

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b> Selma Unotjari Kahuure  v  Erastus Philemon Kahuure	<b>Case No:</b> HC-MD-CIV-ACT-MAT-2020/05144
	<b>Division of Court: High Court</b> Main Division, Windhoek
<b>Heard before:</b> Honourable Lady Justice Schimming-Chase	<b>Date of hearing:</b> 27 October 2022
	<b>Judgment delivered on:</b> 1 November 2022
<b>Neutral citation:</b> <i>Kahuure v Kahuure</i> (HC-MD-CIV-ACT-MAT-2020/05144) [2022] NAHCMD 596 (1 November 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The application for leave to amend is granted.</li><li>2. The applicant is directed to pay the costs occasioned by the amendment, limited to the costs permitted by rule 32(11).</li><li>3. The applicant shall deliver the amended plea and counterclaim on or before 11</li></ol>	

November 2022.

4. The respondent shall deliver a consequentially amended plea to counterclaim and replication to plea (if any) on or before 28 November 2022.
5. The applicant shall deliver a replication to the respondent's amended plea (if any) on or before 8 December 2022.
6. The matter is postponed to 23 January 2023 at 15:30 for a case management conference.
7. The parties are directed to file a joint case management report on or before 18 January 2023.

**Reasons for order:**

SCHIMMING-CHASE J:

- [1] This is a matrimonial matter. The parties were married to each other on 18 March 1977 at Windhoek. The parties are *ad idem* on their desire not to restore conjugal rights to the other. The main dispute between the parties is the proprietary consequences of the marriage, in particular, whether they are married in or out of community of property.
- [2] According to the respondent, the plaintiff in the divorce action, the parties were married in community of property. According to the applicant, the defendant in the action, the parties were married out of community of property.
- [3] It is not in dispute that the parties were married to each other in accordance with the Ovaherero Traditional Customs on 16 April 1976 at Farm Sukkellaar at Rietfontein, and later in Windhoek on 18 March 1977.
- [4] During the case management of this matter and after close of pleadings, but before pre-trial and the delivery of witness statements, and given the issue in dispute between the

parties, the court proceeded to hear the matter on a stated case in terms of rule 63. By order dated 7 March 2022 the court ordered that the matter would proceed by way of stated case on whether or not the marriage concluded between the parties was one in or out of community of property.

[5] Unfortunately, the parties were unable to agree on a written statement of facts in the form of a special case for adjudication as envisaged by rule 63(1). The parties appeared to be at loggerheads with the defendant's version of events for purposes of the stated case, and the facts as pleaded in the plea and counterclaim. The applicant then sought to amend his plea and counterclaim. This resulted in the application for leave to amend.

[6] Initially a notice to amend was delivered on 29 June 2022 which was objected to. The applicant then indicated that it would abandon and revise its notice to amend. The revised notice to amend was delivered together with a founding affidavit. The respondent delivered an answering affidavit and the applicant a replying affidavit.

[7] The amendment proposed the addition of the following paragraphs (where applicable) to the plea and counterclaim:

'3.1 Sometime between January 1977 and March 1977 and at the plaintiff's village located in Otjimbingwe Communal Area in the Omaheke Region, the plaintiff and the defendant entered into an oral agreement which purpose was to govern the property regime of the common law marriage the parties intended to enter in compliance with the plaintiff's and defendant's Christian beliefs. The terms of the oral agreement are reflected in the marriage register and the marriage certificate signed by both parties when they appeared before a marriage officer for the purpose of blessing their union and marrying under the common law on 18 March 1977.

3.2 It was a term of the oral agreement entered into between the plaintiff and the defendant that the common law marriage that the parties would enter into would be one out of community of property.

3.3 The marriage between the plaintiff and defendant entered into on 18 March 1977 at Windhoek

was therefore a marriage out of community of property.'

[8] The previous paragraph 3 of the counterclaim currently applicable reads as follows:

'3. Subsequent to the traditional marriage, the plaintiff and defendant expressly agreed that their matrimonial regime shall be governed the customary law of the Ovaherero Community.'

[9] The respondent's objection to the notice to amend is twofold:

(a) that the proposed amendment constitutes a fundamental departure from the applicant's case which he has consistently maintained throughout, including in past litigation between the parties; and

(b) the proposed amendment is vague and embarrassing as to the oral agreement allegedly entered into on the date of the 'common law' marriage.

[10] The applicant explains in his founding affidavit that the amendment was necessitated as a result of the dispute that ensued between the parties subsequent to this matter being referred for a stated case, as to what the agreed facts were, given what was initially pleaded. Thus the amendment was sought to clarify exactly what was pleaded, but he maintains that the position that the parties were married out of community of property remains in place.

[11] The respondent on the other hand states that she is prejudiced by the late change in stance as to the existence of an oral agreement which is not fully particularised that took place some 45 years ago. The respondent stated further that she is also hampered by the late stage of the amendment.

