REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:	**Case No:** HC-MD-CIV-ACT-DEL-2020/04887
Jaco Smith and Leon Schiefer	**Division of Court:** Main Division
	Heard on: 27 October 2022
Heard before: Honourable Lady Justice Rakow	**Delivered on:** 15 November 2022
	Reasons delivered on: 22 November 2022

Neutral citation: *Smith v Schiefer (*HC-MD-CIV-ACT- DEL-2020/04887) [2022] NAHCMD 638 (22 November 2022)

Order: 1. The application to amend the pre-trial order is dismissed with costs, such costs to be caped in terms of rule 32(11)

Reasons for order:

RAKOW, J:

Introduction

[1] The plaintiff and defendant in the current matter were involved in an accident about 20 km before Usakos on the way from Arandis to Usakos on 4 December 2018. The plaintiff is claiming the damages he suffered when his vehicle was damaged beyond economical repair from the defendant as he alleges that the negligent driving of the defendant is the sole cause of the accident. It is alleged that the defendant was negligent in that he failed to adhere to the traffic rules and regulations; he attempted to overtake other vehicles when it was unsafe and inopportune to do so; he entered the plaintiff's lane of traffic when it was unsafe and inopportune

to do so; he failed to have a proper lookout, more specifically he failed to take cognisance of the plaintiff's vehicle traveling towards him in the opposite lane; he failed to apply his brakes timeously or at all; and he failed to avoid a motor vehicle accident when by exercise of reasonable care, he could and should have done so.

[2] The defendant denied these allegations and pleaded that while driving, a car unexpectedly stopped abruptly in front of him, which placed him in a sudden emergency. He further pleaded that the sole cause of the accident was the negligent driving on the side of the plaintiff in that he failed to adhere to the traffic rules and regulations; he failed to apply the brakes of his vehicle timeously or at all; he had driven at an excess speed that could not afford him enough time to react to the sight of (the) defendant's vehicle; he failed to avoid the motor vehicle accident when by exercise of reasonable care, he could and should have done so and he failed to keep a proper look out.

[3] The trial proceedings started and the witnesses as per the pre-trial order were called by the plaintiff. The defendant testified and then indicated that he wish to call two more witnesses by way of subpoena with the leave of the court. He intended to apply for an amendment of the pre-trial order to include these witnesses.

The application

[4] The application was made for an order in terms of rule 26(8) in the following terms

'1.Amending paragraph 6 (of) the pre-trial order issued on 26 January 2022 by inserting the following-

''6.2 The Defendant intends to subpoena – Roswhita Uushona and Detective Inspector Dino Skrywer.''

2. Further and/or alternative relief.'

[5] The application was supported by an affidavit of the defendant setting out the need for such a request. A certain Sgt. A.N Julius, a member of the Namibian police stationed at Usakos was called by the plaintiff and during his evidence it transpired that he was not the investigating officer in the criminal matter related to the accident but was the officer who was called out to proceed to the scene of the accident on the day of the accident. He made certain observations and referred to a possible photo plan that was supposedly to be drawn up by the Scene of Crime unit stationed at Walvis Bay. He testified that he enquired about the said photo plan but was told that it is not available as it was not printed and directed to take the matter up with the head of

Scene of Crime in Walvis Bay which he did not do.

[6] The legal practitioner for the defendant contacted Dine Skrywer at the Walvis Bay Scene of Crime unit and he forwarded a photo plan via WhatsApp to the legal practitioner of the defendant. The defendant then stated that he saw these photos and that one of them indicate brake marks which end almost at the edge of the tar road on the left lane in which the plaintiff travelled and as such demonstrate a version at odds with what the plaintiff testified in this court. This photo plan was compiled by a certain Warrant Officer Roshwita Uushona, which is the second person the defendant wish to call as a witness.

[7] In reply to this, the plaintiff raised a number of questions of law. The following issues were raised:

'In terms of paragraph 4 of the Defendant's Founding Affidavit it is clear that the Application in casu is premised on Rule 26(8) of the High Court Rules.

1.2. The Plaintiff respectfully submits that Rule 26(8) is not applicable in the present circumstances as this specific rule only relates to the pre-trial order in instances prior to the hearing of the trial.

1.3. The Pre-Trial Order constitutes an Order of Court and can only be amended in terms of Rule 16, Rule 103 and under the common law.

1.4. The Defendant has thus failed to bring this application under the appropriate Rule(s), and on this basis alone the application should be dismissed.

2. FAILURE TO ATTACH THE SOURCE DOCUMENT ON WHICH THISAPPLICATION IS PREMISED:

2.1. The Defendant failed to attach the "photo plan" it intends to rely on. On the Defendant's own version, he has been in possession of the "photo plan" since 26 October 2020.

2.2. The Defendant fails to identify to this Honourable Court who the author of the "photo plan" is. In the absence thereof the "photo plan" would in any event not be allowed to be submitted into Court as evidence as it will amount to hearsay evidence.

2.3. Rule 36 is the appropriate rule dealing with plans, photos, etc. This rule was also available to the Defendant to procure the "photo plan" but he failed to do so.

2.4. Paragraphs 26, 27, 28 and 29 of the Defendant's Founding Affidavit also constitutes hearsay evidence and should accordingly be disregarded and struck from the affidavit.

