REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, WINDHOEK

MAIN DIVISION

RULING ON APPLICATION

FOR AMENDMENT

CASE NO: HC-MD-CIV-ACT-CON-2018/01503

In the matter between:

JACOBUS NICOLAAS GROBLER	**PLAINTIFF**

and

A.S.S. INVESTMENTS 165 CC	**1ST DEFENDANT**
JOHANNES LE ROUX GERMISHUIZEN	**2ND DEFENDANT**
BLYDA GERMISHUIZEN	**3RD DEFENDANT**
SOSSUS INVESTMENTS (PTY) LTD	**4TH DEFENDANT**

Neutral citation: *Grobler v A. S. S. Investments 165 CC* (HC-MD-CIV-ACT-CON-208/01503) [2021] NAHCMD 276 (04 June 2021)

Coram: SIBEYA J
Heard: **6 May 2021**
Order: **31 May 2021**
Reasons: **04 June 2021**

FLYNOTE: Interlocutory – Amendment of pleading – Defendants sought to amend the plea and counterclaim – Plaintiff opposed the intended application – Court found that the defendants raised triable issues in the plea and which are intertwined with the grounds raised in the intended counterclaim – The plaintiff found to be justified in

opposing the intended amendment – Intended amendment upheld – Defendants ordered to compensate the plaintiff with costs for prejudice caused.

SUMMARY: The plaintiff sued the defendants for ejectment from the leased farm and declarator that the lease agreements concluded between the parties are void ab initio on several grounds, inter alia, that the lease agreements were concluded are contrary to law. Plaintiff avers that the right of first refusal contained in the lease agreements cannot be enforceable as it is contained in unenforceable agreements. The defendants brought an application for leave to amend their plea and counterclaim, rather belatedly. The intended amendment is opposed.

Held – the plaintiff alienated the farm to the fourth defendant when such farm is *res litigiosa* and the defendants have since vacated the farm. This renders some the plaintiff's claim moot.

Held – the defendants' intended amendment raises several defences and questions the very foundation of the plaintiff's particulars claim, whether the provisions of section 58(1)(b) of the Agricultural (Commercial) Land Reform Act 6 of 1995 that prohibits foreign nationals from possession or occupying agricultural land by a foreign national applies to the first defendant, a close corporation with two members comprising of a Namibian citizen and the other being a South African citizen permanently residing in Namibia and married to a Namibian. The challenge to the averment that first defendant is a foreign national as a result, is a triable issue.

Held – where a party seeks to amend a legal conclusion which amount to an admission as having being made out of error, if satisfactorily explained, the court should allow such withdrawal in order to adjudicate the real issues between the parties.

Held – the available information makes it difficult to determine the veracity of the disputed renewal clause and this renders the matter triable.

Held – the intended counterclaim is premised on the same grounds as the intended plea, therefore the application for leave to amend the counterclaim is upheld consequential to upholding the intended plea.

Held – the plaintiff is justified in opposing the intended amendment and awarded costs for the prejudice suffered.

ORDER

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1. The first to third defendants are granted leave to amend their plea dated 6 September 2018 as set out their notice to amend in terms of rule 52(1) dated 29 May 2020 marked “A”.

2. The first to third defendants are granted leave to amend their counterclaim dated 24 July 2018 as set out their notice to amend in terms of rule 52(1) dated 29 May 2020 marked “B”.

3. The first to third defendants are ordered to pay the wasted costs of the plaintiff which includes the taxed costs of opposing the application to amend and such costs to include costs of one instructing and two instructed counsels.

4. The matter is postponed to 22 June 2021 at 14:00 for an additional case planning conference.

5. Parties must file their joint case plan on or before 15 June 2021.

RULING ON THE APPLICATION FOR AMENDMENT

SIBEYA J

Introduction

[1] The parties locked horns on whether the court should grant leave to amend pleadings or not. This court is seized with a belated application by the first, second and third defendants ("the defendants"), for leave to amend their plea and counterclaim. The application is opposed by the plaintiff while the fourth defendant opted to abide by the judgment of this court.

[2] Applications to amend filed late in the proceedings disrupt the planning of the hearing of the case and more often than not prejudices the opposing party. When such application is so belatedly brought, it should be examined whether justice can be served without authorising the amendment sought or whether the prejudice suffered by the opposing party can be cured by an award of costs. The court should further determine whether the delay falls squarely on the part of the applicant or the opposing party contributed to such delay and if so, what effect that contribution may have on the application for amendment.

