REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title:	**Case No.:**
Redforce Debt Management CC Plaintiff and Council of the Municipality of Gobabis Defendant	HC-MD-CIV-ACT-CON-2021/01522
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Rakow	**Date of hearing:** 31 March 2022
	Delivered on: 10 May 2022
Neutral citation: *Redforce Debt Management CC v Council of the Municipality of Gobabis* (HC-MD-CIV-ACT-CON-2021/01522) [2022] NAHCMD 235 (10 May 2022)	
Order:	
1. The application to amend the plea of the defendants is struck with costs, such costs to include the costs of one instructed and one instructing counsel but are capped in terms of rule 32(11).	
Reasons for the above order:	
RAKOW, J <u>Background</u> [1] On 3 October 2021, the court directed the Defendant (Applicant in this application) to	

file witness statements no later than 10 December 2021 and also directed the filing of expert witness reports no later than 15 December 2021. The Defendant did not comply with the court order but on 3 December 2021 sent a letter in terms of rule 32(9) of the court rules, alerting the plaintiff to the effect that they wish to bring an application to amend their plea. A proposed draft amendment of the said plea was attached thereto. In this letter, they requested a meeting in chambers. The representative of the plaintiff was not available and indicated that they will revert to the defendant's counsel at a later stage, which they never did.

[2] An objection to the notice to amend was filed on behalf of the Plaintiff and thereafter on 29 December 2021 a notice of motion was filed on e-justice, importantly it was signed. The notice of motion indicated that the affidavit of Steve Evon Adonis would be used in support of the Notice of Motion, on 29 December 2021 no such affidavit was filed at that stage. On 30 December 2021, what is purported to be the founding affidavit of Steve Evon Adonis in support of the application for leave to amend was filed. This affidavit was however never commissioned and not signed by the deponent.

[3] The matter appeared before the court and additional instructions regarding the compliance with rule 32(9) and 32(10) were given as well as certain timelines for the filing of further affidavits. On 25 January 2022, the Plaintiff filed an answering affidavit raising several legal points, including that the application is not properly before court as it is not accompanied by a proper founding affidavit. On 26 January 2022, an affidavit was filed by the Defendant headed founding affidavit, which was now properly signed and commissioned, the date of the commissioning 26 January 2022. Thereafter the Defendant also filed a replying affidavit on 15 February 2022.

Point in *limine* issues raised by the respondents

[4] There were some initial issues raised by the respondents regarding the fact that there was no proper compliance with rules 32(9) and 32(10) as well as the fact that there is no application before the court, among other things. The issues regarding the non-compliance with the order of 3 October 2021 I will not deal with as I am satisfied with the explanation provided by the applicants as to why the changed instructions came to their attention at such

a belated stage. Witness statements, in any case, will have to be drafted in line with a plea and if the court allows an amendment of the plea of the defendant, it will necessitate a further opportunity to file witness statements. The court in any case must, if the amendment of a pleading affects any deadline set in a case plan order, the managing judge or the court must give appropriate directions as to new dates for the taking of such steps as remain unfinished in terms of the case plan order. (As per rule 52(10)). I will also not deal with the rules 32(9) and 32(10) compliance as a report was eventually filed and the fact that no meeting or engagement otherwise was held in terms of rule 32(9) can be attributed to both the applicant and the respondent as the respondent's lack of engagement also contributed to the failure of rule 32(9) engagement.

[5] What the court however will deal with, is the specific application that was filed on 29 December 2021.

Arguments by the parties

[6] The applicant/defendant and the respondent/plaintiff both had the opportunity to file additional notes to their arguments and dealt specifically with cases cited in support or not, of whether the application is an application or not. The applicants referred the Court to a matter where an application was issued with an unsigned and uncommission affidavit. In the matter of the *Prosecutor-General v Atlantic Ocean Management Group (Pty) Ltd*[1], the Prosecutor-General complained that when the application was served on her by Atlantic, the affidavits were not commissioned. However, the Court noted the argument in paragraph 15 of the judgment that the prejudice caused as a result of the unsigned and uncommission affidavit was cured by the filing of a properly signed and commissioned affidavit. In that case, the same defect as is present in this current case was cured by the filing of a proper affidavit during the court proceedings.

