**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2020/01519

In the matter between:

| | |
|---|---|
| **DESMOND HOWARD N.O.** | **1ST PLAINTIFF** |
| **CISKE SMITH N.O.** | **2ND PLAINTIFF** |
| **And** | |
| **ARCHIE GRAHAM AND OTHERS** | **1ST TO 54TH DEFENDANTS** |

**Neutral citation:** *Desmond Howard N.O v Archie Graham* (HC-MD-CIV-ACT-CON 2020/01519) [2022] NAHCMD 204 (20 April 2022)

**Coram:** PRINSLOO J
**Heard**: **30 March 2022**
**Delivered**: **20 April 2022**

**Flynote:** Practice – Rejoinder – provision not made in the case plan as to the filing of the rejoinder and surrejoinder – time that elapsed from the date of replication to the date

of application for leave to file rejoinder- no condonation sought for late filing - rejoinder to be filed for court to have complete conspectus of the facts

**Summary:** The plaintiffs instituted an action against the 54 defendants on 24 April 2020. The claim against the defendants originates from a written agreement incorporating an acknowledgement of debt and suretyship, which was entered into on 30 March 2016. The case plan dated 23 June 2020, indicated that the plaintiffs wanted to proceed with a summary judgment application which was later abandoned. The summary judgment application was relevant where in opposition thereto the defendant raised several issues, which gave rise to the defendants again denying that the plaintiffs have the authority to represent the Howard Family Trust. The said denial gave rise to the plaintiffs filing a replacement Trust Deed regarding the Howard Family Trust. This Trust deed, as well as the averments made in respect thereof in replication, gave rise to this current application.

*Held that* by the time the current application was launched, almost a year had passed since the pre-trial conference and the court is of the view that in considering the key objectives of judicial case management, the defendant had to seek condonation even if it was just out of an abundance of caution.

*Held that* the court is of the considered view that the defendant should be allowed to file the rejoinder in order for the court to have the full facts before it when deciding the matter. Procedurally, the plaintiffs will have the opportunity to join issue with the defendant by filing a surrejoinder and, therefore, not suffer any prejudice. On the other hand, if leave is not granted to file the rejoinder, it can have far-reaching consequences for the defendant's case, especially if he has reasonable prospects of succeeding in his defence as set out in the intended rejoinder and his plea.

**ORDER**

1. The defendant be granted leave to file a rejoinder to the plaintiffs' replication dated 23 September 2020;
2. The defendant's non-compliance with the rules of court is condoned insofar as it may be necessary; and
3. The defendants be directed to pay the costs occasioned by this application. Such cost to include the cost of one instructing and one instructed counsel and is limited to rule 32(11).

Further conduct of the matter:

4. The matter is postponed to **12/05/2022** at **09:00** for a Status hearing (Reason: Documents Exchange).
5. The Parties must comply with the following procedural steps:
   5.1. The First Defendant must file his rejoinder on or before 27 April 2022;
   5.2 The Plaintiffs must file their surrejoinder on or before 6 May 2022.

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**JUDGMENT**

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PRINSLOO J:

Introduction

[1] The parties in respect of the application before me are the plaintiffs and the 1st defendant (the defendant). The defendant is the sole member of the close corporations being the 2nd defendant to the 54th defendants and currently the only defendant against whom the claim is actively pursued. The 2nd to 54th defendants entered voluntary liquidation proceedings on 17 August 2020. For the record, it should be noted that the 2nd to the 54th defendants are 'surety defendants'.

[2] The parties are referred to as they are in the main action.

Background

[3] The plaintiffs instituted an action against the 54 defendants on 24 April 2020. The majority of the defendants defended the matter.

*Particulars of claim*

[4] The claim against the defendants finds its origin in a written agreement inter alia incorporating an acknowledgement of debt and suretyship, which was entered into on 30 March 2016. At the conclusion of the agreement, the plaintiffs were represented by Stephen Chamberlain in his capacity as trustee (for the time being) of the Howard Family Trust (the Trust). The defendant acted personally, and the surety defendants were represented by the defendant who was authorised thereto.

