

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Marcia Welma Berolnize Smith and Johan Engelbrecht	Case No: HC-MD-CIV-ACT-DEL-2020/00126
Plaintiff	Division of Court: Main Division
Defendant	Heard on: 29 June 2022
Heard before: Honourable Lady Justice Rakow, J	Delivered on: 18 July 2022

Neutral citation: *Smith v Engelbrecht* (HC-MD-CIV-ACT-DEL-2020/00126) [2022] NAHCMD 353(18 July 2022)

Order:

1. The application to amend the particulars of claim as prayed for, is hereby granted.
2. The plaintiff is to pay the costs associated with this application as well as the wasted costs associated with obtaining additional expert reports by the defendant.
3. The matter is postponed to 2 August 2022 for a status hearing, the parties are to file a joint case status report on or before 28 July 2022 setting out what the way forward will be in this matter, seeing that the defendant now needs to consider whether he will have to amend his plea as well as obtain additional expert witness statements

Reasons for order:

RAKOW, J:

Introduction

[1] The plaintiff in these proceedings is Marcia Welma Berolnize Smith, an adult female who alleges that she suffered injury after being involved in a motor vehicle accident with the vehicle

of the defendant, Johan Engelbrecht on 20 January 2017, at approximately 22h00 and at or near Windhoek. The motor vehicle collision occurred at the intersection of Dr. Sam Nujoma and Robert Mugabe Avenue, between a Nissan March Model: 2006, bearing Registration Number: N 164404 W, ("the Plaintiff's vehicle"), being driven by the Plaintiff and the Defendant's vehicle, being driven by the Defendant.

[2] The plaintiff alleges that she suffered certain bodily injuries and as a result thereof, suffered medical expenses with additional future medical expenses. As a result of the accident she also suffered a loss of income as well as future loss of income. She computed her losses to be an amount of N\$ 6, 671, 478 (Six Million Six Hundred and Seventy-One Thousand, Four Hundred and Seventy-Eight Namibia dollars)

The application

[3] The plaintiff seeks to amend certain allegations in her particulars of claim. She in essence seeks three amendments. They are as follows:

THE FIRST AMENDMENT:

In paragraph 1 of the notice of intention to amend the plaintiff states:

"1. By deleting the words "western to eastern direction turn right in a southern direction" after the word "the" and replacing them with words "north to south direction in Robert Mugabe Avenue" at the end of paragraph 6.2."

9. The amendments are objected to on the following grounds:

"1. As things stand paragraph 6.2 of the particulars of claim reads as follows:

"The plaintiff was travelling in the western to eastern direction to turn right into a southern direction;"

THE SECOND AMENDMENT:

14. In paragraph 2 of the notice of intention to amend the plaintiff states:

"2. By deleting the existing paragraphs 8.1 to 8.16 and replacing them with the following paragraphs:

"8.1 spine affecting her head and neck (Plaintiff confined to wear a lower back brace);

8.2 high inflammation levels in the body, spasticity in neck, upper and lower back;

8.3 difficulty in walking, balancing and co-ordination;

8.4 severe pain and discomfort in her back and neck;

8.5 difficulty in completing tasks which require concentration.”

THE THIRD AMENDMENT:

22. In paragraphs 3, 4 and 5 of the notice of intention to amend the plaintiff states:

“3. By deleting the existing paragraphs 14.1 to 14.6 and replacing them with the following:

“14.1 Past and future loss of earning in the amount of N\$ 1 653 717.00 (One Million, Six Hundred Fifty-Three Thousand, Seven Hundred and Seventeen Namibian Dollars).

14.2 Past and future Medical Expenses in the amount of N\$ 1 682 022 (One Million, Six Hundred Eighty-Two Thousand and Twenty-Two Namibian Dollars).”

4. By introducing the following paragraph after paragraph 14.2:

“14.3 General damages in the amount of N\$ 1 500 000.00 (One Million, Five Hundred Thousand Namibian Dollars).”

5. By deleting the existing paragraph 15 and 16 and replacing them with the following:

“15. In the premises the Defendant is liable to compensate the Plaintiff in the combined and total amount [of] N\$ 4 835 739.00 (Four Million, Eight-Hundred Thirty-Five Thousand, Seven Hundred and Thirty-Nine Namibia Dollars).

16. Despite demand, alternatively summons constituting demand, Defendant neglects and refuses to pay the total amount of N\$ 4 835 739.00 (Four Million, Eight-Hundred Thirty-Five Thousand, Seven Hundred and Thirty-Nine Namibia Dollars).”

6. By deleting the existing Prayer 1 and replacing it with the following:

“1. Payment in the amount of N\$ 4 835 739.00 (Four Million, Eight-Hundred Thirty-Five Thousand, Seven Hundred and Thirty Nine Namibia Dollars).”

Arguments

[4] For the plaintiff it was argued that the erstwhile legal practitioner erred when he drafted the particulars of claim as he authored the wrong description of events relating to the accident. These instructions further did not follow the accident report which was also discovered to the defendant. The injuries suffered by the plaintiff was further crystalised after several visits to a medical practitioner after the commencement of the trial and as such is not a prejudicial addition or removal of injuries in respect of the plaintiff's claim. The amendment is therefore not to alter the injuries sustained by the plaintiff but to crystalise these injuries relevant to the claim. The third amendment relating to the calculation of the amount for damages was an arithmetical error that had to be rectified. It is clearly a mistake as the amount for damages was doubled in the initial claim and should therefore be corrected to reflect the amount as calculated by the actuary.

[5] On behalf of the defendant, it was argued that the erstwhile legal practitioner should have deposed to an affidavit explaining the mistakes he is now accused of making. The plaintiff simply does not have personal knowledge of the relevant facts. This relates to the first and third amendment. Regarding the deletion of some of the injuries in the second proposed amendment, it was argued that these are only deleted after specific discovery from the plaintiff's general practitioner in relation to medical conditions that existed prior to the accident and further that all expert reports were prepared on the basis of the injuries as alleged in the particulars of claim and as such, if amended, additional expert reports will be needed.

Legal considerations

[6] 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.'

[7] The principles regulating the granting of a proposed amendment of a pleading are very clear and were summarized in the Supreme Court judgment of *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*¹ 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'

[8] 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*² wherein it was held that:

'[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 a 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.'

[9] 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*³ Manyarara AJ stated that:

¹ *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

² *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

³ *South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC) at page 421 paragraph 10.

'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 in regard to 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

[10] 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 and satisfactory explanation for the proposed amendment, although it would have carried more weight if such explanation came from the previous legal practitioner for the plaintiff. I do, however, take into account that obtaining such an affidavit might prove difficult as the relationship between the plaintiff and her previous legal practitioner came to an end and she appointed a new legal practitioner. I am further of the view that the prejudice to the other party, in this case the plaintiff, can be cured by a suitable cost order.

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

1. The application to amend the particulars of claim as prayed for, is hereby granted.
2. The plaintiff is to pay the costs associated with this application as well as the wasted costs associated with obtaining additional expert reports by the defendant.
3. The matter is postponed to 2 August 2022 for a status hearing, the parties are to file a joint case status report on or before 28 July 2022 setting out what the way forward will be in this matter, seeing that the defendant now needs to consider whether he will have to amend his plea as well as obtain additional expert witness statements

Judge's signature	Note to the parties:
E RAKOW	Not applicable

Judge	
Counsel:	
Plaintiff:	Defendant:
K. Simon On behalf of the Plaintiff Sisa Namandje & Co.Inc Windhoek	B. Van der Merwe On behalf of the defendant Van der Merwe-Greef Andima Inc. Windhoek