Background

[3] The matter commenced when the plaintiff issued summons against the defendants on 18 April 2018, arising from the lease agreements. The summons provides in claim one that the plaintiff leased a portion of a farm known as Plaas Witwater, No. 139, Maltahohe ("the farm") to the first defendant on the premise of the lease agreement and the addendums thereto ("the lease agreements). The lease commenced from 01 May 2010 for a period of 9 years and 11 months which period is subject to renewal for another 9 years and 11 months.

[4] The plaintiff alleges in the summons that the second and third defendants who are the only members of the first defendant are South African nationals who therefore holds the controlling interest in the first defendant. This makes the first defendant a

foreign national as set out in section 1 of the Agricultural (Commercial) Land Reform Act, 6 of 1995 ("the Agricultural (Commercial) Land Reform Act"), so plaintiff states.

[5] The plaintiff alleges further that the first defendant has the option to renew the lease for a period of 9 years and 11 months commencing on a date immediately succeeding the date of the expiry of the initial lease agreement. The plaintiff further provides that in the event of the renewal of the lease, the parties shall agree upon a new escalation percentage of the rental as will be negotiated in writing between the parties.

[6] Plaintiff avers that the option was a material term of the lease agreements and is therefore part of the lease agreements. It follows that it is not severable from the lease agreements. Plaintiff further alleges that the option to renew contains an unenforceable agreement to agree which renders the option to renew and the lease agreements invalid and *void ab initio*. The said agreements further allegedly contravenes section 58(1)(b) of the Agricultural (Commercial) Land Reform Act and section 3 (d) of the Subdivision of the Agricultural land Act, 70 of 1970.

[7] On the basis of the aforesaid averments, the plaintiff prays for:

a) A declaration that the lease agreements between the parties are *void ab initio*; and
b) An order for ejectment of the first defendant from the farm.

[8] In claim two, the plaintiff alleges that he sold a business as a going concern known as Sossus Lodge operated on the farm ("the business") to the first defendant. This sale of the business was dependant on the existence and enforceability of the lease agreements. As the lease agreements are alleged to be *void ab anitio*, the sale agreement emanating there from suffers the same fate, it is averred. Consequently, the plaintiff prays for:

a) A declaration that the sale of business agreement between the parties is *void ab initio*; and
b) Delivery of the business to the plaintiff within 30 days of the date of the order.

[9] The defendants filed a plea on 06 September 2018 where they deny the allegation that all the lease agreements are *void ab initio*. The defendants pleaded that the lease agreement is void for vagueness but is severable and ask for the dismissal of the plaintiff's claim.

[10] The defendants also filed a counterclaim on 24 July 2018 where they claim that it was agreed by the parties to the lease agreements that the plaintiff allows the defendants to occupy the farm in order to carry out the business. They further claim that the plaintiff should have registered the right of habitation consequent upon the plaintiff's lease of the farm for 29 years. The defendants pray for an order for plaintiff to register a right of habitation over the farm in favour of the defendants and related claims in money.

[11] On 07 August 2018, the plaintiff filed his plea to the defendants' counterclaim and replicated to the defendants' plea to his particulars of claim.

[12] On 16 August 2018, the plaintiff effected minor amendments to the particulars of claim. On 07 December 2018, however, the plaintiff further amended his particulars of claim with substantive amendments. The defendants did not amend their plea or counterclaim consequent upon the plaintiff amending his particulars of claim on 07 December 2018.

[13] The pleadings in this matter closed and the case progressed to a stage where it was due for allocation of trial dates. I should mention that summons were issued in April 2018 and all along this matter was managed by Justice Oosthuizen. It was transferred to my court roll in December 2020 when the parties were already ordered to file heads of argument for the hearing of the current application for leave to amend the plea and counterclaim.

[14] On 29 May 2020 the defendants filed an application for leave to amend their plea dated 06 September 2018 and counterclaim dated 24 July 2018.

[15] The plaintiff objected to the application for leave to amend the plea and counterclaim on 07 July 2020. The fourth defendant as alluded to above is not opposing the application.