[5] The claim consisted of two claims. Firstly, the plaintiffs' claim rectification of annexure A to the particulars of claim, which consists of a memorandum of agreement incorporating an acknowledgement of debt and a cession agreement. The rectification related to the citation of the 20th defendant, more specifically in respect of the registration number of the CC defendant.

[6] The first part of the second claim relates explicitly to the 1st defendant[1], and deals with the terms of the acknowledgement of debt. The terms of the acknowledgement of debt were that the defendant (and the surety defendants) had to repay the plaintiffs an amount of N$51.2 million in specific instalments as set out in paragraph 65 of the particulars of claim. The agreement further was that the capital sum would attract interest and that the capital amount and any interest outstanding shall be repaid by no later than 31 October 2018.

[7] As at 1 March 2020, the defendant was still indebted to the plaintiffs in the amount of N$43,384,908.06, which comprised of capital and interest.

[1] The second part of claim two deals with the obligation of the surety defendants as per para 70 of the particulars of claim.

[8] The plaintiffs, therefore, claim against the defendants on the basis of jointly and severally, in the following terms:

'1. Rectification of clause 1.1.21 of the written agreement (annexure "A") to the extent that the twentieth defendant's registration number be reflected as CC/2011/1991 and not CC/2011/2026

2. Payment of the amount of N$43,384,908.06.

3. Payment of further interest (at a rate of prime plus 5%) on the outstanding balance of N$43,384,908.06 as from the date of 2 March 2020 to date of final payment (both dates inclusive).

4. Costs of suit, such costs to include the cost of one instructed and two instructing counsel.

5. Further and/or alternative relief.'

*Summary judgment application*

[9] In terms of the case plan filed on 23 June 2020, the plaintiffs indicated that they intend to proceed with a summary judgment application. The relevance of the summary judgment proceedings lies in the fact that in opposition, the defendant deposed to an affidavit wherein he raised several issues, which gave rise not only to what was contained in his plea but also the subsequent replication by the plaintiffs. It is on this replication that the defendant relies for his application for leave to file his rejoinder.

[10] The defendant took three lines of defence in opposing the summary judgment application, i.e.:

'[10.1] Firstly, defective application for summary judgment: The defendant pleaded in opposition to the application that the plaintiffs before court were not authorised to prosecute the litigation in the current matter in terms of the trust deed. He further pleaded that the trustees must act jointly and must have authorised a specific trustee to take steps on behalf of the trust in relation to a particular situation. Therefore, two resolutions are required to prove in the current proceedings (both in respect of the summary judgment application and the subsequent trial) that: a) a resolution by the entire complement of trustees to launch proceedings in accordance with the provisions of the trust deed, and b) a special power of attorney to give to the legal practitioners purportedly acting on behalf of the trust authorising them to do so.

[10.1.1] In the application for the summary judgment the plaintiffs failed to annex a power of attorney as well as the affidavit of the second plaintiff. More importantly, that

> the defendants established from the Master's Office that the plaintiffs were not recorded as trustees of the trust. Instead, the Master's records showed that Messrs Stephen Chamberlain and Antonio de Azevedo had been the trustees of the trust since 2014. The first plaintiff acted in his capacity as the founder of the trust and not a trustee. The first defendant also attached a copy of the relevant trust deed to the opposing papers.
>
> [10.1.2] The defendant pleaded that the contract, such as relied on by the plaintiffs for their action, fell within the category of business described in para 12.10 of the trust deed and submitted that the conclusion of such an agreement and the institution of legal proceedings on behalf of the trust required the necessary resolutions as set out above. . .

[10.2] Secondly, no enforceable cause of action pleaded by the plaintiffs: In this regard, the defendant pleaded that the agreement relied upon by the plaintiffs was never implemented. As this defence is not relevant to the current discussion, I will not elaborate on it.

