



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2019/04835

In the matter between:

BALEIA DO MAR INDUSTRIAL SAFETY SUPPLIES CC

PLAINTIFF

and

THE DOLPHIN SCHOOLS

DEFENDANT

Neutral Citation: *Baleia Do Mar Industrial Safety Supplies CC v The Dolphin Schools*
(HC-MD-CIV-ACT-CON-2019/04835) [2021] NAHCMD 166 (16 April 2021)

Coram: UEITELE J
Heard: 11 February 2021
Delivered: 16 April 2021

Flynote: Practice – Notice of Motion — Amendment of — Substitution of the name of the right defendant for that of the wrong one — Application for amendment always in order unless made *mala fide* or prejudicial to other party — Courts gradually moving away from overly formal approach

Summary: The plaintiff, Baleia Do Mar Industrial Safety Supplies CC instituted action proceedings against the defendant, the Dolphin Schools, claiming an amount of N\$ 482 371-24 plus interest *a tempora morae* from 1 September 2018 to date of payment. The claim is in respect of an outstanding payment allegedly due to the plaintiff for school uniforms sold and delivered by the plaintiff to the defendant.

In its particulars of claim the plaintiff cites the defendant as a "... firm doing business as primary and secondary schools...". The defendant disputed this allegation, pleading that it was a voluntary association at the time the alleged cause of action arose. Despite effecting amendments to its plea on three separate occasions, the defendant maintained its denial of plaintiff's citation of its identity throughout the proceedings thus far.

Plaintiff subsequently noted its intention to amend its particulars of claim to cite the defendant as a "... an *universitas* and voluntary association not for gain and entity with rights and duties independent from the rights and duties of its individual members and with the capacity to sue or be sued in its own name...".

The intended amendment was opposed by the defendant on the ground that the alleged cause of action arose when the school was a voluntary association and not a firm. The School further argued that at the time of it being a voluntary association, its members passed a resolution to change the governance identity of the voluntary association to a section 21 Company, being a company limited by guarantee, which resolution was registered and the association duly incorporated as a company limited by guarantee. The defendant proceeded and submitted that all the rights and obligations of the voluntary association were taken over by the company limited by guarantee.

The defendant argued that the plaintiff, by its intended amendment is seeking to amend the citation of a non-existing person or entity with another non-existing person or entity namely the "Dolphin Schools association a *universitas* or voluntary association not for gain".

In rebuttal, the plaintiff, although conceding that the defendant was a voluntary association when the alleged cause of action arose, contended that the voluntary association still exists. Plaintiff further contended that the association is not a different entity than that cited in plaintiff's particulars of such a citation is allowed in respect of a business, including a business carried on by a Body Corporate or the Sole Proprietor thereof under its trading name, other than his or her own name. The defendant contended that the citation in its particulars of claim was competent in terms of rule 42(1) of the Rules of Court.

Held, that the general approach of this court, is that an amendment of a pleading should always be allowed unless the application to amend is *mala fide* or unless the amendment would cause such injustice or prejudice to the other side as cannot be compensated by an order for costs and, where appropriate, a postponement.

Held, that it is clear from the papers before the court that the firm of attorneys who ultimately issued the summons, acting on the instructions of the plaintiff, did know and was fully aware of the fact that at the time when the alleged cause of action arose the School was a *universitas* and was furthermore alerted (in the plea and in correspondence between that parties) that at the time the summons was issued the School had become a company limited by guarantee.

Held, that the definition of a 'firm' cannot be extended to encompass an incorporated entity. The amendment sought by the plaintiff intends to establish '*legitima persona standi in judicio*' of the defendant. The Court concluded that the amendment seeks to introduce not merely a different citation of the defendant, but it also seeks to demonstrate that the defendant has the capacity to sue and be sued in its own name.

The Court satisfied itself that having regard to the substance of what the amendment seeks to introduce, the amendment seeks to introduce an entity which no longer exists. That this will be prejudicial to the defendant cannot be meaningfully doubted.

The plaintiff's application for amendment was accordingly dismissed.

