

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>MASTER TRADING CC (IN LIQUIDATION) vs CAPX FINANCE NAMIBIA (Pty) Ltd</i>	Case No: HC-MD-CIV-ACT-CON-2019/03166
Heard before TOMMASI J	Division of Court: MAIN DIVISION Date of hearing: 22 October 2020 Delivered on: 26 January 2021 Reasons delivered: 26 January 2021
Neutral citation: <i>Master Trading CC v CAPX Finance (Pty) Ltd</i> HC-MD-CIV-ACT-CON-2019/03166 [2021] NAHCMD 17 (26 January 2021)	
Results on merits: .	
The order: IT IS ORDERED THAT: <ol style="list-style-type: none"> 1. The plaintiff is granted leave to amend its particulars of claim. 2. The plaintiff must file its amended particulars of claim within 15 days from date of the order. 3. The plaintiff must pay the costs of this application as well as the wasted costs occasioned by the amendment of the particulars of claim, such costs to include the costs of one instructed counsel and one instructing counsel but limited in terms of the provisions of rule 32(11). 4. The parties must file a status report on or before 12 February 2021 regarding the further conduct of the matter. 5. The matter is postponed to 17 February 2021 for a status hearing. 	

Reasons for orders:

TOMMASI J,

[1] This is an application by the Plaintiff for the amendment of its particulars of claim. Defendant's oppose the application.

Background

[2] The plaintiff instituted action against the defendant for re-payment of certain monies which it had paid to the defendant in respect of an "invoice discounting agreement". The plaintiff avers *inter alia* that:

(a) The discounting agreement was partly oral and partly written.

(b) The defendant made representations that it was entitled to charge VAT on the interest and that the defendant was lawfully entitled to charge interest on the amounts advanced to plaintiff in terms of the partly written and partly oral agreement;

(c) These representations were false, wrongful, negligently made as the defendant, a financial service provided ought to have known that it was not entitled to charge interest or VAT;

(d) The representations were material.

[3] The defendant pleaded that there was not a partly written and partly oral agreement but several separate invoice discounting agreements. The defendant denies that it is a loan agreement and pleads that the agreements are sales of a debt or *nomen* with a warranty by plaintiff that the debt is good.

[4] The matter reached *lites contestatio* on 19 May 2020 and the matter was ripe for case management when the plaintiff notified the court that it wishes to amend its particulars of claim.

Proposed Amendments

[5] The plaintiff proposed that the following amendments, in bold, below are to read as follows:

Paragraph 15:

On the occasion of each advance (referred to herein as a transaction), the defendant issued to the plaintiff a **signed and dated** invoice discounting agreement – partial invoice **signed and accepted by plaintiff (on the dates above the signatures)**

Insertion of the following new paragraph

16bis. The material and express terms of each invoice discounting agreement were that the defendant would:

16bis.1. Lend and advance to the plaintiff an amount of 70% of the invoice value (with the invoice value represented by the words invoice statements account and 70% of the invoice value represented by the amount appearing next to the words discount amount);

16bis.2. charge interest on the invoice value at the rate of 5% per month or 0.167% per day;

16bis.3. charge the plaintiff a transaction fee of N\$250 per transaction.

Paragraph 17:

The dates of each **signed and dated** transaction, the invoice amounts, the 70% portion (described by the defendant as the discounted amount) the actual amount received by plaintiff from the defendant, the dates upon which payment was received by the defendant, the 5% interest charged by the defendant on the funds lent and advanced, the service fees, the VAT raised by the defendant, the amounts retained or appropriated by the defendant, the balance paid to the plaintiff pursuant to each loan and the interest the defendant could lawfully have charged, appear in the schedule annexed hereto marked "D".

Paragraph 19:

At the time of the conclusion of the main agreement on 12 November 2014 **and/or on the date of each invoice discounting agreement – partial invoice**, and at Windhoek,

the defendants WG Nel represented to the Plaintiff (duly represented by AJ Greeff), orally and in writing that.

Paragraph 21:

The written part of the representation is constituted by the discounting invoice term sheet (Annexure A) **and/or the invoice discounting agreement – partial invoice (collectively marked Annexure “C”)**

Paragraph 41.2:

In this manner defendant appropriated an amount of N\$3 955 166.80 from the **defendant, which is calculated as reflected in the schedule compiled by the defendant (marked “F”) in the column titles “Total Rpmnt”** .