[10.3] Thirdly, the authority of Mr Chamberlain: The defendant pleaded that Mr Chamberlain, who signed the agreement relied upon by the plaintiffs, was not the only trustee of the trust at the date of signature and the said Mr Chamberlain did not sign on behalf of the trust. Mr Chamberlain's authority to have signed on behalf of the trust and whether he was representing the trust was controversial in the defendant's view.'

*Pleadings*

[11] Pursuant to the defendant filing his answering affidavit on 24 July 2020, the plaintiffs elected not to proceed with the summary judgment application. The defendants were granted leave to defend the matter. After an unsuccessful mediation, the defendants filed their plea wherein the defendants again denied that the plaintiffs have the authority to represent the Howard Family Trust. This denial by the defendants gave rise to the plaintiffs filing a replacement Trust Deed in respect of the Howard Family Trust, and it is this specific document, as well as the averments made in respect thereof in the plaintiffs' replication, that gave rise to the current application as indicated earlier in my discussion.

[12] I must interpose and also point out that once the replication was filed and the pleadings were closed, the matter continued through the judicial case management process until the point of the pre-trial conference when the parties reached a stalemate as they could not agree on a number of issues. One of the issues that brought the pre-trial discussions to a screeching halt was the question raised by the defendants whether or not the replacement trust deed is valid and whether the trust deed, annexure A to the particulars of claim was novated and/or replaced by the subsequent agreements concluded between the parties. The plaintiffs were of the view that these issues raised did not speak to the pleadings, whereas the defendants believed that these issues arose from the plaintiffs' replication.

[13] The following were noted in the proposed pre-trial order:

'a) The plaintiffs reject the inclusion of paragraphs 2.1 to 2.3 on the basis that same is not the defendants' case on the pleading and the plaintiffs do not consent to its inclusion.
b) The 1st defendant is of the view that the issues in 2.1 and 2.2 are issues that arise from the plaintiffs' replication and should therefore be included in the pre-trial minute in accordance with Rule 26(6) (a). The plaintiffs disagree with this position, as the 1st defendant did not rejoin issue in this regard, and it remains not to be his case on the pleadings.

c) The 1st defendant is further of the view that the evidence included in the plaintiffs' witness statements, are not pleaded by the plaintiffs. The plaintiffs do not agree with this and stand by their witness statement.

d) The 1st defendant is further of the view that it is not only the issue of fact that appears from the pleading that are to be included in the pre-trial order, but also the issue of fact and conclusions which can be deduced therefrom. The plaintiffs disagree as it is inconsistent with Namibian jurisprudence in so far as pre-trial proceedings are concerned. The plaintiffs remain of the view that the issues to be issued to be determined must stem from the pleadings.'

[14] On 29 April 2021 the court directed the parties to attend a further pre-trial conference hearing on 26 May 2021 in order for the parties to continue engaging each other to file a joint proposed pre-trial order.

[15] This impasse between the parties brought about an application for the amendment of the defendants' plea. The defendant was of the view that the plaintiffs should amend their particulars of claim because of the new facts introduced in replication. However, when the plaintiffs indicated in no uncertain terms that they would stand by the particulars of claim, the defendants proceeded with an application to amend.

[16] The application for leave to amend the defendants' plea was heard by Miller AJ and refused[2]. Pursuant to the judgment by Miller AJ, the defendant initially intended to reformulate his application to amend but received advice from senior counsel who cautioned against that approach.

The application

[17] Following short on the heels of the refusal by Miller AJ, the defendant filed the following notice of motion under the heading **CONDONATION APPLICATION: FILING OF REJOINDER**, wherein the defendant prays for the following relief:

'**TAKE NOTICE THAT** abovementioned applicant (first defendant in the action) intends to make application to make application on a date to be allocated by the Honorable Managing Judge of the above Honorable Court for an order that:

1. the applicant be granted leave to file a rejoinder to the plaintiffs' replication dated 23 September 2020;
2. the applicant's non-compliance with the Rules of the above Honourable Court be condoned insofar as it may be necessary; and
3. the applicant be directed to pay such wasted costs as may be occasioned by this application.'