ORDER

1. The plaintiff's application for the amendment of its particulars of claim is refused and dismissed.
 2. The plaintiff must, subject to Rule 32(11) pay the defendant's costs of the application, such costs are to include the costs of one instructing and one instructed counsel.
 3. The matter is postponed to 18 May 2021 at 08:30 for a case management conference.
-

JUDGMENT

UEITELE, J

Introduction

[1] On 01 November 2019, Baleia Do Mar Industrial Safety Supplies CC (I will, in this judgment, refer to it as the plaintiff), caused summons to be issued out of this court in terms of which it claimed payment in the amount of N\$482 371-24 plus interest *a tempore morae* from 01 September 2018 to the date of payment, from the Dolphin Schools (I will, for ease of reference in this judgment, refer to the defendant as the School).

[2] On 26 November 2019 the School gave notice of its intention to defend the plaintiff's claim and on 14 February 2020 filed its plea to the plaintiff's particulars of claim.

Factual background

[3] The factual background that gave rise to the plaintiff instituting this claim against the School is in dispute between the parties, but is in a nutshell as follows: The plaintiff alleges that on 29 July 2016 and at Walvis Bay the plaintiff and the School concluded a written contract in terms of which the School would buy from the plaintiff who would sell all school clothing which the plaintiff had in stock at cost price and on the terms and conditions pleaded by the plaintiff. Some of the terms pleaded by the plaintiff are that:

- (a) the School would pay the plaintiff's invoice over a 24-month period, calculated from date of the invoice or 01 August 2016, whichever event occurs last;
- (b) simple interest calculated monthly at Bank Windhoek's prime lending rate would accrue on the outstanding amount from the date of commencement of the payment period (that is the date of the invoice or 01 August 2016, whichever occurs last); and
- (c) the School would be obliged to pay at least one third of the total capital amount within the first 12-month period and the remaining capital and interest in the second 12-month period.

[4] The School, however, disputes that it concluded a written contract with the plaintiff and on the terms pleaded by the plaintiff. The School contends that towards the end of the year 2015 certain disputes developed between the School and the plaintiff, as well as the School and the plaintiff's sole member, a certain Mr Vincent Fernandes. The School alleges that the disputes related to the donation of shares which Mr Fernandes held in Dolphin School Properties (Pty) Ltd in which the School's immovable property was registered, as well as the purchase and payment of various school uniforms for the School which the plaintiff had procured as stock and wished to sell and supply to the School.

[5] The School further alleges that on 13 July 2016 a meeting was held at the offices of Metcalfe Legal Practitioners in Walvis Bay for the purposes of negotiating a resolution of the dispute between the School and the plaintiff, and the School and Mr Fernandes. The School continued to contend that upon the conclusion of the meeting the parties were under the impression that, except for a few minor practicalities regarding delivery of the school uniforms and the value of the shares, the disputes between the parties had been resolved and settled. The School further alleges that it was under the impression that in respect of the issue regarding the School uniforms the parties had agreed as follows:-

(a) That the plaintiff would deliver all the remaining school uniforms which it had in stock to the School.

(b) That the School would pay to the defendant the costs of the uniforms, the amount being the sum of N\$ 567 405-68 (Five Hundred and Sixty Seven Thousand, Four Hundred and Five Namibian Dollars and Sixty Eight Cents) as follows:-

- (i) the amount of N\$ 189 135 (One Hundred and Eighty Nine Thousand and One Hundred and Thirty Five Namibia Dollars) on or before 01 September 2017; and
- (ii) the balance of N\$ 378 270-68 (Three Hundred and Seventy Eight Thousand Two Hundred and Seventy Namibia Dollars and Sixty Eight Cents) on or before 01 September 2018.

[6] The plaintiff alleges that on 31 August 2016 it completed delivery of the school uniform stock that it had in its possession and the School signed off the invoice in respect of the delivery in the amount of N\$ 568 849-83. On 28 September 2017 the School paid the amount of N\$ 189 135. The plaintiff instituted this action claiming payment in the amount of N\$ 482 371-24, which allegedly constitutes the capital balance of N\$ 379 714-83 plus:

(a) interest on the capital amount of N\$ 568 849-83 at the rate of 10, 75% (allegedly the prime lending rate of Bank Windhoek for the period 01 September 2016 until 29 September 2017) being the amount of N\$ 65 954-12; and

(b) interest on the capital balance of N\$ 379 714.83 at the rate of 10, 50% (allegedly the prime lending rate of Bank Windhoek for the period 30 September 2017 until 31 August 2018) being the amount of N\$ 36 702-29.

Pleadings and the Case Management Process

[7] After the School entered its notice of intention to defend the plaintiff's claim, the matter was docket allocated to me for case management. In its Particulars of Claim the plaintiff cited the School as "The Dolphin Schools a firm doing business as primary and secondary private schools at 35, Theo-Ben Gurirab Street, Walvis Bay, Republic of Namibia". The School answered this allegation in its plea as follows:

'Defendant disputes its status as being a firm as cited by the Plaintiff and pleads that it was an association at the time the alleged cause of action arose.'

[8] I case managed the matter during the year 2020. On three occasions during the case management process the School indicated its intention to amend its plea. On all three occasions the intention to amend was not opposed and on each occasion the plea was subsequently amended. Furthermore, on all three occasions that the School amended its plea, it maintained its denial that it was a firm as alleged by the plaintiff and continuously pleaded that it was an association at the time that the alleged cause of action arose.

[9] The matter came up for a case management conference on 26 May 2020, at which conference I made the following Case Management Order:

'1 The parties must file their discovery affidavits and bundles of discovered documents on or before **03 June 2020**.

2 The plaintiff must file its witness and witnesses' statements by not later than **10 June 2020**.

3 The defendant must file its witness and witnesses' statements by not later than **17 June 2020**.

4 The legal practitioners who will conduct the trial on behalf of the parties ***MUST HOLD A PRETRIAL MEETING*** on or before **24 June 2020** at which meeting the legal practitioners must discuss and address all the issues contemplated in Rule 26.

5 The parties must compile and file a draft pretrial order by not later than **30 June 2020**.

6 The case is postponed to **07 July 2020** for a pretrial conference.'

[10] When the matter came up for a Pre –Trial Conference hearing on 07 July 2020 the parties had not filed the draft pre-trial order as I ordered but explained that the plaintiff had, on 25 June 2020, issued a notice in terms of Rule 28(8)(a). After hearing the parties I ordered the School to deliver to the plaintiff the documents stipulated in plaintiff's aforementioned rule 28(8)(a) notice by no later than 04 September 2020, or state on oath or by affirmation that such documents are not in its possession, in which case it must state the whereabouts of the documents, if known to it. I furthermore ordered the parties to file a joint status report by no later than 11 September 2020 and I postponed the matter to 15 September 2020 at 08:30 for a status hearing.

[11] For purposes of the Status hearing scheduled for 15 September 2020 the parties' legal practitioners filed a status report indicating that the School has filed an affidavit as contemplated under Rule 28(8)(b)(ii) and that the plaintiff's legal practitioners needed to consult the plaintiff in order to obtain instructions for further action. A consultation could however not be held due to the travel restrictions imposed under the State of Emergency. I accordingly, out of Chambers, issued an order postponing the matter to 06 October 2020 under the hope that by then the travel restrictions would have been eased. On 06 October 2020 the plaintiff's legal practitioners indicated that they had not yet had

the opportunity to consult the plaintiff and requested an additional two weeks to enable them to consult the plaintiff. I again granted the indulgences sought and issued an order, out of Chambers, postponing the matter to 03 November 2020 for a Status hearing.

[12] For the Status hearing scheduled for 03 November 2020 the parties' legal practitioners filed a status report indicating that the plaintiff did not intend to bring an application as contemplated in Rule 28. I accordingly issued an order, out of Chambers, ordering the legal practitioners who will conduct the trial on behalf of the parties to hold a pre-trial meeting on or before 27 November 2020 at which meeting the legal practitioners must discuss and address all the issues contemplated in Rule 26. I also ordered them to file a draft pretrial order by no later than 04 December 2020 and postponed the matter to 08 December 2020 for a pre-trial conference.

[13] On 23 November 2020 the plaintiff filed a notice of intention to amend its particulars of claim obviating the need to hold a pre-trial meeting on 27 November 2020. The notice reads as follows:

'BE PLEASED TO TAKE NOTICE that the Plaintiff intends to amend its particulars of claim as follows:-

1. Ad paragraph 2 thereof

By amending paragraph 2 of the particulars of claim to read as follows:-

"2. Defendant is The Dolphin Schools Association an *universitas* and voluntary association not for gain and entity with rights and duties independent from the rights and duties of its individual members and with the capacity to sue or be sued in its own name with address at 35, Theo-Ben Gurirab Street, Walvis Bay, Republic of Namibia."

[14] The School indicated that it will oppose the intended amendment. Due to the anticipated opposition to the intended amendment I, out of necessity, had to postpone the pre-trial hearing scheduled for 08 December 2020 in order to allow the plaintiff to file its application for leave to amend its particulars of claim. On 21 January 2021 the plaintiff

filed its application to amend its particulars of claim. It is that application that I am now considering.

The grounds on which the School objects to the intended amendment

[15] The School objected to the intended amendment on the ground that the alleged cause of action arose when the school was a voluntary association and not a firm. The School further argues that on 10 August 2017 the Dolphin Schools, a voluntary association, at a duly constituted extraordinary general meeting of its members resolved to change the governance identity of the voluntary association to a section 21 Company, being a company limited by guarantee. The resolution of 10 August 2017 was put into effect on 13 October 2017 when the DOLPHIN SCHOOLS was, in terms of s 21 of the Companies Act, 2008, registered and incorporated as a company limited by guarantee. The School proceeded and submitted that all the rights and obligations of the voluntary association were taken over by the company limited by guarantee.

[16] The School thus argues that the plaintiff, by its intended amendment is seeking to amend the citation of a non-existing person or entity with another non-existing person or entity namely the “Dolphin Schools association an *universitas* or voluntary association not for gain”.

The plaintiff's response to the School's objection

[17] The plaintiff concedes that at the time when the alleged cause of action arose the School was a voluntary association known as the Dolphin School Association, but contends that it has been advised by its legal practitioners that that voluntary association still exists. Mr Fernandes, who deposed to the affidavit in support of the intended amendment, contends that from the minutes of the meeting of 10 August 2017 of the voluntary association, it is evident that no resolution was taken to dissolve the School. He thus contends that the voluntary association was not dissolved nor was a resolution

taken transferring the assets of the voluntary association to the company limited by guarantee.

[18] Mr Fernandes further contends that it is not correct that the association (he presumably refers to the School) is a different entity than that cited in plaintiff's particulars of claim. He states that the School was cited as a firm. He further contends that the plaintiff was advised that such a citation is allowed in respect of a business, including a business carried on by a Body Corporate or the Sole Proprietor thereof under its trading name, other than his or her own name. The trade name of the entity sued is indeed "The Dolphin Schools", argues Mr Fernandes. He thus contends that he was advised that in terms of Rule 42(1) this citation was indeed competent on the facts. What is clear, says Mr Fernandes, is that The Dolphin Schools (Pty) Ltd as a section 21 Company in terms of the Companies Act, 2008 could not have entered appearance to defend in respect of this matter since it is not the defendant cited.

Discussion

[19] It is now an established principle of our law that the court hearing an application for an amendment has a wide discretion whether or not to grant it, a discretion which must clearly be exercised judicially¹. The general approach of this court, which has been confirmed in numerous cases, is that an amendment of a pleading should always be allowed unless the application to amend is *mala fide* or unless the amendment would cause such injustice or prejudice to the other side as cannot be compensated by an order for costs and, where appropriate, a postponement².

¹ *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013]NASC 11(Delivered on 19 August 2013) at para [38]. Also see Erasmus, Breitenbach, Van Loggerenberg and Fichardt *Superior Court Practice* (1994, with loose-leaf updates) at B1 – 178; Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* 4th ed (1997) by Van Winsen, Cilliers and Loots (edited by Dendy) at p 515 and the other authorities cited therein.

² See *Meyer v Deputy Sheriff, Windhoek and Others* 1999 NR 146 (HC).

