REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

In the matter between: Case no: HC-MD-CIV-ACT-OTH-2021/03944

HIGH POWER HOLDINGS INVESTMENT (PTY) LTD	**1ST PLAINTIFF/APPLICANT**
EUGENE LOTTERING	**2nd PLAINTIFF/APPLICANT**
WISEMAN KHUMALO	**3RD PLAINTIFF/APPLICANT**

and

IMPRINT INVESTMENT (PTY) LTD	**1ST DEFENDANT/RESPONDENT**
PSP LOGISTICS (PTY) LTD	**2ND DEFENDANT/RESPONDENT**
BPLC MANAGEMENT CONSULTANTS (UK) LIMITED	**3RD DEFENDANT/RESPONDENT**
VEIINASTOCKS HOLDING GROUP INTERNATIONAL (PTY) LTD	**4TH DEFENDANT/RESPONDENT**
NAMIBIA EQUITY MINING CC	**5TH DEFENDANT/RESPONDENT**
PASCAL INVESTMENT CC	**6TH DEFENDANT/RESPONDENT**
ABUID KATJAITA	**7TH DEFENDANT/RESPONDENT**
ALFRED MBAHA	**8TH DEFENDANT/RESPONDENT**
JACQUELINE PRINCE	**9TH DEFENDANT/RESPONDENT**
JUNFA XIE	**10TH DEFENDANT/RESPONDENT**
MICK MUTANGA	**11TH DEFENDANT/RESPONDENT**
PANDULENI SHIMUTWIKENI	**12TH DEFENDANT/RESPONDENT**
RAUNA HANGHUWO	**13TH DEFENDANT/RESPONDENT**

STEVEN KARIAZU **14TH DEFENDANT/RESPONDENT**
BEN KAUARI **15TH DEFENDANT/RESPONDENT**
IYALOO MWANINGANGE **16TH DEFENDANT/RESPONDENT**

Neutral citation: *High Power Holdings Investment (Pty) Ltd v Imprint Investment (Pty) Ltd* (HC-MD-CIV-ACT-OTH-2021/03944) [2022] NAHCMD 387 (3 August 2022)

Coram: PARKER AJ
Heard: **19 July 2022**
Delivered: **3 August 2022**

Flynote: Interlocutory – Amendment of pleadings – Applicants argued amendment necessitated by a meeting of first respondent called when the lawfulness of previous meetings of first respondent was subject matter of the action that had been instituted by applicants.

Held: Notwithstanding that effect of an amendment will be to add or substitute a new cause of action, such amendment will be allowed, but only if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying to make amendment.

Held, further, amendment will not be allowed where the amendment is inconsistent with the known facts of the case.

Summary: Interlocutory – Amendment of pleading – Applicants sought to make amendment to the pleading in an action instituted to challenge the lawfulness of a series of meetings of first respondent – While action pending respondents called a meeting of first respondent – Applicants aver that items to be discussed are the same as those of previous meetings – Court found that material aspects of fact and law of the instituted action not the same as the material aspects of fact and law of the proposed amendment – Court found that the amendment has the effect of adding a new cause of action – But applicants failed to establish that the new cause of action arises out of the same facts or substantially the same facts as the cause of

action in respect of which relief has already been claimed in the action instituted by applicants – Consequently, application dismissed with costs.

ORDER

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1. The application is dismissed with costs in terms of rule 32 (11) of the rules of court, including costs of one instructing counsel and one instructed counsel.

2. The application to amend is finalized and removed from the roll.

3. On the date of this ruling, the court shall consider the further conduct of the action.

RULING

PARKER AJ:

[1] Before the court is an application by plaintiffs (ie applicants) to amend their pleading in an action they had instituted on 19 October 2021 ('the action'). I do not intend to garnish this ruling with a copious rendition of the description of the parties. They are laid out in the papers filed of record. Suffice it to mention that a reference herein to 'meeting' or 'meetings' should be understood to be a reference to a meeting or meetings of first defendant (ie first respondent). 'Applicants' and 'plaintiffs' are used interchangeably; so are 'defendants' and 'respondents'.