[18] In support of his application, the defendant explained when it came to his attention that the plaintiffs would object to his allegation that the agreement was novated from time to time. As a result, he decided to amend his plea. The defendant further stated that instead of amending their particulars of claim, the plaintiffs elected to

[2] *Desmond Howard NO v Graham* (HC-MD-CIV-ACT-CON-2020/01519) [2021] NAHCMD 478 (14 October 2021).

introduce new evidence during replication. Out of an abundance of caution, he was advised to bring a rejoinder to address the new facts introduced during replication. The defendant submitted that as the plaintiffs will have the opportunity to file a surrejoinder, there will be no prejudice suffered on the part of the plaintiffs.

[19] The defendant submitted that it would be in the interest of justice and the *audi alteram partem* rule.

[20] The defendant submitted that he has prospects of success as the plaintiffs rely on the trustees' powers incorporated in the replacement trust deed dated 28 March 2019. According to the defendant, the trust deed applicable at the time of concluding annexure A to the particulars of claim required a special resolution to be passed, not only for entering an agreement of that nature but also for the institution of any action. The replacement trust deed does not alter this position. Therefore, on the face of it, the plaintiffs lacked the requisite authority to have concluded the agreement and to have instituted action.

[21] The defendant further indicated that he intended to raise the fact that replacing a trust deed in its entirety, in the manner the plaintiffs did, is not legally competent. The defendant submitted that the signatory to the agreement on behalf of the trust did not have the required authority to conclude the agreement. As a result, the agreement never came into existence.

[22] The defendant, in conclusion, submitted that he should be granted leave to file a rejoinder to the allegations contained in the plaintiffs' replication.

[23] The defendant also filed a copy of the proposed rejoinder for the court's attention but took the view that as the proposed rejoinder is not properly before the court, as yet the court cannot consider the merits thereof.

<u>Opposition</u>

[24] The plaintiffs' objection is that the plaintiffs allege that the defendant requires condonation for the late filing of the rejoinder as well as upliftment of bar, which operates *ipso facto* against the defendant relying on good cause requirement inherent in condonation applications. The plaintiffs allege that the defences sought to be raised are a) not bona fide and b) not good in law.

[25] The plaintiffs are of the view that the proposed rejoinder was unmeritorious and proceeded to deal with the proposed rejoinder in detail and argued that this court is in as good a position as the trial court to make findings on the merits of the proposed rejoinder.

[26] The plaintiffs are further of the view that there are no merits in the proposed rejoinder, there are no prospects of success in the main action on the issues that the defendant proposes to raise in the rejoinder.

[27] The plaintiffs address the issue of prejudice as follows in para 80 of the answering affidavit of the first plaintiff:

> ‘80. I admit that should the rejoinder be allowed, procedurally speaking, the plaintiffs will have an opportunity to join issue, however, this does not alleviate the prejudice that the plaintiffs will suffer. I say so for the following reasons:
>
> 80.1 The issues in the proposed rejoinder are essentially legal issues, the resolution of which may well determine the outcome of the action.
>
> 80.2 In the premise it seems convenient to determine the validity, if any, of the proposed rejoinder by way of motion proceedings prior to the action.
>
> 80.3 I am informed and submit that it will be prejudicial to the plaintiffs to expect them to prepare for trial on issues raised in a rejoinder which are essentially bad in law and do not take the first defendant’s defence any further.
>
> 80.4 In these circumstances the first defendant cannot be heard to complain that the interest of justice will be usurped (pertaining to the *audi alterem partem* principle) if he is not granted leave to file rejoinder especially in circumstances where the rejoinder is simply bad in law.’