[6] The plaintiff further seeks to add two further documents to Annexure C and by replacing Annexure D with an amended Annexure “D” (inserting columns for the dates of the transactions, the page number as it appears in annexure “C” and by adding a new annexure “F”

[7] The defendant’s objection to the amendments is mainly against the amendments contained in paragraph 15, 17, 19 and 21 and the insertion of paragraph 16bis. The amendments proposed in paragraph 41.2, the additions/replacements and insertions to the existing annexures and the addition of the new annexure “F” may be allowed.

Law applicable to Amendments

[8] Both parties are *ad idem* on the approach to be adopted by the court when considering an application for amendment. Both parties referred to the full bench decision 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) where Damaseb, JP, at page 24, paragraph 49, page 25 respectively, stated as follows:

‘The unchanged position under the rules of court at the time the matter was argued and now is that an amendment may be granted at any stage of a proceeding and that the court has discretion in the matter, to be exercised judicially. The common law position that a party may amend at any stage of proceedings as long as prejudice does not operate to the prejudice of the

opponent remains, save that, like every other procedural right, it is also subject to the objectives of the new judicial case management regime applicable in the High Court. That includes the imperative of speedy and inexpensive disposal of causes coming before the High Court.’

[9] It is furthermore submitted that the amendment will render the pleading vague and embarrassing and thus excipiable. In this regard the following was stated by Prinsloo J in *J & M Casino Consulting CC v United Africa Group (Pty) Ltd* (HC-MD-CIV-CON-2017/01344) [2018] NAHCMD 176 (06 June 2018):

‘The accepted approach is that an amendment should not be granted where the introduction of such amendment would render such pleadings excipiable, however before an amendment will be refused on the grounds of excipiability, it must be clear that the amendment will (not may) render the pleadings excipiable.’

Issues raised in opposition

Amendments render the proposed particulars of claim vague and embarrassing and therefore excipiable

[10] The defendant’s opposition to the amendment is that the plaintiff effectively seeks to expand the contractual matrix between the parties so as to include both the partly written and partly oral agreement as well as the various Invoice Discounting Agreements. Ms. Schickerling for the defendant maintains that such an approach is untenable because the terms pleaded are in conflict with the written terms of the respective Invoice Discounting Agreements. Defendant’s counsel argued that these agreements contain a non-variation clause and it cannot be reconciled with the main agreement and its terms. She further submitted that plaintiff, in order to present its case on the amended particulars of claim, would have to present evidence which would violate the non-variation clauses contained in the Invoice Discounting Agreements as well as the parole evidence rule. Insofar as it is the plaintiff’s case that the main agreement was for the parties to agree to enter into future agreements, it would be void and unenforceable. She submitted that the proposed amendments would render the amended particulars of claim vague and embarrassing and accordingly, excipiable. The defendant submitted that if the amendment would render a pleading excipiable, it should not be allowed and in this

regard referred the court to *Cross v Ferreira* 1950 (3) SA443 (C).

[11] The plaintiff stated that it is not its case that it is an agreement to agree in future or that the discounting agreements amount to novation.

[12] The plaintiff submits that its case stems from a contractual relationship which existed to enter into money lending agreements from time to time and that the loan agreement was partly written and partly oral. The written part of the agreement comprises of annexure A (an Invoice Discounting Term Sheet) and in terms of the amendment also the various Invoice Discounting Agreements which are contained in Annexure "C".

[13] Plaintiff's counsel submitted that it is Plaintiff's case that the various invoice discounting agreements were money lending agreements and not invoice discounting agreements thus making the interest usurious. According to plaintiff the Invoice Discounting Term Sheet which appears in Annexure "A" provides the overarching terms and conditions upon which the invoice discounting services would be provided. The argument is further that the material terms are the same, that they are reconcilable and not in conflict of each other. The plaintiff therefore contends that the proposed amendments would not render the particulars of claim vague and embarrassing.

The failure to comply with the stamp duties act

[14] The defendant's counsel submitted that the introduction of the various Invoice Discounting Agreements as part of the written agreement as opposed to a transaction/Invoice, requires of the plaintiff to comply with section 12 of the Stamp Duties Act, 15 of 1993 and the mere production of these documents is prohibited. The defendant argues that the plaintiff, even in this application for amendment, is barred from producing any of the documents in "Annexure C". The defendant's counsel submits further that although the documents may be stamped *ex post facto*, and the plaintiff may be ordered to do so but until this happen, the documents may not be produced or attached to the amended particulars of claim as they are regarded as invalid.