[2] From the papers the essence of plaintiffs' claim in the action is captured in paragraph 29 of the particulars of claim; and it reads:

'29. To the first, second and third plaintiff's knowledge, between December 2020 and October 2021 – on dates unknown to the first, second and third plaintiffs, contrary to paragraphs 26.1, 26.2 and 27 hereof (and in violation of the first, second and the third

plaintiff's rights to participate in the governance and management of the first defendant), the first defendant (and/or the second to the sixteenth defendant), unlawfully, held meetings (to which the persons in paragraph 24.4 and 24.5 hereof did not have notice and sub-sequently, as a consequence of the latter, did not attend) at which, amongst others, the first defendant resolved to commence mining operations at the sites in paragraphs 23.1 and 23.2 hereof.'

[3] To that end, plaintiffs prayed these orders:

'1. An order in terms whereof the meetings held by the first defendant between December 2020 and October 2021 – on dates unknown to the first, second and third plaintiffs (and the business conducted thereat) is declared unlawful, null and void of any legal consequences and the business conducted or transacted thereat is set aside.

'2. In so far as it is necessary, an order in terms whereof the second and the third plaintiffs, as contemplated in section 256(2) of the Companies Act, Act No. 28 of 2008, be excused from any possible claim emanating from the business conducted pursuant to the first defendant's impugned resolutions of between December 2020 and October 2021 – on dates unknown to the first, second and third plaintiffs.'

[4] Thus, it is as clear as day that plaintiffs' case in the action is encapsulated in paragraph 29 of the particulars of claim (see para 2 above). Applicants seek to amend their pleading. Defendants (ie respondents) have moved to reject the amendment application. In the instant application, Mr Muhongo represents applicants and Mr Rukoro represents respondents. I am grateful to counsel for their industry in submitting written heads of argument, together with authorities. At this juncture, I must note that I am satisfied that all the parties are properly before the court and that all the respondents, but first respondent, oppose the application; a point Mr Muhongo was so much enamoured with. I accept Mr Rukoro's submission that that turns on nothing. Even if only one respondent (out of the 16 respondents) oppose the application, the application is opposed.

[5] A closer look at the pleading in the originating process and the proposed amendment indicate indubitably that we are looking at two disparate matters. For this reason, we must go to the basics by examining the interpretation of the rules of court on amendment of pleadings. Rule 52(1) reads:

'A party desiring to amend *a pleading* or document, other than an affidavit, *filed in connection with a proceeding* must give notice …' [Italicised for emphasis]

[6] I have Italicised 'a pleading' and 'filed in connection with a proceeding' for a purpose. In the instant matter, 'a pleading' is in the originating process filed in connection with the action, and so, it is 'in connection with a proceeding' wherein applicants put out the claim set out in their particulars of claim and prayed the relief set out therein (see paragraph 3 above). It follows inexorably that in terms of the rules, an amendment may be sought in respect of 'a pleading' that has already issued from the registrar's office; that is, in respect of the instant matter, the pleading in the action. The width of the wording of rule 52(1) impels this conclusion.

[7] But in the instant matter, on the papers and from submission by counsel, I find that the proposed amendment is not sought to correct a mistake made in the pleading respecting the action or to prosecute or clarify existing claims, as Mr Muhongo appeared to submit. Furthermore, applicants do not say that the version of fact or law that is in the pleading of the action no longer represents their stance. (See Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia* 2020 at 145.) That is to be expected. Mr Muhongo's submission is that even if on the facts, the proposed amendment has the effect of adding a new cause of action, the amendment should be allowed. It is, accordingly, to Mr Muhongo's assertion that I now direct the enquiry.

