



“PRACTICE DIRECTION 61 ORDER AND REASONS”
IN THE HIGH COURT OF NAMIBIA

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| Case Title: NABIL BENNANI and CYNTHIA KOTCHANOVA NICOLAI KOTCHANOVA ELLIS ELTON TA-GORA-ATE HARADOEB CONSETHA DESIREE KGOBETSI-HARDOES REGISTRAR OF DEEDS STANDARD BANK NAMIBIA LIMITED | Case No: HC-MD-CIV-ACT-OTH- 2017/02915 Division of Court: High Court, Main Division 1 ST DEFENDANT 2 ND DEFENDANT 3 RD DEFENDANT 4 TH DEFENDANT 5 TH DEFENDANT 6 TH DEFENDANT |
| Heard before: Honourable Mr Justice Oosthuizen | Date of hearing: 17 May 2022 Delivered on: 17 June 2022 |
| Neutral citation: <i>Haradoeb v Bennani</i> (HC-MD-CIV-ACT-OTH-2017/02915) [2022] NAHCMD 300 (17 June 2022) | |
| Result on merits: Application for variation and amendment of the pre-trial order is successful. | |
| COURT ORDER | |
| IT IS ORDERED THAT: | |

1. The applicant is granted leave to vary and amend the joint pre-trial order report filed on 15 November 2019 and made a court order on 25 November 2019, by removing the entire paragraph 26(6)(c)(2) that reads “On 10 March 2009, in Windhoek, the plaintiff, acting personally and the first defendant, acting personally and on behalf of the second defendant, concluded a written deed of sale, in respect of erf no. 1431 Pioneerspark Extension 1, Windhoek in the Republic of Namibia attached to the particulars of claim as POC1.”
2. No order as to costs.

REASONS FOR ORDERS:

Introduction

[1] On 30 March 2022, the third and fourth defendants, hereto referred to as the applicants brought an application seeking a variation of the pre-trial report filed on 15 November 2019 which was made an order of court on 25 November 2019.

[2] The applicants are seeking the following order:

‘2.1 Varying and amending the joint pre-trial order report filed on 15 November 2019 and made a court order on 25 November 2019, by removing the entire paragraph 26(6)(c)(2) that reads “On 10 March 2009, in Windhoek, the plaintiff, acting personally and the first defendant, acting personally and on behalf of the second defendant, concluded a written deed of sale, in respect of erf no. 1431 Pioneerspark Extension 1, Windhoek in the Republic of Namibia attached to the particulars of claim as POC1.”

2.2. Costs of suit (only if opposed).

2.3. Further and or alternative relief.’

[3] The plaintiff, hereto referred to as the respondent objected to the application on the basis that the applicants failed to bring the application without delay and have not provided a reasonable, acceptable, and sufficient explanation for the delay, and in that they failed to show good cause.

Background

[4] On 5 November 2018 the parties were ordered by court to file a joint pre-trial report by 14 February 2019 and at this time the applicants were represented by Mr. Diedericks. After the withdrawal of Mr. Diedericks the applicants were represented by Mr. Bangamwabo whom they gave instructions on the pre-trial that was to be filed by the parties by 14 February 2019. There were various individual pre-trial reports that were filed by the parties before a pre-trial order was made.

[5] The first pre-trial report was filed by the respondents legal practitioner on 15 February 2019 which was not signed by the applicants' legal practitioner and which included the clause which the applicants intend on varying and amending, hereafter referred to as 'paragraph 26(6)(c)(2)'.

[6] The second pre-trial report was filed by the applicants legal practitioner on 18 February 2019, which was not signed by the respondent's legal practitioner and which put 'paragraph 26(6)(c)(2)' in dispute, which correlates with the applicant's plea filed on 15 November 2017.

[7] On 06 March 2019, both the applicants' and respondents legal practitioners agreed and signed the pre-trial report as 'paragraph 26(6)(c)(2)' was placed in dispute as intended by the applicants. This report was, however, not adopted as it was not agreed to by the other legal practitioners that were on record at that time.

[8] On 20 May 2019, the respondent's legal practitioner filed another pre-trial report which did not put 'paragraph 26(6)(c)(2)' in dispute and yet again this pre-trial report was not signed by the applicants legal practitioner.

[9] On 15 November 2019 the applicants' legal practitioner, Mr. Bangamwabo took the same pre-trial report that was filed on 20 May 2019, signed it and filed same. It was then made an order of court on 25 November 2019.

[10] It is further the evidence of the applicants that on 4 November 2019, the defendants held a meeting with Mr. Bangamwabo to withdraw from the matter and transfer the file to the new legal practitioner, Sisa Namandje & Co. Inc. Mr. Bangamwabo instead of withdrawing from the matter on 15 November 2019 filed the signed pre-trial report and thereafter filed a notice of withdrawal as the applicant's legal practitioner, thus

at the time of uploading the pre-trial report he did not have authority to do same.

