REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		**Case No:**
		HC-MD-CIV-ACT-CON-2020/02695
The Government of the Republic of Namibia	1st Plaintiff	**Division of Court:** Main Division
Minister of Urban and Rural Development	2nd Plaintiff	**Heard on:** 17 May 2022
and		
Ferusa Capital Financing Partners CC	1st Defendant	
Nelson Ndelimono Napeje Akwenye	2nd Defendant	
Tobias Akwenye	3rd Defendant	
Heard before: Honourable Lady Justice Rakow, J		**Delivered on:** 7 June 2022

Neutral citation: *The Government of the Republic of Namibia v Ferusa Capital Financing Partners CC (*HC-MD-CIV-ACT-CON-2020/02695) [2022] NAHCMD 280 (7 June 2022)

Order:

1. The application to amend is hereby granted.
2. The defendants to pay the costs associated with this application as well as the wasted costs associated with the drafting of the Pre-Trial report.
3. The matter is postponed to 28 June 2022 for a status hearing, the parties to file a joint case status report on or before 23 June 2022 setting out what the way forward will be in this matter, seeing that a special plea of arbitration seemingly was raised as well as any other matter that might flow from the amendment of the pleadings.

Reasons for order:

RAKOW, J:

Introduction

[1] The Defendants/ Applicants in the current application applied to the court for leave to amend their plea. From the explanation offered by the legal practitioner in its founding affidavit, it seems that the legal practitioner realized that his client failed to address some of the allegations in their pleas when he started with the drafting of the pre-trial report for this matter, and as such approached the court with an application to amend the said plea to bring it in line with the witness statements.

[2] The defendants in the matter received a contract under the Mass Housing Initiative in 2014 under which they were to construct several houses at Swakopmund. The terms of this agreement were changed in 2015, which resulted in the Government of Namibia and the first defendant entering into a New Construction Agreement under the Mass Housing Development Programme. The first defendant is a closed corporation and the second and third defendants are members of the first defendant, each holding 50% shares in the first defendant. The plaintiffs are the Government of the Republic of Namibia and the Minister of Urban and Rural Development. The allegation against the second and the third defendants is that they are personally liable for the claim sought against all the defendants as they were acting on a frolic of their own.

[3] The defendants initially pleaded on 22/9/2021 and dealt with a plea regarding the arbitration clause and then proceeded to plea specifically dealing with the paragraphs setting out the allegations in the Particulars of Claim as from paragraph 11. An amendment to this plea was filed on 28/9/2021 but again started in dealing with the allegations of the Particulars of claim as from paragraph 11. The exchange of documents proceeded with the filing of the discovery affidavit on behalf of the defendants, which was also amended on 22/11/2021, and subsequently the amended discovery affidavit was withdrawn. The plaintiff proceeded to file their witness statements, together with a condonation application because they were filed out of time. This

application was unopposed and subsequently granted.

[4] The matter proceeded and the court ordered the party to meet and discuss a pre-trial report. Some other issues arose during these discussions relating to an inspection in loco and the unavailability of the plaintiff's legal counsel who was set to conduct the trial. The Pre-Trial report was filed but no pre-trial order was made. The report, therefore, was concluded and signed by the legal practitioners of both parties.

The application

[5] The defendants lodged an application for the amendment of their plea to include dealing with the allegations contained in the Particulars of Claim from paragraph 1 – 10. Mr. Shikongo, the legal representative of the defendants deposed to the affidavit in support of the said application. He explained that during the engagement with the counsel of the plaintiff during the process of preparing a pre-trial report as per the order of the court, he noted that there was a complete omission in the defendants' Amended Plea of a reply concerning paragraphs 1 – 10 of the Particulars of Claim. From the intended amendment it is clear that it mostly contains admissions except for the part dealing with paragraphs 6 and 7 of the Particulars of claim wherein the defendants deny having acted in their personal capacity insofar as they have been acting as members of a Closed Corporation.