[12] The function of pleadings are in essence to clarify the issues between the parties so as to ensure that both parties know what the points of issue between them are, and so that each party knows what case has to be met to ensure proper preparation for trial, knowing

what evidence is required to support the party's case. Thus the court is assisted when the parties through their pleadings, define the limits of the action.<sup>1</sup> This is why it is necessary to plead the material facts to facilitate the real disputes between the parties.

[13] When there is a fundamental departure from the initial case pleaded and where an amendment is sought late in the proceedings, it is incumbent on the applicant for the amendment to explain the reasons for the delay under oath and to show that a triable issue is raised on the proposed amendment.<sup>2</sup>

[14] The applicable principles relating to amendments are:

- (a) amendments may be sought at any stage of the proceedings;
- (b) in granting or refusing an amendment, the court exercises a discretion, which discretion must be exercised judicially;
- (c) a litigant seeking leave to amend craves the indulgence from the court and must, therefore, proffer some explanation for the amendment sought;
- (d) the explanation proffered will be determined by the nature of the amendment sought. The more substantial the amendment, the more a compelling case for an explanation under oath;
- (e) if a party proffers an explanation that is not reasonably satisfactory of one lacking in bona fides, the court may disallow the amendment, especially where the amendment is opposed and has the potential to compromise a firm trial date;

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<sup>1</sup> H Daniels *Beck's Theory and Principles of Pleading in Civil Actions* 6 ed Butterworths (2002) at 43-44 para 3.1.1 and the authorities there collected; *Conrad v Dohrmann and Another* 2018 (2) NR 535 (HC) paras 63-66.

<sup>2</sup> *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* 2021 (3) NR 670 (SC) paras 40 and 59; *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

and

- (f) a court cannot compel a party to stick to a version of fact or law that it says no longer represents its stance and this is because litigants must be allowed in the adversarial system, to ventilate what they believe are the real issues between them.<sup>3</sup>

[15] I am of the view that the applicant has properly explained the delay in making the amendment. The issue did not arise before the matter was referred for a stated case, and after the parties sought to define common cause issues for purposes of the stated case. I am also satisfied that the proposed amendment is not *mala fide*. The applicant remains steadfast in his stance that the parties are married out of community of property. What has changed, for purposes of the amendment, are the material facts in support of that averment which must be pleaded. The applicant in any event draws the onus to prove these allegations at the trial.

[16] In *I A Bell*, the application for leave to amend was brought on the first day of a trial that had previously been set down on the floating roll. In contrast, this application for leave to amend is brought after close of pleadings, but before the pre-trial process, and before witness statements have been filed. Therefore the delay in this matter is not significant, and the respondent has an opportunity to plead to the amended pleadings.

[17] I respectfully associate myself with the remarks made in *Tidesley v Harper*<sup>4</sup>, where the court reasoned as follows:

<sup>3</sup> *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC (supra)* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) para 55; See also *Billy v Mendonca* (I 3945-2013) [2016] NAHCMD 391 (16 December 2016) para 18; *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture* (I 1216/2015) [2018] NAHCMD 2 (17 January 2018) para 22.

<sup>4</sup> *Tidesley v Harper* 10 Ch. D 393, per Lord Bramwell at 396; approved in *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture* (I 1216/2015) [2018] NAHCMD 2 (17 January 2018) para 29.

'My practice has always been to give leave to amend, unless I have been satisfied that the party was acting *mala fide*, or that by his blunder, he has done some injury to his opponent which cannot be compensated for in costs or otherwise.'

[18] As regards the submission that the pleading of the oral agreement is vague and embarrassing, the proposed amendment is in substantial compliance with the principles relating to the pleading of an oral agreement. The parties, the date, the place and the terms, namely that the marriage would be out of community of property, are set out. The respondent has an opportunity to plead to the amended counterclaim, and to replicate to the amended plea. The applicant is not barred in law from departing from his stance, especially if the departure is explained.

[19] It is important to the court and for the finalisation of this matter, for the claims between the parties to be fully formulated and pleaded so that the court can hear the matter and make a determination on the evidence presented on facts in issue between them at the trial.<sup>5</sup>

[20] In light of the foregoing the following order is made:

1. The application for leave to amend is granted.
2. The applicant is directed to pay the costs occasioned by the amendment, limited to the costs permitted by rule 32(11).
3. The applicant shall deliver the amended plea and counterclaim on or before 11 November 2022.
4. The respondent shall deliver a consequentially amended plea to counterclaim and replication to plea (if any) on or before 28 November 2022.
5. The applicant shall deliver a replication to the respondent's amended plea (if any) on or before 8 December 2022.
6. The matter is postponed to 23 January 2023 at 15:30 for a case management

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<sup>5</sup> It is clear from the inability of the parties to agree, that this matter can no longer proceed on a stated case.

conference.

7. The parties are directed to file a joint case management report on or before 18 January 2023.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
Schimming-Chase Judge	Not applicable.
<b>Counsel:</b>	
<b>Applicant / Defendant</b>	<b>Respondent / Plaintiff</b>
A Hans-Kaumbi of Ueitele & Hans Inc., Windhoek.	U Katjipuka-Sibolile of Nixon Marcus Public Law Office, Windhoek.