Arguments advanced

*On behalf of the defendant*

[28] The approach by the respective counsel to the current application was quite diverse. The approach by the applicant/defendant was from the point of view that there is a specific consequence that followed from rule 51(a) of the Rules of Court that deems the pleading closed if *"(a) either party has joined issue without alleging any new matter and without adding any further pleading"*. As no rejoinder was filed, the pleadings were closed. Mr Diedericks argued that the defendant was barred from filing a rejoinder after the close of pleadings unless leave of court is sought and obtained.

[29] Mr Diedericks argued that there was neither non-compliances with the Rules of Court nor non-compliances with any of the court orders. The condonation which is sought is done out of an abundance of caution as a substantial period elapsed from the time of the filing of the plaintiff's replication.

[30] Mr Diedericks referred the court to rule 54(3) and argued that there are two instances where bar operates: i.e.

a) Where a party failed to comply with a case plan and misses a date in filing pleadings;
b) Where the court extended a date for filing and the party misses the date.

[31] In the instant matter, there was no non-compliance with the case plan, and the case plan did not make provision for the filing of rejoinder and surrejoinder. Therefore, the plaintiffs' reliance on condonation is misplaced.

[32] Mr Diedericks argued that the application by the defendant flows from the deeming provision in rule 51(1) (a) as the filing of the rejoinder would constitute the filing of a subsequent pleading. Counsel further argued that the application could not strictly be decided on whether good cause was shown.

[33] Mr Diedericks argued that if the court has regard to the issues raised in the pre-trial meeting and the defendant's insistence on the inclusion of the pre-trial issues, it should be clear to the court that the application for rejoinder by the defendant is not an afterthought to delay the proceedings but was done in good faith as the defendant is of the belief that it is premised upon issues arising for the pleadings and the witness statements.

[34] Mr Diedericks further argued that the plaintiffs' opposition to the inclusion of the issues raised by the defendant resulted in substantial delays in furthering the matter. The plaintiffs would suffer no prejudice should the court allow the defendant to file his rejoinder, other than possibly losing a tactical advantage. Mr Diedericks submitted that it was rather the defendant that would suffer prejudice if deprived of the right to have the real issues in dispute determined by the court at trial.

[35] Mr Diedericks drew the court’s attention to para 80.1 of the answering affidavit of Mr Howard, wherein he submitted that the issue raised in the proposed rejoinder is a legal issue, which may determine the outcome of the matter. That in itself, as argued by counsel, should be why the court grants leave for the defendant to file his rejoinder. Mr Diedericks submitted that the court should bear in mind that the rejoinder is not before the court for adjudication and does not stand to be dissected for purposes of these proceedings.

<u>On behalf of the plaintiffs</u>

[36] Mr Fitzgerald based the plaintiffs’ argument on two main premises, i.e. a) the principles applicable to condonation applications and b) the merits of the rejoinder.

[37] The plaintiffs’ argument is from the point of view that the defendant is under bar and is therefore obliged to seek condonation from this court first on good cause shown and prospects of success and further called on this court to determine if there was

compliance with rule 56. In the context of upliftment of bar, the court was referred to *Solomon v De Klerk*[3].

[38] Counsel submitted that the defendant's purported defence regarding the plaintiffs' lack of standing and lack of authority is not new as it dates back as far as July 2020, when the plaintiffs launched an application for summary judgment. It was incorporated in his answering papers resisting summary judgment. Counsel raised the question on what basis the first allegations by the defendant were made in his answering papers and why the defendant pleaded evasively instead of pleading what he now proposes to include in the rejoinder.

[39] Counsel, therefore, holds the view that the application before the court is not bona fide.

[40] Mr Fitzgerald further argued that the defendant's explanation for the delay in launching the current application is not a reasonable one and that the defendant does not enjoy any prospects of success on the merits as the argument by the defendant in the proposed rejoinder that the replacement trust deed does not have any legal efficacy is without merit.

[41] Mr Fitzgerald, with reference to a discussion on the contents of the original trust deed and the replacement trust deed and authorities regarding amendment of contracts (including inter vivos trust deeds), urged the court to consider the inherent inconsistencies in the defendant's plea that it is bad in law and that the court cannot find that it is in the interest of justice to allow the defendant to file a rejoinder that is bad in law. Therefore, the application by the defendant should fail.

