REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2021/02204

In the matter between:

SALT ESSENTIAL INFORMATION TECHNOLOGY (PTY) LTD **PLAINTIFF/APPLICANT**

and

RDW PROPERTIES CC **DEFENDANT/RESPONDENT**

Neutral citation: *Salt Essential Information Technology (Pty) Ltd v RDW Properties CC* (HC-MD-CIV-ACT-CON-2021/02204) [2022] NAHCMD 533 (6 October 2022)

Coram: PARKER AJ
Heard: **22 September 2022**
Delivered: **6 October 2022**

Flynote: Practice – Applications and motions – Amendments – Condonation – Plaintiff wishing to amend pleading and to apply for condonation of late filing of discovery affidavit.

Summary: Practice – Applications and motions – Plaintiff wishing to amend pleading and apply to court to condone late filing of discovery affidavit – Plaintiff's

legal practitioner writing letters to defendant's legal practitioner about plaintiff's wishes – As to the condonation application court finding that material part of the letters meant to be precursor to a meeting was hesitant and indefinite – Court concluding that no reasonable receiver of those letters could be expected to act on them as being precursors to a genuine and efficacious rule 32(9) meeting – Court finding that there has simply been non-compliance with the peremptory provisions of rule 32(9) and (10) – Consequently, the two interlocutory applications are struck from the roll with costs.

Held, rule 32(9) casts the burden solely on the party wishing to bring an interlocutory proceeding to seek an amicable resolution thereof with the other party or parties.

Held, further, rule 52 of the rules of court on amendment of pleadings does not grant a general, definitive and unqualified exemption to parties wishing to bring amendment applications from complying with rule 32 of the rules of court.

ORDER

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1. The plaintiff's application to condone the late filing of plaintiff's discovery affidavit and its application to amend its pleading are struck from the roll.

2. Plaintiff shall pay defendant's costs in terms of rule 32(11); and such costs shall include the costs of one instructing counsel and one instructed counsel.

3. The interlocutory applications are finalized and are removed from the roll.

RULING

PARKER AJ:

[1] That every matter that is before the court is unique and peculiar in its own way is a truism. The peculiarity of the instant matter lies in the fact that it was argued most ably by two very senior practitioners. But alone would ordinarily not have made the matter unique. What makes it unique is that it is not the kind of matter that would draw the skills of these capable practitioners into the fray; one even coming from across the boarder. Mr Dicks represents the plaintiff and Mr Barnard represents the defendant.

[2] Both counsel have asked the court to depart from the capped costs contained in rule 32(11) of the rules of court. From the consideration of the issues in the instant matter as demonstrated hereinafter, I see no good reason why I should depart from the prescription in rule 32(11).

[3] I should say at the threshold that of the view I take of the case, as can be gathered from the determination of the matter in succeeding paragraphs, I hold that it is otiose to consider issues relating to the indexing of the court documents and the filing of heads of arguments.

[4] Without beating about the bush, and ‘still telling it like it is’ (with apologies to *The Namibian* newspaper), I say this. If the instructing counsel on both sides of the suit had displayed a modicum of respect for each other – as legal practitioners – and have been amicable in their dealings towards each other in the implementation of rule 32(9) and (10), all this kawfwafwa, and hullabaloo in the proceeding would probably have not occurred. But it has occurred much to the incurring of great legal costs.

[5] As I see it, the determination of the present matter turns on a very short and narrow compass. At the core of the determination of the matter is the interpretation and application of rule 32(9) and (10) of the rules of court. And I need not go into the merits of the case to see whether the plaintiff has prospects of success in the action. Common sense tells me that we have not come to that stage at all. At this stage, the burden of the court is to determine whether the condonation application and the amendment application are interlocutory proceedings, within the meaning of rule 32(9) of the rules of court; and if they are, to determine whether the peremptory

provisions of rule 32(9) and (10)[1] have been complied with, because it is 'only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court'.

[6] Rule 32(9) casts the burden solely on the 'party wishing to bring such proceeding' (ie an interlocutory proceeding) to seek an amicable resolution thereof with the other party or parties'[2] In the instant matter, it is the plaintiff who bears the burden. It follows, as a matter of course, that I should determine whether plaintiff has discharged that burden. The next logical question to consider first is whether the amendment application and the condonation application are such 'proceeding' as contemplated in rule 32.

[7] In our rule of practice, a condonation application or an amendment application has always been an interlocutory proceeding. The reason is that the determination of any one of them would (a) not be final in effect and would be susceptible to alternation by the trial court; (b) not be definitive of the rights of the parties; and (c) not dispose of at last a substantial portion of the action which has already been filed.[3]

[8] *Pace* Mr Dicks, I do read *Marmorwerke Karibib* as exempting an amendment application from the unbending purview of rule 32(9) and (10). Thus, *Marmorwerke Karibib* is no authority for the proposition that, because an amendment of pleadings is governed by its own rules under rule 52 of the rules of court, rule 32 does not apply to amendment applications.

[9] First and foremost, plainly rule 32 does not provide such general and definitive and unqualified exemption. All that the Supreme Court held in that regard is this. It is not necessary to resort to rule 32 prior to filing the notice of intention to amend a pleading, as Mr Barnard correctly submitted.[4] It makes sense: Why,

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[1] *Mukata v Appolus* 2015 (3) NR 695 (HC), referred to the court by Mr Barnard.