[15] The plaintiff's counsel referred the court to the matter of *Anderson Transport (Pty) Ltd v Wings Innovation Solutions* (I 1016/2014) [2014] NAHCMD 227 (25 July 2014)

where the court recognized the exceptions under which a document could be received under the proviso to section 12. It also referred the court to the matter of *Buyers Guide (Pty) Ltd v Dada Motors (Mafikeng) Pty Ltd 1990 (4) SA 55 (BG) at 57E-G* where that court dealt with a similar complaint and proviso contained in the now repealed South-African Stamp Duties Act 77 of 1968 and went on to hold that:

‘...the non-stamping of a document was not an absolute bar to it being used as evidence, particularly where no issues of morality or dishonesty were involved or the action was not deliberate, and where the interests of the fiscus were met there would normally be no impediment in allowing the party concerned to proceed; once the document was properly stamped and penalties paid any disability in not using the document was removed with retroactive effect.’

Timing of the application/ Prejudice

[16] The defendant submits that:

[16.1] The pleadings already closed in March 2020 and the proposed amendment would mean that the parties must go back to the starting blocks and plead afresh and the defendant would have to plead to a pleading which is excipiable and bad in law;

[16.2] The proposed amendments is a stark contrast to the version and stance taken in the original particulars of claim and amounts to a significant change of front; although the plaintiff is not prohibited from changing its version, the current change of front appears to be a belated afterthought in order to cover all basis, so to speak, and in the absence of a proper explanation, raises concerns of *bona fides*.

[16.3] There is no explanation in the founding papers as to when and under what circumstances the plaintiff realised that it needed to change its stance and amend the pleadings and no foreshadowing of any evidence to support the amendments. The facts were already known from the outset, and there is no indication that new evidentiary matter came to light which necessitated the amendment and defendant failed to foreshadow any evidence to support the amendments so as to show that a triable issue exists and that a triable issue has been defined as being “(a) a dispute which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant, or (b) a dispute which will probably be established by the evidence

thus foreshadowed". (*Vide Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd 2002 (2) SA 447 (SCA)*).

[17] The plaintiff submitted that it is not seeking to withdraw admissions, that parties have not yet participated in a case management conference, no discovery affidavits has been filed, no witness statements has been filed, no pre-trial conference held and no trial date has been set. There is thus no prejudice which a cost order would not remedy.

[18] The defendant submitted that the plaintiff does not tender legal costs which it is liable to pay in terms of the rules and that even in the event that the matter is opposed and the amendment is subsequently granted, the defendant is still liable to pay the costs unless the opposition is unreasonable. The defendants' argument is that, it is telling that, even in the papers before court, the plaintiff still does not make a plan tender for costs. The defendant made it plain in the answering affidavit that it would not persist with the issue although it would not alleviate the other difficulties the plaintiff is faced with in this application.

[19] The plaintiff's argument is that the amendment sought is bona fide and although it concedes that defendant would incur wasted costs, it would be limited to the amendment of the plea only.

Application of the law to the facts

Timing/prejudice

[20] The right of a party to the proceedings to amend pleadings at any time remains unchanged. The courts have on more than one occasion encouraged litigants to make the changes timeously and consequently adopted a more stringent approach where a party seeks to amend pleadings after the agreed pre-trial report has been made an order of court (See *Jin Casings & Tyre Supplies CC v Hambabi*)¹ and during trial (See *Coertzen v Neves Legal Practitioners*)²). This matter has not yet reached the stage of pre-trial and it is generally during this stage of case management when parties are encouraged to amend pleadings and not to leave it until the last minute before trial or during trial. It is at the latter stage where the court would insist on a reasonable explanation for the delay in

¹ *Jin Casings & Tyre Supplies CC v Hambabi* (I 1522/2008) [2013] NAHCMD 215 (25 July 2013).