[6] This application was opposed by the plaintiffs and an affidavit of Erastus Uutoni, the Minister of Urban and Rural Development was filed in support of the said opposition. He raised a point *in limine* regarding the propriety of legal practitioners deposing to affidavits. He further referred the court to the fact that a joint Pre-Trial report was signed by the parties' legal practitioners. On the merit, it seems that the plaintiff is opposing the application based on the ground that such an amendment will indeed cause the plaintiff prejudice as it is not only, as alleged by the defendants, related to averments already made later in the plea but introduce new matter. The prejudice will include that the pleadings are already closed and the Pre-Trial report signed. The amendment will delay the finalization of the matter and as such defeat the overriding objective of the judicial case management system. The plaintiff wishes to hold the defendant to the original signed pre-trial report without incorporating the amended plea.

Point *in limine*

[7] On behalf of the respondents/plaintiffs, it was argued that it is improper for the legal practitioner of the applicant/defendant to depose the affidavit in support of the application and then only file a vague confirmatory affidavit. This is unethical and as such, the application should be dismissed. The court was referred to *Minister of Urban and Rural Development v Witbooi*[1]where it was held by the court 'that legal practitioners should not, save in very exceptional circumstances, depose to affidavits in matters handled on behalf of clients. Even then, the reason why the client has not deposed to the affidavit must be explained to the court's satisfaction in the said affidavit.'

[8] On behalf of the applicants, it was argued that the matter of *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd*[2] find application in this instance. This matter deals with the requirement that the deponent of an affidavit needs to clearly state that he has authority to make an affidavit and set out the facts of the affidavit, and that is indeed what they did, as the founding affidavit was accompanied by a confirmatory affidavit indicating that Mr. Shikongo indeed has the permission to proceed and make the affidavit on behalf of the defendants. It was further argued that Mr. Shikongo was the best person to make the affidavit as it was the oversight of the legal practitioner that needed to be explained.

Discussion of point in *limine*

[9] In the matter of *Prosecutor-General v Paulo and Another* [3] the learned Judge Angula stated as follows:

'I feel obliged to make an observation here that this practice by legal practitioners of filing an affidavit on behalf of a client should be discouraged and desisted from. It should only be resorted to in exceptional circumstances for instance where the party to the proceedings is for compelling reasons unable to depose to an affidavit. Such reason must be disclosed in the affidavit deposed to by the legal practitioner. . . In the event of disputes of facts in affidavits arising which cannot be resolved by the approach to resolving disputes in motion proceedings commonly referred to as the Plascon-Evans rule and the matter has to be referred to oral evidence, in such event the legal practitioner will have to become a witness. Such a scenario would be undesirable. It is further undesirable for a legal practitioner to depose to an affidavit on behalf of a client dealing with factual issues. A legal practitioner cannot be astride two horses at the same time, namely, be a witness and also a legal practitioner subject to ethical

[1] *Minister of Urban and Rural Development v Witbooi* (HC-MD-CIV-MOT-GEN-2019/00225 [2020] NAHCMD 279 (9 July 2020).
[2] *Baobab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/02613 [2020] NAHCMD 290 (10 JULY 2020).
[3] *Prosecutor-General v Paulo and Another* 2017 (1) NR 178 (HC), at p.184, para 16.

rules of conduct.'

[10] In this instance, no explanation is given by Mr. Shikongo as to why the defendants could not provide the court with the necessary affidavit setting out the basis for the application. The court however finds some merit in the argument that the legal practitioner is the one who has knowledge of the oversight and as such should explain it. He is also the one who realized that there was such a shortcoming after preparing for the drafting of the pre-trial report. I must however express my support for the position set out above by Angula DJP but will accept the affidavit filed by Mr. Shikongo in the current matter.