2.5. The Defendant in paragraph 19 of the Founding Affidavit indicates that he is in possession of the "photo plan" as from 26 October 2020.

2.6. Absent the "photo plan" which was already in the possession of the Defendant prior to launching/ filing this Application, this Honourable Court cannot determine the relevance thereof nor can it determine what value it may bring in finalising this matter.

3. PREJUDICE AND UNREASONABLE DELAY:

3.1. The Hearing commenced on 22 June 2022 and the Defendant was already at that stage aware of

Sergeant Julius' presence as a subpoena witness.

3.2. In fact, the Defendant must have already been aware that Sergeant Julius was subpoenaed as far back as 17 May 2022. Since then he had the opportunity to interview and consult this witness but failed to make use of this opportunity.

3.3. It is a common law principle that a litigant's legal representatives are entitled, at any time and for the purpose of obtaining information which may assist the litigant to prepare or to present any part, aspect or stage of his or her case, to interview any person whom they have reason to believe is in possession of such information.

3.4. Since June 2022 until 24 October 2022 the Defendant had ample opportunity to further consult Sergeant Julius and to ascertain the existence of the "photo plan" and who the author thereof was and to introduce it in terms of Rule 36. However, the Defendant failed to make use of this opportunity.

3.5. Despite the various opportunities to procure the "photo plan" the Defendant elected to continue with the trial to the extent that the Plaintiff already closed its case and then attempting through this stillborn application to procure further potential evidence. The Plaintiff submits that this amounts to a fishing expedition.

3.6. It is also not clear from the application whether the Defendant intends to rely exclusively on the "photo plan" or the viva voce evidence of the two individuals identified in prayer 1 of the Notice of Motion or both.

3.7. From the Defendant's Affidavit it is not evident whether any of the two individuals identified in the application is the author of the "photo plan" and absent the author the relief prayed for has no merit.

3.8. The Plaintiff already closed his case on 25 October 2022 and the Defendant waited until the Plaintiff closed his case until applying for the relief, well knowing of the possible existence of the so called "photo plan". None of the witnesses that already testified for either the Plaintiff or the Defendant would have had an opportunity to consider the "photo plan" and it will subsequently be of no evidential value to the Court.

3.9. It is clear that the Defendant could have made a proper attempt to secure the "photo plan" at a much earlier stage of the proceedings.'

The legal considerations

[8] Rule 26(8) reads as follows:

'(8) The registrar must provide the pre-trial order referred to in subrule (7) to the parties, but the managing judge may amend the pre-trial order if in the opinion of the judge such amendment is necessary to avoid manifest injustice.

(9) …….

(10) Issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with leave of the managing judge or court granted on good cause shown.'

[9] An application to amend a pre-trial order should be brought in terms of rule 32(4)[1] and should make out a case on the principles discussed in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*[2]*:*

'[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.'

[10] 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:

'It will normally not be granted if there will be prejudice to the other party which cannot be cured by and 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.'

[11] What further needs to be considered in relation to the principles applicable in considering amendment application, is the extensive quote from the Supreme Court case of *Municipal Council of Windhoek v Pioneerspark Dam Investment CC*[4] :

'[35] What has however changed since the advent of JCM is that the previously liberal attitude to granting amendments has been found by a Full Bench of the High Court in *IA Bell Equipment*

[1] Court-Managed Civil procedure of the High Court of Namibia, Petrus T Damaseb, Juta 2020 at page 133
[2] *IA 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
[4] *Municipal Council of Windhoek v Pioneerspark Dam Investments* CC [2018] NASC 394

Company (Namibia) (Pty) Ltd v Roadstone Quarries CC to no longer apply because it is inimical to the ethos of JCM, with the emphasis shifting from 'doing substantial justice between parties' to the 'interests of the administration of justice overall' – of which doing justice between the parties is but one consideration. We endorse this approach except to add that 'doing substantial justice between the parties' although no longer being the primary consideration, remains of considerable importance but is now to be considered within the context of the objectives of JCM, with late amendments being subjected to greater scrutiny than before because of their deleterious effect upon the administration of justice.'

Discussion

[12] Although the above authorities refers to the amendment of pleadings, the same sentiments should guide the court in deciding whether to allow for an amendment of a pre-trial order or not. The argument of the plaintiff that this can only be done in terms of rule 16, 103 or the common law, however does not find application in this instance as it is not a judgement, merely an order and with leave of the court these can be varied to cater for changed circumstances.

[13] In the current matter it is clear that the scene of the accident was indeed photographed and that a possible photo plan containing these photographs might be in existence. What is however also clear, is that the defendant only filed his own statement without filing any confirmatory affidavits from either the drafter of the said plan, his legal practitioner who received the plan via Whatsapp or the head of the Scene of Crime Unit in Walvis Bay. The photo plan was further not attached to the affidavit of the defendant and as such, the founding affidavit contains a number of hearsay allegations and contains in essence a number of unsupported allegations which under these circumstances is not sufficient for the court to consider in an application as before court. The court is therefore not satisfied with the unsupported allegations made in the founding affidavit in support of this application.

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

1. The application to amend the pre-trial order is dismissed with costs, such costs to be caped in terms of rule 32(11)

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

Plaintiff:	**Defendants**:
M. Boonzaaier On instruction of Dr. Weder, Kauta and Hoveka, Windhoek	B. Isaacks Isaacks & Co, Windhoek