[20] The primary object of allowing an 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 done³. The power of the court to allow even material amendments is limited only by considerations of prejudice or injustice to the other side⁴. Despite this liberal attitude of the court towards amendments to pleadings, it must not be forgotten that a litigant seeking to make an amendment does not do so as a matter of right, but is seeking an indulgence and must offer some explanation as to why the amendment is required⁵.

[21] The principles that I have outlined in the previous paragraphs were restated by the full bench of this Court in the matter *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*⁶. In his work Damaseb⁷, 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 ;. . .’

[22] Mr Olivier who appeared on behalf of the plaintiff argued that the School was cited in terms of the provisions of Rule 42(2) which provides for a citation in respect of a business, including a business carried on by a body corporate or by the sole proprietor thereof under a name other than his or her own. He continued and argued

³ See *and South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC). *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

⁴ See *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 637A - 641C and *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F - I).

⁵ *Zamnam Exclusive Furniture CC v Lewis* (I 268-2014) [2015] NAHCMD 274 (13 November 2015) and *Krogman v Van Reenen* 1926 OPD 191 at 194 – 5;

⁶ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601/2013 & I 4084/2010) [2014] NAHCMD 306 (Delivered on 17 October 2014)

⁷ P T Damaseb. *Court-Managed Civil Procedure of the High Court of Namibia* at p145.

that Rule 42(1) defines a firm as meaning a business, including a business carried on by a body corporate or by the sole proprietor thereof under a name other than his or her own. As can be seen, the defendant indeed conducted business as “The Dolphin Schools” and also “The Dolphin Elementary School” and “The Dolphin Secondary School”.

[23] Relying on the case of *Cupido v Kings Lodge Hotel*⁸ Mr Olivier argued that Rule 42 is a procedural remedy whereby a litigant can be brought to Court. It has nothing to do with the substantive law concerning the nature and status of a defendant. It does not elevate a defendant to a status which it did not possess. He thus concludes by arguing that in citing a defendant by its trading name, one merely addresses it by the trade name it is commonly known by and that Rule 42 was enacted so as to ensure that a plaintiff’s claim is not defeated by technical defences by the citing of a defendant.

[24] On the other hand, Mr Boonzaier, who appeared for the School, argued that despite the fact that the plaintiff was, prior to it instituting its claim, aware of the School’s status as company limited by guarantee it at a late stage brought the application to amend its particulars of claim. He further argued that apart from the fact that the application to amend was brought at a late stage, the plaintiff did not offer any explanation as to what prompted it to apply for the intended amendment. He argued that the plaintiff did not offer an explanation to Court as to when it realised that the defendant is wrongly cited.

[25] Mr Boonzaier further argued that if the amendment were to be allowed the School will suffer prejudice and the prejudice lies in the fact that unnecessary legal costs will be occasioned by intended amendment. In addition thereto, if the plaintiff were to be successful in the main claim against a non-existing entity, the Court’s order will have no effect as it will not be able to be executed. He further argued that the Dolphin Schools never existed as a firm and the intended amendment seeks to introduce a now dissolved

⁸ *Cupido v Kings Lodge Hotel* 1999 (4) SA 257.

and non-existing party to the main proceedings, namely “The Dolphin Schools as an *universitas* and voluntary association”.

[26] In the matter of *Cupido v Kings Lodge Hotel*⁹ Horn AJ opined that it is imperative for a plaintiff, when intending to issue summons, to ascertain who the defendant is and to ensure the correct citation of the defendant. The learned judge further stated that a failure in this regard could result in a plaintiff being non-suited. This could have serious consequences for a plaintiff who, having incurred damages, could find himself or herself with a claim but with no one to be held liable for his or her losses. This requirement that the plaintiff must ensure that it brings the correct defendant before the Court emanates from the well-established principle that a plaintiff must find the defendant and sue him in the Court with the requisite jurisdiction. He continued and said:

‘It concerns the principle *legitima persona standi in judicio*. Few problems in this regard arise where the defendant is an individual who is readily identifiable and available to the doors of the Court. It is when businesses, associations and partnerships are involved where difficulties regarding the citation of the parties arise. At common law, for example, a partnership could not be sued other than through its partners. An unincorporated association or firm could likewise not be sued other than through its members. A company could trade under another name but had to be cited in legal proceedings in the name by which it was registered. These requirements created problems for litigants by reason thereof that the correct names or identities of businesses or their constituents, particularly in the case of associations and partnerships, were not always readily ascertainable. This often led to a party who was sued taking technical points of being incorrectly cited, thereby escaping liability. It can therefore be stated with some conviction that Rule 14¹⁰ was introduced in order to streamline the procedure of citation of litigating parties and to meet the situation of particularly the plaintiff when claiming damages from a defendant who trades not as an individual but under another name, either on his own or together with others.’

