

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:	Case No: HC-MD-CIV-ACT-OTH-2020/01519
Desmond Howard N.O Ciske Smith N.O	Division of Court: Main Division
and	Heard on: 23 September 2021
ARCHIE GRAHAM SUR LA PLAGE ESTATES 1 CC SUR LA PLAGE ESTATES 2 CC SUR LA PLAGE ESTATES 3 CC SUR LA PLAGE ESTATES 4 CC SUR LA PLAGE ESTATES 5 CC SUR LA PLAGE ESTATES 6 CC SUR LA PLAGE ESTATES 7 CC SUR LA PLAGE ESTATES 8 CC SUR LA PLAGE ESTATES 9 CC SUR LA PLAGE ESTATES 10 CC SUR LA PLAGE ESTATES 11 CC SUR LA PLAGE ESTATES 12 CC SUR LA PLAGE ESTATES 13 CC SUR LA PLAGE ESTATES 14 CC SUR LA PAGE ESTATES 15 CC SUR LA PLAGE ESTATES 16 CC SUR LA PLAGE ESTATES 17 CC SUR LA PLAGE ESTATES 18 CC SUR LA PLAGE ESTATES 19 CC	1 st DEFENDANT 2 nd DEFENDANT 3 rd DEFENDANT 4 th DEFENDANT 5 th DEFENDANT 6 th DEFENDANT 7 th DEFENDANT 8 th DEFENDANT 9 th DEFENDANT 10 th DEFENDANT 11 th DEFENDANT 12 th DEFENDANT 13 th DEFENDANT 14 th DEFENDANT 15 th DEFENDANT 16 th DEFENDANT 17 th DEFENDANT 18 th DEFENDANT 19 th DEFENDANT 20 th DEFENDANT

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SUR LA PLAGE ESTATES 49 CC	50 th DEFENDANT	
AMBROSI PROPERTY DEVELOPMENT 1 CC	51 st DEFENDANT	
AMBROSI PROPERTY DEVELOPMENT 2 CC	52 nd DEFENDANT	
AMBROSI PROPERTY DEVELOPMENT 3 CC	53 rd DEFENDANT	

<p>AMBROSI PROPERTY DEVELOPMENT 4 CC</p> <p style="text-align: right;">54th DEFENDANT</p>	
<p>Heard before: Honourable Mr. Justice Miller, AJ</p>	<p>Delivered on: 14 October 2021</p>
<p>Neutral citation: <i>Desmond Howard N.O. v Graham</i> (HC-MD-CIV-ACT-CON-2020-01519) [2021] NAHCMD 476 (14 October 2021)</p>	
<p>Order:</p>	
<ol style="list-style-type: none"> 1. The first defendant's application to amend his plea is dismissed. 2. The first defendant is ordered to pay the plaintiffs' costs occasioned by this application, capped in terms of rule 32(11). 3. The matter is postponed to 4 November 2021 at 15h00 for a Status Hearing. 4. The parties shall file a joint status report on or before 1 November 2021 regarding the further conduct of the matter. 	
<p>Reasons for order:</p>	
<p>MILLER, AJ:</p> <p><u>Introduction</u></p> <p>[1] This is an application by the first defendant to amend his plea. In terms of his notice of motion, the first defendant seeks the following order:</p> <p style="padding-left: 40px;">'1. By renumbering the existing paragraph 4.3 to 4.4.</p> <p>2. By inserting the following paragraph as paragraph 4.3:</p> <p style="padding-left: 40px;"><i>"4.3 In addition to the foregoing, the first defendant pleads that Annexure "A" was replaced or novated from time to time."</i></p> <p>[2] In its plea to the particulars of claim, the first defendant pleaded as follows:</p> <p style="padding-left: 40px;">'4.1 The defendant admit that the first defendant signed the documents, a copy whereof is annexure "A" to the particulars of claim, and that the first defendant represented the second to fifty fourth defendants.</p>	

4.2 The defendants deny that annexure "A" assumed, alternatively, continued any contractual or legal force and that it was never implemented, alternatively, continued to be implemented.

4.3 Save as aforesaid the defendants deny the allegations herein.'

[3] The plaintiff opposes the application on the following grounds:

'1. Firstly, if the amendment is allowed, the effect of this would be that the following two allegations would co-exist in the same plea, namely:

"4.2 The defendants deny that Annexure "A" assumed, alternatively, continued any contractual or legal force and that it was ever implemented, alternatively, continued to be implemented.