The law applicable to amendments

[16] In *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[3], the full bench of the High Court examined the approach to late amendments in terms of the Rules of Court.[1]

[17] Damaseb JP in Bell (*supra*) at para [48] stated, *inter alia*, that a late amendment of pleading and change of position calls for an explanation.

[18] Damaseb JP proceeded to state that as follows:

'[44] Although as I point out later, I am in general agreement with the approach that late amendments and revision of pre-trial orders must be discouraged, I wish to caution that it should not be elevated to a rule of law and that each case must be considered on its facts. If a bona fide mistake had been made by a lawyer in correctly representing the client's version in the pleadings or the pre-trial order, it would be manifestly unjust to hold the party to a version which does not reflect the true dispute between the parties. But that is by no means the end of the matter as the very fact of the alleged mistake and the subsequent attempt to change front may well go to the merits of the matter overall in that a finding that it was not bona fide could well undermine a party's case and strengthen the probabilities in favour of the opponent…

[49] 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 the 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 the 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…

[1] *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

[55] Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judicially. An amendment may be brought at any stage of a proceeding. The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings. Although concessions made in a pre-trial order are binding on a party, being an admission, they can be withdrawn on the same basis as an admission made in a pleading. Facts admitted in case management orders are not that easily resiled from than those in pleadings: that is so because a legal practitioner is presumed, because of the new system which requires them to consult early and properly, to have done so and committed a client to a particular version only after proper consultation and instructions. That presumption entitles the opponent to rely on undertakings made by the opponent and to plan its case accordingly. A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought… If the proposed amendment is justified on the ground that it arose from a mistake, the mistake relied on must be bona fide and will only be allowed if good grounds exist for allowing the amendment.'

[19] The court in adjudicating an application for an amendment, should seek to obtain a proper ventilation of the dispute between the parties, in order to determine the real issues between the parties, for justice to be done.[2]

Application of the law to the present intended amendment

[20] I do not consider that I am obliged for purposes of this ruling on the application for leave to amend, to determine the merits and demerits of the action and counter action of the parties. The defendants' notice to amend the plea and the counterclaim with the intended amended plea and counterclaim consists of 59 pages. The plaintiff's objection thereto consists of 36 pages. This demonstrates the voluminous nature of the intended amendment sought and the objection thereto.

[21] It is literally impractical to refer to all the grounds and submissions made for and against the intended amendment. I will therefore not deal in any detail with the relevant clauses of the lease agreements and the interpretation thereof as well as some of the

[2] *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

submissions made by counsel. This is by no means aimed at diminishing the industrious work carried out by counsel for both parties which is commended for in depth analysis and research done.

[22] The plaintiff objects to the intended amendment on several grounds which includes the attack on the merits of the averments, contentions and legal conclusions made by the defendants in their application. The plaintiff further opposes the application for leave to amend on the basis that it is sought belatedly and brought when the proceedings are at an advanced stage. The defendants conceded to the belatedness of the intended amendment.

[23] At the hearing of this application the court inquired from Mr. Totemeyer whether the plaintiff insists on the belatedness of the filing of the application to amend as one of the grounds of objection. He responded that belatedness was not strictly taken as an issue. I hold the view that this statement was properly made as the plaintiff has in the past took procedural steps, although minimal in comparison to that of the defendants, which contributed to the delay of the trial in the matter. Such steps include but not limited to the plaintiff amending his particulars of claim. In the premises nothing turns on the ground of belatedness of the application to amend and it deserves no further mention.

[24] In the interim the plaintiff alienated the farm to the fourth defendant when such farm is *res litigiosa*. This renders part if the relief sought by the plaintiff regarding ejectment moot. Mr Totemeyer submitted correctly so, that, notwithstanding the alienation of the farm which affects the ejectment claim, the remainder of the prayers sought by the plaintiff remain live for adjudication. It is based on the remainder of the prayers that the plaintiff persists in his objection to the intended amendment.

[25] The defendants' notice to amend, as comprehensively set out in the Draft amended plea,[3] contains 40 paragraphs while the draft counterclaim contains 34 paragraphs.[4] To say that the amendments sought are substantive is an

[3] Annexure "A" to the Notice to amend.
[4] Annexure "B" to the Notice to amend.

understatement. In their own words, the defendants submits that the issues raised in their intended amendment are legally intricate and factually interwoven.