[11] It is evident from the various pre-trial reports that were filed by the respondents and not agreed to by the applicants and the applicants plea filed on 15 November 2017, that the applicants intention was to dispute 'paragraph 26(6)(c)(2)'.

[12] On 22 November 2019, Mr. Bangamwabo provided the file content to the applicants, including the supposedly agreed upon pre-trial report, which differs from the one uploaded on 15 November 2019, and the current legal practitioner Mr. Ntinda and Adv. Chibwana made reliance on the pre-trial report they received from Mr. Bangamwabo legal practitioner during the preparation of their trial.

[13] Furthermore, on 16 August 2021 the matter was set down by the parties for trial for the period of 7-11 March 2022, however, on 07 March 2022 the matter was postponed for the applicants to bring an application for variation and amendment of the pre-trial order.

[14] On 09 March 2022, the court made a cost order against the applicants, as they tendered the wasted costs for one trial day on 7 March 2022 and for the two court appearances on 8 - 9 March 2022, and same was accepted by the respondent.

[15] Applicants' evidence is that, they only discovered that there were two different pre-trial reports when the applicants wanted a special plea argued on their behalf. Upon this discovery a decision was taken that a variation application would be brought as the pre-trial report uploaded and made an order of court, as per paragraph 26(6)(c)(2) is inconsistent with the applicants' pleadings.

Legal Principles

[16] In respect of the application for variation and amendment of the pre-trial report the court will make reliance on case of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*¹ where the full bench held as follows:

[27] The pre-jcm culture placed great accent on the so-called litigant- freedom in the conduct of litigation. Thus, the core inquiry in an amendment dispute was whether the proposed

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).

amendment ventilated the real dispute between the parties and whether any prejudice was occasioned thereby to the opponent. The Namibian Supreme court pointed out in *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*² at para 38:

‘The established principle that relates to amendments of pleadings is that they should be “allowed in order 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.³

[28] In South Africa, Watermeyer, J reflected the widely held view in *Moolman v Estate Moolman*⁴ that:

‘The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.’

[17] In respect of the opposing counsel’s concerns regarding late amendments, the current court in the case of *Lee’s Investment (Pty) Ltd v Shikongo*⁵ held as follows:

[17] Late amendments of pleadings or a pre-trial order violate the overriding objective of judicial case management to bring expeditious closure to litigation.

[18] Parties are usually bound by their pre-trial reports, which constitute their binding compromise. Vide Rule 26(10) of the Rules of the High Court.

[19] Late amendments call for reasonable explanations.

[20] In the circumstances of this case and taking into account the pleadings in the matter, instructing counsel’s explanation was reasonable and satisfactory, and is accepted.

² *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11(19 August 2013).

³ See further *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A.

⁴ *Moolman v Estate Moolman* 1998 (1) SA 53 (W) p 56.

⁵ *Lee’s Investment (Pty) Ltd v Shikongo* (HC-MD-CIV-ACT-CON-2016/03394) [2018] NAHCMD 321 (12 October 2018).

[21] The amendment is allowed in part.'

[18] The respondent's argument regarding prejudice is that the admission negated the need for the respondent to prove the allegation and this will bring a delay to the matter. This, in the circumstances, is nonsensical. The validity of the sales agreement concluded in 2009, was always in dispute.

[19] The applicants argued that the respondent will not suffer any prejudice as a result of the variation, as the variation would be consistent with the pleadings filed and has always been the defendant's position. The counsel for the applicants further argued that he took over the matter from another legal practitioner and he relied on the documents provided by the previous legal practitioner.

[20] This seems to be a reasonable explanation and cannot be said to be mala fide.

[21] The applicant also argued that the defendants have already tendered the plaintiffs costs occasioned by the need to bring this application and has already been ordered by the Honourable Court. I am therefore satisfied that the respondent will not be prejudiced.

Conclusion

[22] In the circumstances of this case and taking into account the pleadings in the matter, the applicants' explanation was reasonable and satisfactory, and is accepted. I wish to add that in my view it was not necessary to bring about an amendment to the pre-trial order. In its unamended form, the validity of the 2009 agreement remained an issue.

Order

[23] Therefore and in the premises the following orders are made:

[23.1] The applicant is granted leave to vary and amend the joint pre-trial order report filed on 15 November 2019 and made a court order on 25 November 2019, by removing the entire paragraph 26(6)(c)(2) that reads "On 10 March 2009, in Windhoek, the plaintiff, acting personally and the first defendant, acting personally and on behalf of the second defendant, concluded a written deed of sale, in respect of erf no. 1431 Pioneerspark Extension 1, Windhoek in the Republic of Namibia attached to the particulars of claim as

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| POC1. | |
| [23.2] No order as to costs. | |
| Judge's signature: | Note to the parties: |
| Oosthuizen Judge | |
| Counsel: | |
| Plaintiff/Respondent | Defendant(s)/Applicant(s) |
| J. Janser Shikongo Law Chambers Windhoek, Namibia | M. Ntinda Sisa Namandje & Co.Inc Windhoek, Namibia |