Discussion:

[3] *Solomon v De Klerk* 2009 (1) NR 77 (HC) at par [14]:' With reference to the requirements of a bona fide defence, it has been held that the minimum that the applicant must show is that his defence is not patently unfounded; that it is based on facts (which must be set out in outline) which, if proved, would constitute a defence; and that the application has not been made with the intention of delaying the action.'

[42] I must start my discussion by pointing out that the papers of the defendant are quite misleading in the sense that the application for leave to file the rejoinder was filed under the heading **CONDONATION APPLICATION: FILING OF REJOINDER**, which created the impression that condonation is sought for the late filing of the rejoinder, i.e. non-compliance with a court order.

[43] This appears not to be the case. When the parties filed their joint case plan, there was no provision made as to the filing of rejoinder and surrejoinder, as is the case in the majority of all case plans filed. Further common law pleadings like rejoinder, surrejoinder, rebutter, and surrebutter may be filed, although by exception and will be served and filed if necessary to accurately and sufficiently put the facts before the court. As a result, once the plaintiffs filed the replication to the defendants' plea, it closed the pleadings[4].

[44] Considering the E-justice file, it is clear that there was no non-compliance with either the case plan or any court rules up to the close of pleadings on 23 September 2020.

[45] From that point onwards, the matter was at first postponed for settlement negotiations, and when these negotiations were unsuccessful, the matter was set down for a case management conference hearing.

[46] Interestingly the defendants did not use the opportunity available to them during the case management conference proceedings dated 8 February 2021 to address further pleadings, and under para (c) of the joint case management conference report the parties indicated "*The parties do not foresee the need for filing of further pleadings. The plaintiffs reserve their right to amend their pleadings, should the need arise*".

[47] It is not clear if the possibility that the plaintiffs might approach the court to apply for leave to amend their particulars of claim caused the defendants to become

[4] Rule 51(b): (b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed.

complacent or not and how the defendants intended to address the replacement trust deed that was filed in replication, and how long they would maintain their position of inactivity pending the decision of the plaintiffs.

[48] In the application for amendment of his plea, the defendant advanced as one of the reasons for applying to amend the defendants' plea that the plaintiffs elected not to amend their particulars of claim.

*Was there non-compliance by the defendant?*

[49] The short answer in this regard must be NO. The next question is whether there was an inordinate delay in applying for leave to file the defendant's rejoinder and if the defendant was required to apply for condonation. If so, he must comply with the two requisites of good cause before succeeding in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success[5].

[50] In terms of the rules of court, any matter should be finalised in a manner that is as expeditious and cost-effective as possible. That was the purpose of introducing the 'new' court rules, which have been in operation for 8 years already.

[51] The principles applicable to unreasonable delay by a litigant before the institution of the proceedings have been authoritatively laid down by the Supreme Court in *Keya v Chief of Defence Force*[6]. However, the *Keya* matter was decided in the context of instituting of review proceedings. Still, I believe that some of the principles as set out by the Supreme Court be distilled into the matter *in casu*. The Apex Court remarked as follows:

> *'Proper approach to the question of unreasonable delay*:

[5] *Balzer v Vries* 2015 (2) NR 547 (SC) at 551-552F.
[6] *Keya v Chief of Defence Force* 2013 (3) NR 770 (SC).

[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the high court has held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion'

[52] The view expressed by the Apex court must be considered in conjunction with what the learned Damaseb JP in his book *Court-Managed Civil Procedure of the High Court of Namibia*[7] sets out as the key objectives of judicial case management, i.e.

'a) to ensure the speedy disposal of an action;
b) to promote the prompt and economical disposal of any action or application;
c) to use efficiently the available judicial, legal and administrative resources;
d) to identify issues in dispute at an early stage;
e) to curtail proceedings, and
f) to reduce the day and expenses of interlocutory processes.'