[26] The intended amendment raises several new defences to the plaintiff's claim and supplements the basis of the defendants' counterclaim. Amongst others, the defendants in the intended amendment questions the applicability of the Agricultural (Commercial) Land Reform Act, particularly section 58(1)(b) to this matter. The said section prohibits a foreign national from entering into an agreement with another for occupation or possession of agricultural land for a period of more than 10 years without the consent of the Minister. They further question whether or not the farm is agricultural land, as they say that they have no knowledge if the farm is agricultural land or not.

[27] The defendants further state that the first defendant is not a foreign national. As at 2010 and 2011, the members of the first defendant were the second defendant, a South African national who is permanently resident in Namibia and married to a Namibian, and the second defendant who is a Namibian national. At present, the defendant alleges that, first defendant has three members consisting of two Namibians with a joint member's interest of 60% while the remaining 40% member's interest is held by a South African citizen and can therefore still not be regarded as a foreign national in terms of the Agricultural (Commercial) Land Reform Act.

[28] The Agricultural (Commercial) Land Reform Act defines a foreign national in section 1 as:

> '(a) …
> (b) …
> (c) in relation to a close corporation, a close corporation in which the controlling interest is not held by Namibian citizens;'

[29] The same section 1 provides further that controlling interest in relation to:

> '(a) …
> (b) a close corporation, means more than 50 per cent of the interest in the close corporation;'

[30] The aspect of a foreign national holding a controlling interest in the first defendant will require interpretation to determine if a foreign national is a person with no links in Namibia or not. Another question is whether a person who is domiciled in Namibia or married to a Namibian is a foreign national or not in terms of the aforesaid legislation. These are difficult questions to determine which, in my view, calls for full evidence to be led, thus rendering them triable issues.

[31] The defendants raised a further defence that the renewal clause in the lease agreements is not void or unenforceable and does not constitute an agreement to agree. The plaintiff disagrees and argues that the defendants in the same intended amendment states that the renewal is severable, implying that if it is found to be invalid then it will not affect the lease agreements in whole.

[32] The defendants in their plea filed of record stated as follows in paragraph 8 regarding the renewal clause:

> 'The Defendants admit that the parties had agreed on a right of renewal of the original Lease Agreement. The Defendants however plead and agree that this clause (as opposed to the whole contract as the Plaintiff alleges) is unenforceable and void due to vagueness. The parties had not agreed on the rental that would be payable during the renewed period of the lease and did not set any parameters by which the lease amount would be determined.'[5]

[33] The defendants seek to amend the said statement in their plea. They contend that the said statement or admission is a legal conclusion that was made out of error. I hold the view that the said admission regarding the unenforceability of the agreement amounts to a legal conclusion not a factual statement. I am satisfied that the defendants made the said admission by mistake which they presently seek to amend in order to have the real issue ventilated by the court. A court should not insist on adjudicating a matter on a wrong statement or admission as such approach runs contrary to the interests of justice. Where satisfactorily explained, parties should be allowed to amend their admissions or statements provided that the prejudice to the opposing party can be compensated by an appropriate order of cost.

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[5] See also para 10.2 and 11 of the defendants' plea.

[34] In any event it is difficult to conclusively determine the validity of the renewal clause at this stage with the available information. In the premises it would be unfair to shut the door of the courtroom in the face of the defendants, when this issue can be meaningfully debated during the trial with evidence led. In view of the foregoing, I hold that this is a triable matter.

[35] The defendants contend (with reliance the Rents Ordinance 13 of 1977) that the lease of the business was not renewable at will therefore section 3(d) of the Agricultural (Commercial) Land Reform Act does not apply. I hold the view that this submission runs contrary to the established legal interpretation. Courts have stated that where the lease of the business lapses by effluxion of time, no notice of termination of the lease is required.[6] I find that if the only defence mounted by the defendants that the first defendant in this respect was not able to renew the lease at will which therefore paralysed the applicability of section 3(d) of the Agricultural (Commercial) Land Reform then such defence would have no merit.

[36] The defendants, however upgraded their defence to an argument that the Rents Ordinance applies to business premises but not to farms. Whether the entire farm leased formed part of the business premises in terms of the Rents ordinance is a triable matter to be determined by evidence.

[37] The defendants contend that the right of first refusal is severable while the plaintiff argues contrariwise. In a situation as *in casu,* where the terms of the loan agreements are to have been made expressly, impliedly and tacitly agreed to between the parties, it becomes crucial that the determination of the terms of the agreements are triable for lack of certainty on face value.