[8] Doubtless, the material aspects as respects applicants' claim contained in the proposed amendment are – as a matter of law and fact – alien to the material aspects as regards applicants' claim contained in the originating process filed on 19 October 2021, that is, the action. In the originating process filed in the action, the pleading there concerns a series of meetings held 'on days unknown' between December 2020 and October 2021. The proposed amendment concerns a meeting held on 23 December 2021. The two meetings are separate materially in time and context. If there was an order of the court that had barred first applicant from holding any meeting on account of the action instituted on 19 October 2021, that would have ushered in different considerations. This, in a way, was Mr Rukoro's submission.

[9] To illustrate the point: Plaintiff **X** instituted action on 30 June 2021 against defendant **Y** (a building company) for a damage done to the swimming pool in **X**'s residence when **Y** did renovations to the swimming pool. After process was issued and had been served on **Y** and the matter allocated to a managing judge, **X** saw that a wall of her residence adjacent to the swimming pool began to show cracks. A building inspector informed **X** that because of the poor work done by **Y**, a foundation of the wall was damaged. In such a scenario, **X** should be allowed to amend the pleading in the originating process after becoming aware of the second damage because the facts concerning the damage to the foundation of the wall which was not pleaded in the 30 June 2021 action forms part of the *res gestae* of the 30 June 2021 action. (See G D Nokes *An Introduction to Evidence* 4th ed (1967) at 88; P J Schwikkard et al *Principles of Evidence* 4th impr (2001) at 102.) In the present matter, as I have demonstrated previously, the facts that gave rise to the amendment do not form part of the *res gestae* of the action.

[10] I have dealt with the principle of *res gestae* of the action to respectfully reject Mr Muhongo's submission that the amendment should be allowed because it was necessitated by the conduct of the respondents in calling the 23 December 2021 meeting when action was pending in the court. As I have said, no legal impediment stood in the way of the callers of that meeting to call the meeting. In any case, I signalize the point that for the present application, the lawfulness or unlawfulness of the 23 December 2021 meeting matters tuppence, as it is irrelevant. I so to respectfully refuse to consider Mr Muhongo's submission, made with great verve, that that meeting was unlawful.

[11] Of course, I accept Mr Muhongo's submission that even if on the facts, the proposed amendment has the effect of adding a new cause of action, the amendment should be allowed. The only fly in the ointment is that Mr Muhongo's submission is good as a rule of general application; but there is an important qualification to that general rule; and it is based on the *res gestae* principle. The qualification is that such amendment will be allowed only if – and this is crucial – the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action already instituted. For an example, see the facts in the illustration painted in para 9 above. For our present purposes, the action in which relief has already been claimed

is the action instituted on 19 October 2021. Doubtless, the 23 December 2021 meeting is indubitably not connected in law or fact to the series of meetings held between December 2020 and October 2021 which is the subject matter of the action and in which relief is already claimed; *a priori*, the amendment sought is plainly inconsistent with the known facts of the 19 October 2021 action; and so, it should not be allowed. *(Litchfield v Dreyfus [1906] 1 KB 584)*

[12] Based on these reasons, I find that applicants have not made out a case for the relief they seek. Of the view I have taken of the application, it is otiose to consider any arguments about exception in respect of the proposed amendment raised by Mr Rukoro. As to costs, I think costs should follow the event, and in terms of rule 32 (11) of the rules of court.

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

1. The application is dismissed with costs in terms of rule 32 (11) of the rules of court, including costs of one instructing counsel and one instructed counsel.

2. The application to amend is finalized and removed from the roll.

3. On the date of this ruling, the court shall consider the further conduct of the action.

C PARKER

Acting Judge

APPEARANCES

PLAINTIFFS/APPLICANTS:	T Muhongo Instructed by Shakwa Nyambe & Company Incorporated, Windhoek
DEFENDANTS/RESPONDENTS:	S Rukoro Instructed by Williams Legal Practitioners, Windhoek