[27] Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* 4th ed (1997) by Van Winsen, Cilliers and Loots (edited by Dendy)¹¹ states the following:

⁹ *Supra*.

¹⁰ Rule 14 is the predecessors of our current Rule 42.

'Prior to the introduction of Rule 14 [in our current situation, Rule 42], the citation of partnerships, firms and unincorporated associations of natural persons (also known as "voluntary associations") in the Superior Courts presented certain difficulties arising from the fact that, not being separate legal personae, they could not generally be sued, nor could they be sued in their own names, apart from the individual members, whose names and addresses had to be alleged in the summons. The purpose of the Rule is to render it unnecessary to cite each and every individual forming part of an unincorporated body of persons and to simplify the method of citation to enable that body of persons to be sued in the name which the body normally bears and which is descriptive of it.'

[28] The learned authors, at page 134 state:

'Rule 14 facilitates the citation of partnerships, firms and associations as defendants, as well as allowing those entities to sue in their own names. It is framed so as to bar a number of technical defences formerly open to litigants in connection with such proceedings.'

[29] In the South African case of *Farm Fare (Pty) Ltd v Fairwood Supermarket*¹², Munnik JP, with whose judgment Van den Heever J and Baker J concurred, said the following:

'Rule 14(2) provides in so many words that a firm may be sued in its own name. The plaintiff need not allege the name of the proprietor. The plaintiff may, but is not obliged to, attempt to discover who wore the mask of the firm name at the "relevant date" - apparently the date when the cause of action arose.'

[30] The judgement of *Durban City Council v Jailani Cafe*¹³ reveals that the Courts were prepared to afford the definition of 'firm' as wide a meaning as possible. In that matter Milne J said:

¹¹ Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* 4th ed (1997) by Van Winsen, Cilliers and Loots (edited by Dendy) at p 133.

¹² *Farm Fare (Pty) Ltd v Fairwood Supermarket* 1986 (4) SA 258 (C) at 262A.

¹³ *Durban City Council v Jailani Café* 1978 (1) SA 151 (D) at 159D-F.

'Finally, there is the matter of the citation of the respondent. It is submitted on behalf of the respondent that the company Jailani Cafe (Pty) Ltd should have been cited as the respondent in these proceedings. I have already held that Jailani Cafe is the name under which Jailani Cafe (Pty) Ltd carries on business. Rule 14(2) provides that a partnership, a firm or an association may sue or be sued in its name and, for the purpose of this Rule, the word "firm" is defined in subrule (1) as meaning a business carried on by the sole proprietor thereof under a name other than his own.'

[31] From the discussion in the preceding paragraphs it is clear that the question that needs to be answered in the present matter is whether the contention by Mr Olivier that the School is being simply sued by its trade name is valid or whether the contention by Mr Boonzaier that the plaintiff is seeking to introduce a non-existing legal person is valid.

[32] It is clear from the papers before the court that the firm of attorneys who ultimately issued the summons, acting on the instructions of the plaintiff, did know and was fully aware of the fact that at the time when the alleged cause of action arose the School was a *universitas* and was furthermore alerted (in the plea and in correspondence between that parties) that at the time the summons was issued the School had become a company limited by guarantee.

[33] The insistence, on advice by its legal practitioner, by the plaintiff that the School is still a *universitas* is clearly wrong and ill-advised and is thus untenable. Even if one was to accept that the resolution of 10 August 2017 did not specifically provide that the voluntary association was dissolved, the fact that the School was incorporated as a company limited by guarantee must logically follow that the School can no longer retain its status as voluntary association. One entity cannot retain two different statuses under the law (one under the common law and one under statutory law).