4.3 In addition to the foregoing, the first defendant pleads that Annexure "A" was replaced or novated from time to time."

2. The proposed plea in its amended form will not only be left vague and embarrassing, but will also not disclose a cause of defense by virtue of the fact that the allegation sought to be inserted cannot be sustained if regard is had to the existing allegation contained in paragraph 4.2.

3. The allegation made in paragraph 4.2 is basically that annexure "A" as relied on by the plaintiff is, or more importantly was, never of any "legal force" nor was it ever "implemented". Therefore, the upshot of this allegation is simply that the agreement relied on by the plaintiff, according to the defendant in paragraph 4.2 of its plea, is non-existent or invalid.

4. By effecting the proposed amendment, the first defendant – despite the circumstances in 4.2– rely on the alleged replacement or novation "from time to time" of annexure "A".

5. The trite position is simply that a void, invalid or non-existent contract cannot be novated, because novation presupposes the existence of a valid obligation between the parties.

6. Therefore, and in light of this, it is impossible for paragraph 4.2 and the proposed paragraph 4.3 to co-exist in a plea as they are mutually destructive and render the plaintiffs' defense contradictory, which in turn would leave the amended plea excipiable for want of alleging a sustainable defense which is valid in law.

7. Secondly, by pleading that the novation purportedly occurred from "time to time" with nothing more, the first defendant's amended plea would be left vague and embarrassing by virtue of:

7.1. Rule 45(6) providing that every allegation in a pleading must be dealt with specifically and not evasively or vaguely, and,

7.2. Subrule (7) in turn providing that a party who in his or her pleadings relies on a contract must

state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written, a true copy thereof or of the part relied on in the pleading must be annexed to the pleading.

8. The first defendant fails to plead the terms of the alleged novation(s) with any particularity and moreover fails to plead whether or not:

8.1. The alleged novation(s) was concluded in writing or was concluded orally.

8.2. By whom it was concluded,

8.3. when it was concluded; and

8.4. Where it was concluded.

9. In the premise, the insertion of the proposed paragraph 4.3 into the plea will (in addition to leaving the first defendant's amended plea excipiable), also render the proposed amended plea vague and embarrassing for the reasons alluded to before.

10. The result of this is that the plaintiffs will be prejudiced in having to deal with not only a pleading which is excipiable, but one which is in addition to that vague and embarrassing.'

Arguments

[4] Counsel for the first defendant submits that the purpose of the amendment sought is to merely introduce novation in its plea as a legal conclusion based on the facts of the case. He argued that the first defendant's defence is that the agreement that the plaintiff relies on, annexure "A" to the particulars of claim, is unenforceable i.e. it never assumed, alternatively continued any contractual or legal force and that it was never implemented, alternatively, continued to be implemented. However, should it be found that the contract was enforceable and of legal force, then it was not implemented because it was replaced from time to time. Therefore, the amendment does not seek to introduce a new defence.

[5] On the other hand, counsel for the plaintiff asserts that the application must be dismissed. He basis this on the argument that the paragraph to be inserted cannot be sustained if regard is had to the allegation already in the plea that the agreement relied upon by the plaintiff was never implemented and of no legal force. He argued that an invalid and unenforceable agreement that was purportedly never implemented cannot be novated, because novation assumes the existence of a valid and binding agreement, from which obligations flow.

[6] Counsel for the plaintiff further argued that, should the amendment in its current form be allowed, the plea would be left vague and embarrassing in the sense that the first defendant

would merely plead that novation(s) occurred from “time to time” without further particulars as to: (a) whether the alleged novation(s) was/were concluded in writing or orally; (b) by whom it was concluded; (c) when it was concluded; (d) where it was concluded; and (e) the terms of the alleged novation(s). Counsel referred to the provisions of rule 45(6) which states that every allegation in a pleading must be dealt with specifically and not evasively or vaguely and rule 45(7) which in turn provides that when a party relies in his or her pleadings on a contract, he or she must state whether the contract is written or oral, when, where and by whom it was concluded and if the contract is written, a true copy or part thereof relied on in the pleading must be annexed to the pleading.

Analysis

[7] The position regarding amendments is trite and I need not repeat it, save to say that an amendment may be granted at any stage of a proceeding and that the court has a discretion in the matter, which is to be exercised judicially. The common law position that a party may amend at any stage of the proceedings, remains, as long as the amendment does not operate to the prejudice of the opponent.¹

[8] The first defendant, in his attempt to amend his plea, alleges novation of the agreement relied upon by the plaintiff. However, it is the court’s view that the allegation of novation is not properly pleaded. The plaintiff denies in its plea that the agreement (Annexure “A”) assumed any legal force and that it was ever implemented. In other words, the agreement is unenforceable. The plaintiff then wants to plead, alternatively and additionally, that the said agreement was novated from time to time. However, if one is to consider the proposed amendment in its current form, one is left to wonder how an unenforceable agreement, in the alternative and in addition thereto, is novated? The alternative and additional allegation of novation will contradict the allegations of unenforceability of the agreement. A contract of novation extinguishes an existing obligation and replaces it with a new one.

[9] The court is therefore of the view that the amendment sought will result in two mutually destructive allegations that will render the plea excipiable, and the courts will not allow the filing of pleadings which would render same excipiable. This will be against the objectives of the Rules of Court, which rules are intended to save costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause

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) para 49.

or matter.

[10] The difficulty in the way that the first defendant intends to plead is that on the pleading, the defence of novation is not introduced as an alternative defence i.e. in the event that the court finds that the agreement (annexure “A”) is valid, then in that case the agreement was novated. But the defence of novation is introduced as a self-standing defence, which is inconsistent with the plea that no agreement exists.

[11] In terms of our current judicial case management system, a defendant is expected to plead with particularity, this is so because the plaintiff will not be in position to request for further particulars, as the current Rules of Court does not recognize such a procedure. The request for further particulars was done away with when the new rules were introduced in 2014. There is therefore nothing that inhibits the first defendant from filing a proper notice to amend having regard to the points raised in this ruling.

[12] Furthermore, the proposed amendment suggests that not only was Annexure “A” novated, but several further novations also occurred, as the first defendant alleges that Annexure “A” was replaced or novated “from time to time”. However, no details of the subsequent novations have been pleaded in the proposed amendment. It is therefore incumbent upon the first defendant, who attracts the onus, to plead and prove that more than one novation took place, which entails complying with the relevant rules of court to enable the plaintiff to deal with and replicate to the first defendant’s case.

[13] According to Amler’s Precedents of Pleadings, it is stated that if a party wishes to plead extinction of an obligation, he or she should do so in the following manner:

‘1. On [date] at [place], the parties entered a written agreement in terms of which plaintiff granted to defendant an option to purchase a property [description] for [amount]. A copy of the agreement is attached and marked ‘A’.

2. On [date] at [place], the parties novated the agreement by agreeing in writing that plaintiff would be granted the right of pre-emption to purchase the property if and when defendant decided to sell it at a price equivalent to that offered by the highest other offeror but at a maximum price of [amount], a copy of this agreement is attached and marked ‘B’.

3. Defendant denies, therefore, that plaintiff was entitled to exercise the option by accepting the offer in Annexure ‘A’.²

[14] An allegation of novation must be proved, either by an express declaration or inference

² At 278.

from the circumstances of the case, including the conduct of the parties. First defendant therefore attracts and bears that onus to plead the necessary and essential terms of the alleged novation. An intention to novate cannot therefore be presumed. If the first defendant wish to plead that annexure "A" was novated, then the circumstances of the alleged novation(s) should be properly set out and pleaded with particularity.

[15] If the first defendant desires to circumvent its obligations in terms of the agreement as pleaded by the plaintiffs annexure "A", then he must fully set out and plead the foundation on which he alleges that he is entitled to circumvent the agreement, failing to do so will be failing to adequately allege and plead his defence based on the novation, that is, the termination and replacement of the obligation and rights in annexure "A" and the coming into effect of new agreements with new rights and obligations.

[16] As the first defendant does not allege the circumstances surrounding the novation, the plaintiff is left to linger as to what the first defendant's case is.

[17] In conclusion, I am of the opinion that the first defendant's application to amend its plea falls to be dismissed and the plaintiffs are entitled to their costs.

[18] In the result, I make the following order:

1. The first defendant's application to amend his plea is dismissed.
2. The first defendant is ordered to pay the plaintiffs' costs occasioned by this application, capped in terms of rule 32(11).
3. The matter is postponed to 4 November 2021 at 15h00 for a Status Hearing.
4. The parties shall file a joint status report on or before 1 November 2021 regarding the further conduct of the matter.

Judge's signature	Note to the parties:
Miller Acting Judge	Not applicable
Counsel:	
Plaintiff:	First Defendant:
Mr JP Jones Instructed by Ellis Shilengudwa Inc.	Mr MvR Potgieter, SC Instructed by Danielle Lubbe Attorneys

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