this regard. Rule 52(8) stated that a party giving notice of an amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned to any other party. The rule therefore lays the defendant's concern to rest in this regard.

#### *Preliminary legal point raised*

[19] The next issue that the defendant raised in her notice of opposition to the proposed amendment is the fact that the amendment would defeat the preliminary legal

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<sup>6</sup> *Cross v Ferreira* 1950 (3) SA 443 (CPD) at 447.

point raised as a special plea regarding the question if the plaintiff had the legal capacity during 1999 to 2008 to enter into a partnership agreement. It cannot be accepted as a valid objection to the proposed amendments. This is not a sound reason for refusing the amendment sought. In any event the defendant can still raise the said point in her consequential plea should she wish to do so.

#### *Withdrawal of admissions*

[20] Lastly the defendant raised an objection that the plaintiff seeks to withdraw an admission to the effect that the plaintiff entered into a partnership agreement and traded as partners in the business during the period of 1999 to 2008. In this regard I must point out that I fail to find this 'admission' referred to by the defendant which the plaintiff apparently seeks to be withdrawn anywhere in the pleadings. The defendant also complains that the plaintiff seeks to withdraw an admission to the effect that the Stop and Shop Group Supermarkets were established on or about 7 December 2015. From the proposed amendment it is clear that the plaintiff still very much relies on the written partnership agreement in terms of which the Stop and Shop Group came into existence and which is annexed to the current particulars of claim. There appears to be no merits to this objection raised to the proposed amendment.

#### Conclusion

[21] Having considered the papers before me I am of the view that the amendment is neither *mala fide* nor unjust and in order to present the true issues in dispute between the parties the proposed amendment should be granted as prayed for.

#### Costs

[22] In my view, the defendant was to a certain extent justified, in opposing this

application and I order that the costs of and occasioned by the amendment be paid by the plaintiff.

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

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
In person Windhoek	T Chibwana Instructed by Nicki Ngula Attorneys Windhoek