Arguments on the merit

[11] On behalf of the applicants/defendants, it was argued that the respondent/plaintiff seeks to hold the second and third defendants personally liable for the claims against the first defendant and it is the case of these defendants that they were at all relevant times members of the first respondent and acted as such. The proposed amendment seeks to withdraw an admission occasioned by the applicants' omission to plea to the averments contained in paragraphs 6 and 7 of the respondents' particulars of claim as they specifically wish to deny these averments. It was submitted therefore that the applicants need the opportunity to vent the true issues between the parties and that is what the proposed amendment will allow them to do.

[12] It was argued by the respondents/plaintiffs that the defendants did not provide a satisfactory explanation as to whether there was a mistake or an error by their legal practitioners and how such an error occurred. They further wish to point out that the joint pre-trial report is a binding agreement between the parties and should, as such be placed before the court to give effect to the express intention of the parties. In essence, the respondents/plaintiffs object to the second and third defendants raising a plea in terms of the Close Corporation Act.

Legal considerations

[13] 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 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.
(5) The managing judge must set the matter down for hearing and thereafter the managing judge may make such order thereon as he or she considers suitable or proper and that order must be made within 15 days from the date of the hearing.
(6) Whenever the court has ordered an amendment or no objection has been made within the time specified in subrule (2), the party amending must deliver the amendment within the time specified in the court's order or within five days after the expiry of the time specified in subrule (2).
(7) When an amendment to a pleading has been delivered in terms of this rule, the other party is, within 15 days of receipt of the amended pleading, entitled to plead to the amendment or to amend consequentially any pleading already filed by him or her.
(8) A party giving notice of amendment is, unless the court otherwise orders, liable to pay the costs thereby occasioned to any other party.
(9) 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.
(10) 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.'

[14] The principles regulating the granting of a proposed amendment of a pleading are very clear and were summarized in a Supreme Court judgment *of DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* [4] as follows:

'[38]. . . The established principle that relates to amendments of pleadings is that they should be "allowed to obtain a proper ventilation of the dispute between the parties … so that justice may be done", subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement . . . .'

[15] A further elaboration on these principles can be found in the matter of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[5] wherein it was held that:

[4] *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

'[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 the discretion to allow or refuse an amendment, the discretion must be exercised judicially . . .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 . . . A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought . . . A court cannot compel a party to stick to a version either of fact or law that it says no longer represent its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.'

[16] When deciding whether or not to grant an amendment application, it is of utmost importance for the court to decide on the question of prejudice and to what degree the responding party might be prejudiced by the granting of an amendment to pleadings. In *South Bakels (Pty) Ltd and Another v Quality Products and Another* [6] Manyarara AJ stated that:

'It will normally not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party regarding the subject matter of the litigation. . . There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading which is sought to be amended, was originally filed. The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudiced by the amendment.'

Conclusion

[17] Looking at the above discussion of the legal principles applicable and the arguments advanced by the parties, together with the affidavits filed in support of this application, I conclude that there is indeed a reasonable satisfactory explanation for the proposed amendment and I am further of the opinion that the prejudice to the other party, in this case, the plaintiff, can be cured by a suitable cost order. I would however fail in my duty as the managing judge in this matter if I fail to point out to the defendants' legal practitioners of record that they need to take more care in preparing their pleadings as this is the second amendment to the plea of the defendants that was necessitated by their careless conduct.

[5] *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).
[6] *South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC) at page 421 paragraph 10.

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

1. The application to amend is hereby granted
2. The defendants to pay the costs associated with this application as well as the wasted costs associated with the drafting of the Pre-Trial report.

3. The matter is postponed to 28 June 2022 for a status hearing, the parties to file a joint case status report on or before 23 June 2022 setting out what the way forward will be in this matter, seeing that a special plea of arbitration seemingly was raised as well as any other matter that might flow from the amendment of the pleadings.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	**Defendant**:
Mr. Phatela On instruction of The Government Attorney	Mr. Brendell Shikongo Law Chambers