[38] The intended counterclaim is premised on the existence of the valid right of first refusal and the exercise thereof accordingly. The alleged breach of the lease agreements on the part of the plaintiff brought about the intended counterclaim, so the defendants state.

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[6] *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 637.

[39] As I draw the curtains to a close in this ruling, I am reminded by the old words that matures like wine, expressed in *Whittaker v Roos*[7] as follows:

'This court has the greatest latitude in granting amendment, and it is necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time that mistakes are made in pleadings, and it will be a very grave injustice, if for a sip of the pen, or error in judgment, or misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. This would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties.'

[40] It appears from the intended amendment of the plea and counterclaim that the defendants seek such amendments bona fide. While accepting that I may not have covered all the grounds raised by the parties for and against the intended application, I hold the view that the grounds covered and discussed herein above are sufficiently dispositive of the matter.

Conclusion

[41] In the premises of the reasons and conclusions mentioned herein, I hold the view that some of the defences raised in the intended amendment to the plea and the basis for the counterclaim raise triable issues as stated in the preceding paragraphs. In the result leave to amend the plea and the counterclaim stands to be granted.

Costs

[42] The defendants in an affidavit filed in support of the application for leave to appeal stated as follows in paragraph 19 regarding prejudice that may be suffered by the plaintiff on the account of the amendment sought:

[7] *Whittaker v Roos* 1911 TPD 1092 at p. 1102.

'Above all, the first respondent is not prejudiced by the intended amendment in a manner that cannot be compensated for by an appropriate costs order.'

[43] It follows that the defendants were all along alive to the fact that prejudice caused to the plaintiff by the intended amendment is highly likely to attract an adverse cost order. This court harbours no doubt that the plaintiff is prejudiced by the amendment sought in this matter.

[44] The court has a discretion to grant costs or not and to limit such costs in interlocutory proceedings in accordance with the provisions of rule 32 (11) or not. A number of factors should guide the court in the exercise of its judicial discretion. In this regard I take into consideration the fact that Mr Heathcote agreed to a question from the court that the amendment sought creates a paradigm shift from the initial plea and counterclaim filed by the defendants. This in my view calls for a whole new approach to be engaged by the plaintiff in the prosecution of his case and putting up his defence to the defendants' counterclaim. This approach includes revising his plea to the counterclaim, the replication to plea to the particulars of claim, the proposed pre-trial memorandum and his witness statements. Literally, the work carried out by the plaintiff in this matter is due to be duplicated on account of the amendment sought.

[45] The substantiveness and implication of the amendment sought justifies the stance that the plaintiff resorted to in attempt to extinguish the wrath of such intended amendment at its infancy stage. The substantiveness and complexity of intended amendment and considering that the parties went all out in advancing their case for and against the application for leave to amend, favours an award of costs to the plaintiff beyond the cap stipulated in rule 32 (11).[8]

Order

[46] In view of the foregoing, it is ordered that:

[8] South African Poultry Association and Others v Ministry of Trade and Industry and Others 2015 (1) NR 260 (HC) para 67.

a) The first to third defendants are granted leave to amend their plea dated 6 September 2018 as set out their notice to amend in terms of rule 52(1) dated 29 May 2020 marked “A”.

b) The first to third defendants are granted leave to amend their counterclaim dated 24 July 2018 as set out their notice to amend in terms of rule 52(1) dated 29 May 2020 marked “B”.

c) The first to third defendants are ordered to pay the wasted costs of the plaintiff which includes the taxed costs of opposing the application to amend and such costs to include costs of one instructing and two instructed counsels.

d) The matter is postponed to 22 June 2021 at 14:00 for an additional case planning conference.

e) Parties must file their joint case plan on or before 15 June 2021.

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O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF:	R Totemeyer, SC Instructed by Dr Weder, Kauta & Hoveka Inc Legal Practitioners for Plaintiff Windhoek
1ST TO 3RD DEFENDANTS:	R Heathcote, SC Instructed by Francois Erasmus & Partners Legal Practitioners for 1st to 3rd Defendants Windhoek
4TH DEFENANT:	Engling Stritter & Partners Legal Practitioners for 4th Defendant Windhoek