[34] I take cognizance of the judgement of Milne J in the matter of *Durban City Council v Jailani Cafe*¹⁴ where he affords the definition of 'firm' with a wide meaning. In my view the meaning of 'firm' cannot be extended to encompass an incorporated entity. Secondly

¹⁴ *Durban City Council v Jailani Café* 1978 (1) SA 151 (D) at p159 D-F.

the plaintiff by the amendment it is seeking does not simply want to cite the School by its trade name, it intends to establish '*legitima persona standi in judicio*' of the School.

[35] In the unreported judgment of *Oshuunda CC v Blaauw and Another*¹⁵ this Court held that:

'... the expression "locus standi" in our law is not used in one sense only. If the counsel intended to use it in the sense of an "an interest to sue" we have no quarrel with that argument. Generally a corporation will always have standing to in that sense to recover damages caused to it by such conduct. However, if counsel, used the expression in the narrower sense of "capacity to sue" the generalization cannot stand unqualified. *Legitima persona standi in judicio* is, as Baxter, (*Administrative Law*, p. 648) points out, an incident of legal personality. Being a legal *persona*, a corporation cannot do anything, "except by human agency."

[36] In the matter of *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*¹⁶ where a defendant had incorrectly been sued as lessee instead of as a surety for the debts of the lessee, Trollip JA emphasized that what must be considered is the substance of the process and not merely its form. In the matter of *Four Tower Investments (Pty) Ltd v André's Motors*¹⁷ Galgut DJP remarked that since *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*, decisions in the reported cases tend to show that there has been a gradual move away from an overly formal approach. This development is to be welcomed because it facilitates the proper ventilation of the issues and the attainment of justice in a case thereby giving effect to the spirit of this court's rules¹⁸. In line with this approach courts must therefore be careful look at the substance of the matter.

¹⁵ *Oshuunda CC v Blaauw and Another* Case No. FA 10/2000 (delivered on 29 August 2000. At

¹⁶ *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 470F - 471C.

¹⁷ *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N).

¹⁸ Rule 1(3) of this Court's Rules amongst other things provide that: 'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable ...'

[37] Galgut DJP¹⁹ cautioned that the facts of cases are never the same. He stated that in some instances the incorrect citation happens to be one of an otherwise nonexistent *persona*, and because of the well-established rule that a pleading that is a nullity cannot be amended, the question that has sometimes been posed in such cases is whether the pleading concerned is as a result a nullity. The learned Judge continued and said whether a process is a nullity or not will depend on the facts of the case, and on the authorities it seems that it may be a question of the degree to which the given process is deficient.

[38] I have concluded earlier that what the amendment seeks is to introduce not merely a different citation of the School, but it also seeks to demonstrate that the School has the capacity to sue and be sued in its own name. I am satisfied that having regard to the substance of what the amendment seeks to introduce, the amendment seeks to introduce an entity which no longer exists. That this will be prejudicial to the school cannot be meaningfully doubted. I therefore am of the firm view that the facts in the case of *Cupido v Kings Lodge Hotel* on which Mr Olivier so heavily relied are distinguishable from the facts of this case. *Cupido* is therefore of no assistance to the plaintiff.

[39] The parties were *ad idem* in this matter that the cost must follow the course and where appropriate include the costs of one instructing and instructed counsel. I therefore, in my discretion find that, subject to Rule 32(11), costs must follow the course. For the reasons that I have set out in the earlier paragraphs of this judgment I will refuse to grant the plaintiff leave to amend its particulars of claim and will dismiss the plaintiff's application.

[40] In the result I make the following order:

1. The plaintiff's application for the amendment of its particulars of claim is refused and dismissed.

¹⁹ *Four Tower Investments supra*.

2. The plaintiff must, subject to Rule 32(11) pay the defendant's costs of the application such costs are to include the costs of one instructing and one instructed counsel.
3. The matter is postponed to 18 May 2021 at 08:30 for a case management conference.

SFI UEITELE
Judge

APPEARANCES

PLAINTIFF:

Jan Hermanus Olivier
Of Jan Olivier & Company Legal
Practitioners

DEFENDANT:

Partners

Marinus G Boonzaier
Instructed by Theunissen, Louw &