² *Coertzen v Neves Legal Practitioners* (I 3398/2010) [2013] NAHCMD 283 (14 October 2013),

bringing the application to amend as the litigant is afforded enough time during case management to do so. (See *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC, supra*). The parties took a considerable time to reach case management conference stage and some of the delay was occasioned by the defendant's exception to the original particulars of claim which was subsequently abandoned. The plaintiff's proposed amendment followed the Defendant's plea that the transactions were in fact separate agreements. It cannot be said that the plaintiff delayed in bringing the application for amendment.

[21] The objection by the defendant mainly centres on the issue of the Invoice Discounting Agreements being incorporated as part of the written agreement of the parties. The proposed amendment seeks *inter alia* to amend the particulars of claim to incorporate the various agreements titled 'Invoice Discounting Agreement – Partial Invoice' as part of the written agreement between the parties. In a nutshell the amended pleading proposed to change the plaintiff's case from having entered into one agreement with many "transactions" into having entered into a main overarching agreement which was partly oral and partly written and several other subsequent written agreements on the same terms and conditions as the main agreement. The amendment, in my considered view is not a withdrawal of an admission or a complete change of front but rather an attempt to clarify the true nature of the agreement between the parties. The documents which are now alleged to also form part of the written part of the main agreement were attached to the original particulars of claim. When viewed against the timing of the amendment I am unable to infer *mala fides* on the part of the Plaintiff. I would under the circumstances lean in favour of granting the amendment as I am of the considered view that the prejudice suffered herein can be cured by an appropriate cost order.

[22] A further consideration however is whether the proposed amendment to the particulars of claim renders the pleading vague and embarrassing and whether the vagueness causes prejudice. The defendant maintains that such an approach is untenable because the terms pleaded are (a) in conflict with the written terms of the respective Invoice Discounting Agreements; and (b) it contains a non-variation clause which cannot be reconciled with the main agreement and its terms. The plaintiff's position is that both the main and the subsequent discounting agreements are money lending

agreements and not discounting agreements.

[23] The additional factual premises governing the relationship between the parties contains sufficient particulars with sufficient clarity as is necessary to enable the defendant to identify the case it has to meet and I am not persuaded that it is vague and embarrassing. I agree with counsel for the defendant that any attempt by plaintiff to adduce extrinsic evidence in respect of the several discounting agreements would be problematic for the plaintiff and that is why it would not be helpful to foreshadow such evidence. My understanding of the proposed pleading is however that, as it stands, it is a loan agreement and not a discounting agreement. This is an interpretational issue or factual finding best left for the trial court to determine.

Stamp duty

[24] In respect of the failure by the plaintiff to comply with the Stamp Duties Act 15 of 1993, I would adopt the approach in *Buyers Guide (Pty) Ltd v Dada Motors (Mafikeng) Pty Ltd, supra*. Once the agreements are properly stamped and penalties paid any disability in not using the document would be removed with retroactive effect. Furthermore, considering the objectives of case management, an overly formalistic approach in respect of this issue would retard the expeditious determination of the real issues. This does not mean that the non-compliance with the Stamp Duties Act would be tolerated. The plaintiff would thus be well advised to comply with the Stamp Duties Act in respect of all documents which ought to be stamped.

Costs

[25] 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 any other party and Rule 52 (9) provides that 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. The opposition hereto however is meritorious particularly having regard to the fact that a delay in the proceedings invariably lead to prejudice and a failure by plaintiff to make a clear tender for costs despite being invited to do so. Under these circumstances the plaintiff who seeks the indulgence, must pay the wasted cost of the defendant which costs should include the cost of one instructed and one instructing counsel. I would however limit the costs payable in terms of Rule 32 (11).

Order

[26] In the premises the court made the following order:

- (1) The plaintiff is granted leave to amend its particulars of claim;
- (2) The plaintiff must file its amended particulars of claim within 15 days from date hereof;
- (3) The plaintiff must pay the costs of this application and the wasted costs occasioned by the amendment of the particulars of claim, the costs to include the cost of one instructed counsel and one instructing counsel and limited in terms of the provisions of rule 32(11).
- (4) The parties must file a joint status report on or before 12 February 2021 regarding the further conduct of the matter.
- (5) The matter is postponed to 17 February 2021 for a status hearing.

Judge's signature:	Note to the parties:
TOMMASI J	.
Counsel:	
Applicant	Respondent
<i>Mark Kutzner</i> <i>Of</i> <i>Engling, Stritter & Partners</i>	<i>Carli Schickerling</i> <i>of</i> <i>Etzold-Duvenhage</i>