[53] In my view, the defendant can be criticised for the time that elapsed from the date of replication to the date of application for leave to file rejoinder as he became aware of the replacement trust deed on 23 September 2020, but as can be seen from my discussion above the defendants allowed themselves to be strung along on the possibility that the plaintiffs might amend their particulars of claim and when it was clear that that was not going to happen the defendants reverted to apply to amend their plea, instead of joining issue with the replication by applying then already to file a rejoinder to the plaintiffs' replication.

[54] By the time the defendant launched the current application, almost a year had passed since the pre-trial conference. I am of the view that considering the key

[7] At p144.

objectives of judicial case management, the defendant had to seek condonation, even if it was just out of an abundance of caution.

[55] The plaintiffs took the position that the defendant did not sufficiently explain the delay and that the application by the defendant is not bona fide. From the discussion above, it is clear that the plaintiffs believe that the rules on pleadings were not complied with as the issue regarding the replacement trust deed was neither raised in opposition to the summary judgment application nor was it pleaded. I agree to some extent with the plaintiff in this regard. However, the replacement trust deed was produced for the first time in the plaintiff's replication. There is no reference made to the replacement trust deed in the plaintiffs' particulars of claim and the defendant could thus not plead to that. The defendant did raise the issue of authority and *locus standi* in no uncertain terms in his opposition to the summary judgment and also pleaded same.

[56] The plaintiffs further urged the court to decide on the merits of the rejoinder as they are of the view that there are no prospects of success on the merits and that the proposed rejoinder is bad in law. In fact, Mr Fitzgerald argued that this court would be in the same position as the trial court to consider the merits of the rejoinder. I must disagree with this contention.

[57] Firstly, the rejoinder is not formally before me and secondly, the trial court will benefit from completed pleadings and evidence to make the relevant findings. I am of the considered view it is not the place of this court, during interlocutory proceedings, to make the findings on the trust deeds and the rejoinder that it is called upon to make and must therefore decline to make the said findings.

[58] On the plaintiffs' own version the issues raised in the intended rejoinder may determine the outcome of the action. I am of the view that the defendant should be allowed to file the rejoinder for the court to have the complete conspectus of the facts before it when deciding the matter. Procedurally, the plaintiffs will have the opportunity to join issue with the defendant by filing a surrejoinder and, therefore, not suffer any

prejudice. The same cannot be said of the defendant if this court refuses to grant leave to file the rejoinder. It will potentially have far-reaching consequences for the defendant's case, especially if he has reasonable prospects of succeeding in his defence as set out in the intended rejoinder and plea.

[59] The proceedings in this matter were delayed by the previous interlocutory applications launched by the defendants. Still, in the current instance the possible prejudice suffered by the plaintiffs can be relieved by an appropriate costs order.

Cost

[60] The defendant is seeking an indulgence from the court and is therefore liable for the cost occasioned by this application. Such cost to include the cost of one instructing and one instructed counsel and is limited to rule 32(11).

Order

1. The defendant be granted leave to file a rejoinder to the plaintiffs' replication dated 23 September 2020;
2. The defendant's non-compliance with the rules of court is condoned insofar as it may be necessary; and
3. The defendants be directed to pay the costs occasioned by this application. Such cost to include the cost of one instructing and one instructed counsel and is limited to rule 32(11).

Further conduct of the matter:

4. The matter is postponed to 12/05/2022 at 09:00 for a Status hearing (Reason: Documents Exchange).
5. The Parties must comply with the following procedural steps:
    5.1. The First Defendant must file his rejoinder on or before 27 April 2022;
    5.2. The Plaintiffs must file their surrejoinder on or before 6 May 2022.

_____

JS Prinsloo

Judge

Appearances:

For the Plaintiffs: Michael Fitzgerald SC assisted by Mia Kellerman
Instructed by Ellis Shilengudwa Inc.

For the Defendants: James Diedericks assisted by Danielle Lubbe-Retief
Instructed by Danielle Lubbe Attorneys.