[7] For the respondents, it was argued that the case relied upon by the applicant deals with another issue. The issue in that matter was not whether or not there was before the Court a valid application. The issue was a postponement application, the Prosecutor General

[1] *Prosecutor-General v Atlantic Ocean Management Group (Pty)* (HC-MD-CIV-MOT-GEN-2017/00172) [2017] NAHCMD 163 (12 June 2017) (“Atlantic”).

raised a complaint that she only had one day to deal with a voluminous application on an urgent basis because Atlantic had filed an application with unsigned affidavits and then filed commissioned affidavits leaving the Prosecutor-General one day to deal with the application.

Considerations

[8] Rule 52 of the High Court rules deals with the amendment of pleadings. It reads as follows:

'(1) A party desiring to amend a pleading or document, other than an affidavit, filed in connection with a proceeding must give notice to all other parties to the proceeding and the managing judge of his or her intention so to amend.

(2) A notice referred to in subrule (1) must state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.

(3) If no objection in writing is made the party receiving the notice is considered as having agreed to the amendment.

(4) If the objection is made within the period referred to in subrule (2), which objection must clearly and concisely state the grounds on which it is founded, the party desiring to pursue the amendment must within 10 days after receipt of the objection apply to the managing judge for leave to amend."

[9] From this, it is clear that the party who wishes to amend a pleading must give notice of such an intended amendment, which in this instance was done. If the other party wishes to object to such an amendment, they need to do so and state their objection. In that event, the party who wishes to amend has 10 days in which to file such an application to amend. Such an application must be in terms of the definition of the High Court rules in rule one, taken to mean an application on notice of motion as contemplated in Part 8 of the rules. This refers to applications upon notice of motion, as set out in rule 65 of the High Court rules.

[10] Rule 65 reads as follows regarding the requirements in respect of an application:

'(1) Every application must be brought on notice of motion supported by an affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of

the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.

(2) …….

(3) Every application must conclude with the form of order prayed and be verified on oath or by affirmation by or on behalf of the applicant.'

[11] There are therefore two things required for an application to be considered a proper application, namely a notice of motion setting out the relief sought and an affidavit, made under oath or affirmation by the applicant, setting out the facts on which the applicant relies for the relief it seeks. In the matter of *CJS v CS*[2] Prinsloo J said the following regarding these requirements:

'It is clear that these provisions are peremptory and this is so from the language employed by the rule-maker, especially when regard is had to the use of the word 'must' in the very first sentence and line. In this regard, the application must consist of a notice of motion and also be accompanied by an affidavit setting out the facts on which the relief sought by the applicant is predicated. There is no notice of motion in this matter and there is no affidavit filed stating the facts on which the application is based.'

[12] The purported application filed on 29 December 2021 is therefore not an application as such as it lacks the second requirement, being supported by an affidavit made under oath or affirmation by the applicant. This was further not cured by the unsigned, un-commissioned statement which was filed on 30 December 2021. The attempt of 26 January 2022 however met the second leg required for an application to be before the court and to be considered, but it added a further complication as the date of filing the application is now no longer 29 December 2021 but 26 January 2022, which takes the application outside the 10 days provided for by rule 52 and now will need a condonation application to cure the belated filing of the said application. There is further no explanation before the court as to why Mrs. Venter signed the notice of motion as "*p.p*" meaning *per procurationem* as she at that stage was employed as a legal practitioner at the firm representing the defendants. Be that as it may, that is not the reason for the court's order, but needed to be pointed out.

[2] *C J S v C S* (HC-MD-CIV-ACT-MAT-2017/00179) [2020] NAHCMD 92 (11 March 2020).

[13] I, therefore, make the following order:

The application to amend the plea of the defendants is struck with costs, such costs to include the costs of one instructed and one instructing counsel but capped in terms of rule 32(11).

Judge's signature	**Note to the parties:**
RAKOW Judge	Not applicable
Counsel:	
Defendant/applicant	**Plaintiff/respondents**
Mr Boonzaaier On instructions of Weder, Kauta and Hoveka, Windhoek	Mr Chibwaba On instructions of Mr Kadhila Amoomo, Windhoek