[2] *Bank Windhoek Ltd v Benlin Investment CC* 2017 (2) NR 403 (HC).
[3] *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC); and *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited* Case No. SA 92/2020 (Judgment delivered on 27 May 2020).
[4] *Marmorwerke Karibib* para 24.

rhetorically, pursue a rule 32(9) and (10) procedure where 'there is no valid or grounded objection to the delivery of a party's notice of intention to amend?[5]

[10] Naturally the next level of the enquiry is to consider whether plaintiff has complied with rule 32(9) and (10) of the rules, entitling the court to adjudicate upon the condonation application and the amendment application. It is important to note at the outset that whether rule 32(9) and (10) have been complied with is a question of fact. What are the facts?

[11] In that regard, Masuku J tells us this in *Bank Windhoek Ltd v Benlin Investment CC*.[6] The writing of a letter by the party wishing to bring an interlocutory proceeding 'may be the precursor to a meeting of the parties… The letter initiating the meeting cannot be an end in and of itself'.[7]

The condonation application

[12] As to the condonation application, plaintiff indubitably considered the writing of a letter to be an end in itself. In its first so-called 'Engagement Letter', plaintiff says: 'The plaintiff also intends to disclose its reasons for the late filing of these documents in its condonation application'. By this letter, plaintiff closed the door against any proactive and efficious meeting to amicably resolve the dispute concerning the late filling of the discovery affidavit. By this letter plaintiff had crossed the Rubicon. The defendant would be informed about the reasons for the late filing of the discovery affidavit in the condonation application, not at any meeting. Then, what would be the purpose of any meeting? Such approach cannot by any stretch of imagination be characterised as a genuine effort by the plaintiff to pursue a rule 32(9) solution. Plaintiff only went through the motions, with no intention of resolving the dispute amicably.

[13] Mr Dicks submitted that the filing of the discovery affidavit was only two days late in terms of the court order and no prejudice could have occasioned the defendant. With respect, the argument does not hold good and valid. It is to discuss

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[5] *Marmorwerke Karibib* para 24.
[6] *Bank Windhoek Ltd v Benlin Investment CC* 2017 (2) NR 403 (HC) para 13-14 passim.
[7] Ibid para 14.

such matters outside the surrounds of the court that a proactive meeting was necessary, where plaintiff could have brought such reason to the table, as it were, for defendant's consideration. As I have said, the chances of any such meeting was completely scuppered by the 6 May 2022 first 'engagement letter'.

[14] The second 9 May 2022 engagement letter does not fare any better. If the reason for the late filing of plaintiff's discovery existed before the first 6 May 2022 engagement letter, why was it so difficult for plaintiff to have given the reason it now gives in the 9 May 2022 letter in the 6 May 2022 letter. Contrary to what plaintiff asserts, there was no rule 32(9) engagement worth noting. The letters were a 'precursor to a meeting of the parties'[8] which never took place.

[15] As to the amendment application, I have held previously that rule 52 of the rules does not exempt a party wishing to bring an application from complying with rule 32. In that regard, I should say, plaintiff's 20 May 2022 letter does not even begin to get off the starting blocks in plaintiff's attempt to comply with rule 32(9) and (10) respecting the application to amend plaintiff's pleading.

[16] The essence of the 20 May 2022 letter on the matter of amendment is as nebulous as is indefinite. It cannot even be considered as a precursor to a rule 32(9) meeting. The letter reads in material part:

> 'We can *tentatively* advise that we intend to amend the particulars of claim and plead unjustified enrichment specifically, *inter alia*.' [Italicized for emphasis]

[17] The plaintiff's advice is only 'hesitant, not definite'.[9] Moreover, the intended amendment will contain, among other things (inter alia), a claim for unjustified enrichment. No reasonable receiver of the 20 May 2022 letter could be expected to act on such a letter as being a precursor to a genuine and efficacious rule 32(9) meeting.

[18] I feel no doubt that plaintiff has not complied with the rule 32(9) requirement. There is no proof that the parties attempted, and did fail, to resolve their dispute

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[8] *Bank Windhoek Ltd v Benlin Investment CC*; see para 11 above.
[9] Concise Oxford Dictionary of Current English 12 ed.

concerning condonation of the late filing of the plaintiff's discovery affidavit and plaintiff's wish to amend its pleading. Consequently, I conclude that there has simply been non-compliance with the peremptory provisions of rule 32(9) and (10) of the rules of court.

[19] In the result, following the path beaten by the court in similar cases[10] I order as follows:

1. The plaintiff's application to condone the late filing of plaintiff's discovery affidavit and its application to amend its pleading are struck from the roll.

2. Plaintiff shall pay defendant's costs in terms of rule 32(11); and such costs shall include the costs of one instructing counsel and one instructed counsel.

3. The interlocutory applications are finalized and are removed from the roll.

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C PARKER

Acting Judge

[10] Eg *Mukata v Appolus* 2015 (3) NR 695 (HC); and *Bank Windhoek Ltd v Benlin Investment CC*.

APPEARANCES:

PLAINTIFF/APPLICANT:	GB Dicks (with him H Garbers-Kirsten) Instructed by Koep & Partners, Windhoek
DEFENDANT/RESPONDENT:	TA Barnard Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek